CAPITAL IMPROVEMENTS
FUNDING AGREEMENT NO. 3
(CONSTRUCTION RELATED EXPENSES
ALAMEDA THEATER COMPLEX)

This Capital Improvements Funding Agreement No. 3 ("AGREEMENT") is made and entered into by and between the CITY OF SAN ANTONIO, ("CITY,") a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. _____, dated _____, 2011, and ALAMEDA THEATER, ("AT"); a Texas non-profit corporation, acting by and through its Board of Directors, and duly authorized officer and is as follows:

WHEREAS, CITY has provided certain funds from its Capital Improvements budget for the payment of construction-related costs and expenses incurred in connection with renovation of the Alameda Theater Complex, San Antonio, Texas, as a public project which includes construction of the improvements referenced in the Master Lease Agreement between the parties approved by Ordinance No. _____ on _____, 2011 entered into the same day as this AGREEMENT; and

WHEREAS, CITY has adopted a budget for expenditure of such funds, and included therein is an allocation of funds to promote renovation of the Alameda Theater Complex, specifically, improvements to the Alameda Theater lobby and restrooms, floors 2-4 of the Casa de Mexico Office Building, and remaining areas of the Casa de Mexico Office Building (hereinafter known as "PROJECT"); and

WHEREAS, pursuant to the Master Lease Agreement, AT has been designated to carry on renovation and construction obligations of the PROJECT; and

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

WHEREAS, CITY designates its Capital Improvements Management Services department ("CIMS") as the CITY Department, acting for its City Manager, responsible for the evaluation of the PROJECT (hereinafter referred to as "responsible department") and for the fiscal monitoring of the PROJECT; and

WHEREAS, AT has committed to diligently pursuing renovation pursuant to the requirements of a previous Memorandum of Understanding by and between Centro Alameda, Inc. and the CITY, approved by City Ordinance No. 2010-04-01-0272, dated April 1, 2010, and has satisfied CITY that AT is deserving of continued funding for this worthwhile PROJECT;

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. GENERAL PROVISIONS

1. AT represents, warrants, assures and guarantees to CITY 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.

2. The signer of this AGREEMENT for AT represents, warrants, assures and guarantees to CITY that he or she has full legal authority to execute this AGREEMENT on behalf of AT and to bind AT to all terms, performances and provisions herein contained.

3. In the event that a dispute arises as to the legal authority of either the AT, or the person signing on behalf of AT, to enter into this Agreement, CITY shall have the right, at its option, to either temporarily suspend or permanently terminate this AGREEMENT. Should CITY temporarily suspend or permanently terminate this AGREEMENT pursuant to this paragraph, however, AT shall be liable to CITY for any money it has received from CITY for performance of any of the provisions hereof as detailed in the Master Lease Agreement, as amended, including construction of improvements, following the design and all approvals, as previously rendered by CITY and other parties.

4. AT understands that the funds provided pursuant to this AGREEMENT are funds which have been made available through the CITY's Capital Improvements budget and AT will, therefore, comply with all rules, regulations, policies and procedures applicable to these funds as directed by CITY. Should a conflict arise between the provisions in the Master Lease Agreement and the provisions hereof, the provisions of the Master Lease Agreement shall prevail over this AGREEMENT.

5. AT and CITY agree that AT is an independent contractor, that AT shall be responsible to all parties for its respective acts and omissions, and that CITY shall in no way be responsible therefore and that neither has authority to bind the other, or hold out to third parties that it has the authority to bind the other.

6. In no event shall CITY be liable for any expense of AT not eligible for payment hereunder, and in no event shall employees of AT be deemed to be employees of CITY.

7. If AT fails to fulfill in timely and proper manner obligations under this AGREEMENT, or if AT should violate any of the covenants, agreements, or stipulations of this AGREEMENT, then, AT shall have the right to cure such failure within thirty (30) days after receipt by AT of written notice from CITY of such failure. CITY shall thereupon have the right to terminate this AGREEMENT if AT fails to cure within said thirty (30) day period, unless more than thirty (30) days shall be required because of the nature of the failure, whereupon AT shall have an extended period to cure not to exceed a total period of sixty (60) days from the date of failure, unless federal or state law, the City Charter or City ordinance requires competitive bidding or other circumstances that prevent AT from completing the cure within said sixty (60) days.

8. Notwithstanding the above, AT shall not be relieved of liability to CITY for damages sustained by CITY by virtue of any breach of this AGREEMENT and CITY may withhold funds otherwise due as damages.

9. In addition to the above provisions, the City Council shall have the right to terminate this AGREEMENT at any time upon a finding by ordinance that AT's activities, the PROJECT, or AT's operations no longer are in the best interest of the City of San Antonio or its citizens. Adequate provisions shall be made for AT to be heard by the City Council prior to a voting on such ordinance. The effective date of the termination shall be set out in the ordinance.

10. Should this AGREEMENT be terminated by either party for any reason and the PROJECT is not fully completed as solely determined by CITY after consultation with AT, AT shall refund any and all sums of money paid by CITY to AT, not already properly expended or contractually obligated by AT for payment to a contractor or subcontractor, coupled with a written commitment by the contractor or subcontractor to perform the work or balance of the work contracted for by AT, in accordance with the terms of the Master Lease Agreement.

11. **TERM OF AGREEMENT.** The term of this AGREEMENT shall commence on _____, 2011 ("Effective Date") and shall terminate on December 31, 2014 ("term"). The term of this AGREEMENT will be terminated earlier if the Master Lease Agreement is terminated prior to such date. The date for funding completion of said renovation and improvements and the term of this AGREEMENT may both be extended by mutual agreement of the parties, but only as evidenced by the passage of a future City of San Antonio ordinance, in the instance of CITY.

12. AT shall establish and use internal management procedures for the PROJECT to preclude theft, embezzlement, improper inducement, obstruction of investigation or other criminal action and to prevent fraud and PROJECT abuse.

13. AT warrants that no person or selling agency has been employed or retained to solicit or secure this AGREEMENT upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, and further that no such understanding or agreement exists or has existed, with any employee of AT or CITY.

14. AT is required to publicly acknowledge that this PROJECT is supported by the City of San Antonio as directed by CIMS.

15. AT may share information regarding monies provided by the City of San Antonio as a part of its fundraising efforts; however no CITY monies shall be used for fundraising costs.

16. This AGREEMENT is subject to and incorporates by reference the requirements of that certain Grant and Development Agreement by and between Bexar County, Texas and AT ("County Development Agreement"), dated _____, 2011. AT acknowledges that certain requirements of the County Development Agreement are also required of AT by CITY, as more specifically set forth in the County Development Agreement.

II. CONSTRUCTION OBLIGATION/PROJECT MANAGEMENT

1. CITY, for and in consideration of the improvements and enhancements to be made to the Alameda Theater Complex at AT's sole cost and expense, agrees and grants permission to AT to enter upon the Premises, as defined in the Master Lease Agreement, for the purpose of constructing the PROJECT and the improvements referenced above, and as such construction obligation is further detailed in the Master Lease Agreement.

2. AT, in accordance and compliance with the terms, provision and requirements of this AGREEMENT, including the County Development Agreement which is incorporated herein by reference for all purposes, and in connection with such construction obligation, will provide, oversee, administer and carry out all of the activities and services set out in the ordinance which originally approved the Master Lease Agreement, as may be amended from time to time, initial funding, and all subsequent annual appropriations, if any, for the PROJECT.

3. CIMS is assigned fiscal monitoring and responsibility to evaluate the accountability of all projects, including the PROJECT referred to herein; however AT understands and agrees that CIMS may call upon CITY's Office of Internal Review, other CITY departments, offices, and agencies and any other non-CITY individuals or entities if CIMS deems it necessary and advisable to audit AT's books, records and files, or take any other action in connection with CIMS's responsibilities hereunder. AT will provide to CITY's staff, including internal auditors, EEO officers and CITY-designated other persons, such as independent public accountants, access during regular business hours in AT's offices, with three (3) working days prior notice, for the purposes of audit monitoring, evaluation, coordination, investigation and making excerpts and/or copies, to any and all AT's books, records and files on the PROJECT covered by this AGREEMENT and the Master Lease Agreement, as amended, and to any and all books, records and files pertaining to AT's proprietary, agency and/or trust funds as CITY may need and request, but no more than four (4) times per AT's fiscal year. AT understands and agrees that CITY or its designee shall also have access to subcontractor records related to the PROJECT for auditing and monitoring purposes.

a. All such records shall continue to be available for inspection and audit for a period of three (3) years after the termination date hereof.

b. AT agrees that during the term of this AGREEMENT, any duly authorized representative of CITY shall have the right to conduct on-site inspections at reasonable times, upon prior notification to AT, and to interview personnel and clients, for the purposes of evaluating and monitoring the PROJECT for compliance with this AGREEMENT.

c. The submission of falsified information or the failure to timely submit all information by AT as requested by CITY is grounds for immediate termination of this AGREEMENT.

4. The entire amount of CITY funds previously allocated and available for this PROJECT was $5,632,000.00. Under the provisions of the Capital Improvements Funding Agreement expiring September 30, 2002, $3,513,026.39 was expended, leaving a balance of $2,118,973.61 Portions of these funds will be disbursed to AT only (1) upon monthly submission of each request for payment, (2) CITY's satisfaction that the required invoices and supporting documentation covering the construction-related expenses are attached to the request, and (3) that the construction work for which the request has been submitted has, in fact, been satisfactorily completed. AT agrees that the CITY funds shall be used only for (1) renovations and improvements to the Alameda Theater lobby area and restrooms (approximately $1 million); (2) renovations and improvements to floors 2-4 of the Casa de Mexico Office Building (approximately $1 million); and (3) the remaining balance of the CITY funds, if any, for any additional renovations required for the Casa de Mexico Office Building. Costs for demolition of the Basila Pharmacy Building shall be borne at AT's sole expense; AT understands and agrees that the CITY funds shall not be used for such demolition costs.

5. No program or activity funds from or through CITY, nor the personnel involved in the administration of such PROJECT or activity, nor any of the funds received hereunder shall be involved, directly or indirectly, in the construction, operation or maintenance of such part of any facility as is used or will be used for sectarian instruction or activity or as a place of religious worship.

6. AT will establish safeguards to prohibit its officers or employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or those with whom they have family, business or other ties. CITY may, at its option, terminate this AGREEMENT for any violation of this paragraph by AT, or its officers, directors or employees.

7. 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.

8. AT agrees to establish internal procedures which assure employees of an established complaint and grievance policy.

a. Such grievance policy will include procedures to receive, investigate and resolve complaints and grievances in an expeditious manner.

b. In the event no complaint and grievance policy has been established, the procedures outlined in the San Antonio Municipal Civil Service rules will be followed by AT.

III. FISCAL MANAGEMENT

1. In consideration of services provided, CITY will provide funds to AT for construction-related expenses incurred pursuant hereto, in accordance with the invoices and other supporting documentation, including third party invoices, submitted to CIMS for review and approval. As administrative fees, CITY shall deduct a one-time flat fee of $25,000.00 from the first and each subsequent invoice submitted by AT pursuant to this Agreement, until the flat fee is paid in full.

2. An accounting system as detailed in the Master Lease Agreement is mandatory. Further, a system evaluation (a review of AT's administrative and accounting controls) must be conducted by CITY's Office of Internal Review prior to the release of funds.

3. AT will establish a separate account in a commercial bank as a depository for receipt and expenditure of funds provided hereunder, including providing within the account and supporting documents the "tracking" of funds, based on invoices received by AT from a third party for payment, which invoices are then submitted to CITY, then reflecting subsequent payment to the third party after funds are received from CITY.

4. Upon completion or termination of this PROJECT any unused funds, rebates or credits must immediately be returned by AT to CITY, in accordance with provisions of the Master Lease Agreement.

5. AT shall not be relieved of liability to CITY for damages sustained by CITY by virtue of any breach of this AGREEMENT and CITY may withhold funds otherwise due as damages.

6. Payment of eligible expenses, as determined by CIMS in coordination with the CITY Architect's Office, shall be made based on submittals by AT to CIMS no more than once monthly, according to standard procedures followed by CITY's Department of Finance. Salaries and benefits of AT's officers, employees, and directors shall be excluded from eligible expenses for payment. In connection therewith, AT agrees to provide the following items to CITY within ten (10) business days after each check is given to AT:

   a. Copies of AT checks to entities being paid, and

   b. Lien Waiver(s) executed by contractors and subcontractors being paid.

7. Should any expense or charge that has been paid to AT be determined to have not been spent by AT strictly in accordance with the terms of this Agreement, AT will immediately refund such amount to CITY within ten (10) working days of CITY's written request wherein the amount disapproved or disallowed shall be specified. The responsible CITY department has the express authority to deduct such claims from subsequent payments. At the end of said ten (10) working days, if the amount has not been refunded to CITY by AT, CITY may charge interest on such amount at the maximum legal rate under applicable law from the date the amount of refund was due CITY.

8. Audit Conditions and Requirements:

a. It is imperative that AT's independent auditor read this entire AGREEMENT and the Master Lease Agreement between CITY and AT, since the budget and financial compliance of this AGREEMENT is only a portion of the total contractual obligation.

b. AT, upon receiving the funds from CITY, is required to furnish CIMS audited financial statements prepared by an independent Certified Public Accountant (CPA) within ninety (90) days after the end of AT's fiscal year until the entire amount of funds has been disbursed by CITY or within ninety (90) days of termination of this AGREEMENT prior to the disbursement of the entire amount. The audited financial statements must include a supplemental schedule of receipts and disbursements of CITY funds by budgeted cost category for the PROJECT and a certification from AT stating whether or not the terms and conditions of this AGREEMENT were met. The audited financial statements must also disclose whether any unused funds, or rebates/credits collected by AT, were or were not returned to CITY within ninety (90) days after the end of AT's fiscal year or termination of this AGREEMENT. A copy of any management letter issued by the CPA to AT must also be submitted to CITY. AT agrees to send a copy of the audited financial statements and management letter, if applicable, directly to the Office of the City Attorney, P.O. Box 839966, San Antonio, Texas, 78283-3966, Attn: Veronica Zertuche, Deputy City Attorney.

c. Upon termination of this AGREEMENT, should any expense or charge be subsequently disallowed or disapproved as a result of any auditing or monitoring by CITY, AT shall refund such amount to CITY within ten (10) working days of CITY's written request therefore wherein the amount disallowed or disapproved shall be specified. At the end of said ten (10) working days, if the amount has not been refunded to CITY by AT, CITY may charge interest on such amount at the maximum legal rate under applicable law from the date the amount of refund was due to CITY.

IV. INSURANCE REQUIREMENTS

1. All insurance requirements shall be as detailed under the Master Lease Agreement, save and except the following modifications:

TYPE	AMOUNT
Commercial General (Public) Liability	For Bodily Injury or Property Damage of $1,000,000 per occurrence, with an aggregate of $2,000,000.
Property Insurance	Coverage for a minimum of 100% of the actual cash value of personal property; and improvements and betterments to the premises.

2. Further, AT shall ensure and be responsible for hiring contractors and subcontractors licensed by CITY to install any and all equipment for the PROJECT and to require and confirm that said contractor has all necessary insurance and/or bonds in place for the PROJECT, including payment and performance bonds, as necessary.

V. INDEMNITY

AT covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, CITY and the elected officials, employees, officers, directors, agents, contractors, subcontractors, consultants, subconsultants, representatives, and volunteers of 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 CITY, directly or indirectly arising out of, resulting from or related to AT'S activities or CITY'S activities under this AGREEMENT, including any acts or omissions of AT, any agent, officer, director, representative, employee, contractor, subcontractor, consultant, subconsultant or volunteer of AT, 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 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, AGENTS, CONTRACTORS, SUBCONTRACTORS, CONSULTANTS, SUBCONSULTANTS, REPRESENTATIVES AND/OR VOLUNTEERS 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. AT shall promptly advise CITY in writing of any claim or demand against CITY or AT known to AT related to or arising out of AT'S activities or CITY'S activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at AT'S cost. CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving AT of any of its obligations under this Article.

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

VI. SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY PROGRAM

AT shall comply with the CITY's Small Business Economic Development Advocacy Program (SBEDA) requirements set forth in the attached Exhibit A, and incorporated herein by reference, for the award of contracts, subcontracts and other opportunities in the design, construction and operation of the PROJECT.

Prior to spending any portion of the CITY-provided funds for the PROJECT, AT agrees to develop a comprehensive scope for the work within the PROJECT that will be financed with CITY funds. This scope will provide sufficient detail so that CITY staff can review the scope, determine availability and submit to the CITY's applicable Goal Setting Committee, which shall determine and apply the appropriate Affirmative Procurement Initiative and goal for contracts and subcontracts procured in whole or in part with funds provided by CITY. Once developed, this scope of work shall be submitted by AT to:

Ruben Flores, SBEDA Team
Capital Improvements Management Services
100 West Houston Street, Suite 1900
San Antonio, TX 78205

AT agrees to provide the scope to CITY within 60 days of AT's execution of this Agreement outlining in detail the use of funds provided by CITY. AT further agrees not to commence any work, except for architectural services which shall be specifically exempted from this requirement, that will be paid for with CITY funds until CITY staff forwards the Affirmative Procurement Initiative and goal applied by the Goal Setting Committee to AT, and AT has received approval of its Subcontractor/Supplier Utilization form, and any other documentation required pursuant to the SBEDA Program, from CITY's Small Business Office (SBO) of the Economic Development Department. Upon approval of this Subcontractor/Supplier Utilization form and any other documentation required by the SBO, this Agreement shall be amended thereby without further City Council action to incorporate the Affirmative Procurement Initiative and goal applied by the Goal Setting Committee, as well as the approved Subcontractor/Supplier Utilization Plan.

AT's failure to comply with the SBEDA provisions of this Agreement shall be considered a default and the CITY will pursue all remedies available to it as provided in this Agreement and the SBEDA Ordinance.

VII. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

1. AT 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. Any supporting financial statements heretofore or hereafter provided to CITY are, shall be and shall remain complete, accurate and fairly reflective of the financial condition of AT on the date shown on said statements and during the period covered thereby, and that since said date shown, except as provided by written notice to CITY, there has been no material change, adverse or otherwise, in the financial condition of AT;

c. No litigation or proceedings are presently pending or threatened against AT;

d. None of the provisions contained herein contravene or in any way conflict with the authority under which AT is doing business or with the provisions of any existing indenture or agreement of AT;

e. AT has the legal authority to accept payments hereunder, and has taken all necessary measures to authorize execution of this AGREEMENT and acceptance of payments pursuant to the terms and conditions hereof; and

f. None of the assets of AT are subject to any lien or encumbrance of any character, except as shown in its financial statement provided by AT to CITY and except for the Landlord's Lien under the Master Lease Agreement, as amended.

g. AT is currently in compliance with and will remain in compliance with all Federal, State and Local laws and regulations and will ensure said compliance by any and all contractors and subcontractors that may work on the PROJECT.

VIII. ASSIGNMENTS

1. Except as specifically referenced in ARTICLE VIII. 2. a. through c., in the normal course of business, AT 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, as evidenced by the passage of a City of San Antonio ordinance. Any attempt at transfer, pledge or other assignment shall be void from the start and shall confer no rights upon any third person. Further, since funds herein are provided to AT and intended to be used solely for the payment of construction-related costs and expenses incurred in connection with the PROJECT, then AT must receive CITY's prior written approval, as evidenced by passage of a City of San Antonio ordinance, any time AT sells, conveys or leases all or any substantial part of AT's assets that are acquired in whole or in part with funds provided by CITY pursuant to this AGREEMENT.

2. However, in the normal course of business, during the period of time that payment may be made hereunder and provided that any payments remain unliquidated, AT may, with the prior written consent of CITY's City Manager or authorized designee:

a. Mortgage, pledge, or otherwise encumber or cause to be encumbered any of the assets of AT now owned or hereafter acquired by it, in whole or in part with funds provided by CITY pursuant to this AGREEMENT, or permit any pre-existing mortgages,

liens, or other encumbrances to remain on or attached to any of such assets of AT which are allocated to the performance of this AGREEMENT and with respect to which CITY has an ownership interest hereunder;

b. Sell, assign, pledge, transfer or otherwise dispose of accounts receivable, notes or claims for money due or to become due with funds provided by CITY pursuant to this AGREEMENT; or

c. Make any advance of funds provided by CITY pursuant to this AGREEMENT, or loan such funds to, or incur any liability as guarantor, surety or accommodation endorser for any other firm, person, entity or corporation.

3. Any (i) assets acquired or (ii) improvements constructed by AT with CITY funds hereunder shall remain the property of CITY upon any transfer, pledge or other assignment and upon termination or completion of the PROJECT, whichever first occurs. Any document evidencing a transfer, pledge, or other assignment must include language, as first approved by CITY, acting through its CITY Council, pursuant to a CITY ordinance, satisfactory to CITY and protective of CITY's superior interest in such assets and improvements.

IX. CHANGES AND AMENDMENTS

1. Except when the terms of this AGREEMENT expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall be by amendment in writing executed by both CITY and AT, which amendment shall require approval as evidenced by passage of a future ordinance by the City Council of the City of San Antonio. Further, AT understands and agrees that this AGREEMENT may be revised and updated by and upon the mutual agreement of AT and CITY, and CITY, with CITY's approval evidenced by a subsequent ordinance passed by the City Council of the City of San Antonio. Revisions will be reflected in an amendment to be executed by both parties upon final approval. Therefore, AT agrees that, at such time as any revisions are so made during the term hereof, this AGREEMENT will be amended to include such revisions. In the event AT does not agree to any or all of the revisions, then upon receipt of such revisions, AT shall have the option of terminating this AGREEMENT by giving thirty (30) days prior written notice to CITY.

2. 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.

3. AT further agrees to notify CITY of any changes in personnel or governing board composition, such notice to be provided within ten (10) working days of the change.

X. SEVERABILITY OF PROVISIONS

1. 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, CITY Charter, City Code, or ordinances of 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.

XI. NON-WAIVER OF PERFORMANCE

1. No waiver by CITY 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 CITY 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.

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

3. No representative or agent of CITY may waive the effect of the provisions of this Article.

XII. CONFLICT OF INTEREST

1. AT acknowledges that it is informed that the Charter of CITY of San Antonio ("CITY herein") and its Ethics Code prohibit a CITY officer or employee, as those terms are defined in said Ethics Code, from having a financial interest in any contract with CITY or any CITY agency such as CITY-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with CITY or in the sale to CITY of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a CITY officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse, directly or indirectly, owns ten (10%) percent or more of the voting stock or shares of the business entity, or ten (10%) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a CITY contract, a partner or a parent or subsidiary business entity. AT warrants and certifies, and this AGREEMENT is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of CITY.

2. AT 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. AT 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.

3. AT 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.

4. 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.

5. AT further warrants and certifies that it has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with CITY's Ethics Code.

XIII. ENTIRE AGREEMENT

1. This AGREEMENT, the Master Lease Agreement, and the County Development Agreement constitute 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 and the Master Lease Agreement, as amended, 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.

XIV. NOTICE

1. 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
CIMS
P.O. Box 839966
San Antonio, TX 78283-3966
and

AT:
401 E. Houston Street
San Antonio, Texas 78205

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

Notice of changes of address by either party must be made in writing delivered to the other party's last known address within five (5) business days of such change. Notices shall be deemed received within three (3) days after the date of mailing.

XV. PARTIES BOUND

This AGREEMENT shall be binding on and inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns, except as otherwise expressly provided for herein.

XVI. GENDER

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

XVII. 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.

XVIII. 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.

XIX. 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.

EXECUTED IN DUPLICATE ORIGINALS to be effective as of _____.

CITY OF SAN ANTONIO,
a Texas Municipal Corporation

By:_____
City Manager

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

ALAMEDA THEATER,
a Texas Non-Profit Corporation

By: _____
Name: ERNEST W. BROMLEY
Title: CHAIRMAN

ATTEST:

_____

Capital Improvements and Funding Agreement No. 3
Exhibit A

SBEDA Contract Compliance Language
SBE Subcontracting Program

A. SBEDA Program

The CITY has adopted a Small Business Economic Development Advocacy Ordinance (Ordinance No. 2010-06-17-0531, also referred to as "SBEDA" or "the SBEDA Program"), which is posted on the City's Economic Development (EDD) website page and is also available in hard copy form upon request to the CITY. The SBEDA Ordinance Compliance Provisions contained in this section of the Agreement are governed by the terms of this Ordinance, as well as by the terms of the SBEDA Ordinance Policy & Procedures Manual established by the CITY pursuant to this Ordinance, and any subsequent amendments to this referenced SBEDA Ordinance and SBEDA Policy & Procedures Manual that are effective as of the date of the execution of this Agreement. Unless defined in a contrary manner herein, terms used in this section of the Agreement shall be subject to the same expanded definitions and meanings as given those terms in the SBEDA Ordinance and as further interpreted in the SBEDA Policy & Procedures Manual. For purposes of this Exhibit, the Alameda Theater is referred to herein as "CONTRACTOR".

B. Definitions

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

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

Commercially Useful Function – an S/M/WBE firm performs a Commercially Useful Function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm must also be

responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quantity and quality, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it is actually performing and the S/M/WBE credit claimed for its performance of the work, and other relevant factors. Specifically, an S/M/WBE firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of meaningful and useful S/M/WBE participation, when in similar transactions in which S/M/WBE firms do not participate, there is no such role performed. The use of S/M/WBE firms by CONTRACTOR to perform such "pass-through" or "conduit" functions that are not commercially useful shall be viewed by the CITY as fraudulent if CONTRACTOR attempts to obtain credit for such S/M/WBE participation toward the satisfaction of S/M/WBE participation goals or other API participation requirements. As such, under such circumstances where a Commercially Useful Function is not actually performed by the S/M/WBE firm, the CONTRACTOR shall not be given credit for the participation of its S/M/WBE subcontractor or joint venture partner towards attainment of S/M/WBE utilization goals, and the CONTRACTOR and S/M/WBE firm may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

Good Faith Efforts – documentation of the CONTRACTOR's or Respondent's intent to comply with S/M/WBE Program Goals and procedures including, but not limited to, the following: (1) documentation within a solicitation response reflecting the Respondent's commitment to comply with SBE or M/WBE Program Goals as established by the GSC for a particular contract; or (2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., timely advertisements in appropriate trade publications and publications of wide general circulation; timely posting of SBE or M/WBE subcontract opportunities on the City of San Antonio website; solicitations of bids/proposals/qualification statements from all qualified SBE or M/WBE firms listed in the Small Business Office's directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Contractor's posting of a bond covering the work of SBE or M/WBE Subcontractors; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Respondent; and documentation of consultations with trade associations and consultants that represent the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Subcontractors.) The appropriate form and content of CONTRACTOR's Good Faith Efforts documentation shall be in accordance with the SBEDA Ordinance as interpreted in the SBEDA Policy & Procedure Manual.

HUBZone Firm – a business that has been certified by U.S. Small Business Administration for participation in the federal HUBZone Program, as established under the 1997 Small Business Reauthorization Act. To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and Controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its Principal Place of Business must be located in

a HUBZone within the San Antonio Metropolitan Statistical Area. [See 13 C.F.R. 126.200 (1999).]

Independently Owned and Operated – ownership of an SBE firm must be direct, independent and by Individuals only. Ownership of an M/WBE firm may be by Individuals and/or by other businesses provided the ownership interests in the M/WBE firm can satisfy the M/WBE eligibility requirements for ownership and Control as specified herein in Section III.E.6. The M/WBE firm must also be Independently Owned and Operated in the sense that it cannot be the subsidiary of another firm that does not itself (and in combination with the certified M/WBE firm) satisfy the eligibility requirements for M/WBE Certification.

Individual – an adult person that is of legal majority age.

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

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

Payment – dollars actually paid to CONTRACTORS and/or Subcontractors and vendors for CITY contracted goods and/or services.

Prime Contractor – the vendor or contractor to whom a purchase order or contract is issued by the City of San Antonio for purposes of providing goods or services for the City. For purposes of this Agreement, this term refers to the CONTRACTOR.

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

Respondent – a vendor submitting a bid, statement of qualifications, or proposal in response to a solicitation issued by the City or its CONTRACTOR. For purposes of this Agreement, CONTRACTOR's prime contractors or subcontractors are considered the Respondent.

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

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

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

SBE Subcontracting Program – an API in which Prime Contractors or vendors are required to make Good Faith Efforts to subcontract a specified percentage of the value of prime contract dollars to certified SBE firms. Such subcontracting goals may be set and applied by the GSC on a contract-by-contract basis to those types of contracts that provide subcontract opportunities for performing Commercially Useful Functions wherein there have been ongoing disparities in the utilization of available SBE Subcontractors.

When specified by the GSC, the SBE Subcontracting Plan or Good Faith Efforts plan submitted by CONTRACTOR may also be required to reflect Good Faith Efforts that a Prime Contractor or vendor has taken (or commits to taking in the case of solicitations that do not include a detailed scope of work or those in which price cannot be considered a factor in evaluation), toward attainment of subcontracting goals for SBE firms.

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

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

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

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

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

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

Subcontractor/Supplier Utilization Plan – a binding part of this Agreement which states the CONTRACTOR's commitment for the use of Joint Venture Partners and/or Subcontractors/Suppliers in the performance of this Agreement, and states the name, scope of work, and dollar value of work to be performed by each of CONTRACTOR's Joint Venture partners and Subcontractors/Suppliers in the course of the performance of this contract, specifying the S/M/WBE Certification category for each Joint Venture partner and Subcontractor/Supplier, as approved by the SBO Manager. Additions, deletions or modifications of the Joint Venture partner or Subcontractor/Supplier names, scopes of work, of dollar values of work to be performed requires an amendment to this Agreement to be approved by the EDD Director or designee.

C. SBEDA Program Compliance – General Provisions

As CONTRACTOR acknowledges that the terms of the CITY's SBEDA Ordinance, as amended, together with all requirements, guidelines and procedures set forth in the CITY's SBEDA Policy & Procedures Manual are in furtherance of the CITY's efforts at economic inclusion and, moreover, that such terms are part of CONTRACTOR's scope of work that formed the basis for contract award and subsequent execution of this Agreement, these SBEDA Ordinance requirements, guidelines and procedures are hereby incorporated by reference into this Agreement, and are considered by the Parties to this Agreement to be material terms. CONTRACTOR voluntarily agrees to fully comply with these SBEDA Program terms as a condition for being awarded this Agreement by the CITY. Without limitation, CONTRACTOR further agrees to the following terms as part of its contract compliance responsibilities under the SBEDA Program:

1. CONTRACTOR shall cooperate fully with the Small Business Office and other CITY departments in their data collection and monitoring efforts regarding CONTRACTOR's utilization and payment of contractors, Subcontractors, S/M/WBE firms, and HUBZone firms, as applicable, for their performance of Commercially Useful Functions resulting from this Agreement including, but not limited to, the timely submission of completed forms and/or documentation promulgated by SBO, through the Originating Department, pursuant to the SBEDA Policy & Procedures Manual, timely entry of data into monitoring systems, and ensuring the timely compliance of its contractors and Subcontractors with this term;

2. CONTRACTOR shall cooperate fully with any CITY or SBO investigation (and shall also respond truthfully and promptly to any CITY or SBO inquiry) regarding possible non-compliance with SBEDA requirements on the part of CONTRACTOR or its contractors, Subcontractors or suppliers;

3. CONTRACTOR shall permit the SBO, upon reasonable notice, to undertake inspections as necessary including, but not limited to, contract-related correspondence, records, documents, payroll records, daily logs, invoices, bills, cancelled checks, and work product, and to interview contractors, Subcontractors and workers to determine whether there has been a violation of the terms of this Agreement;

4. CONTRACTOR shall immediately notify the SBO, in writing on the Change to Utilization Plan form, through the Originating Department, of any proposed changes to CONTRACTOR's Subcontractor / Supplier Utilization Plan for this Agreement, with an explanation of the necessity for such proposed changes, including documentation of Good Faith Efforts made by CONTRACTOR to replace the Subcontractor / Supplier in accordance with the applicable Affirmative Procurement Initiative. All proposed changes to the Subcontractor / Supplier Utilization Plan including, but not limited to, proposed self-performance of work by CONTRACTOR of work previously designated for performance by Subcontractor or supplier, substitutions of new Subcontractors, terminations of previously designated Subcontractors, or reductions in the scope of work and value of work awarded to Subcontractors or suppliers, shall be subject to advanced written approval by the Originating Department and the SBO.

5. CONTRACTOR shall immediately notify the Originating Department and SBO of any transfer or assignment of its Agreement with the CITY, as well as any transfer or change in its ownership or business structure.

6. CONTRACTOR shall retain all records of its Subcontractor payments for this Agreement for a minimum of four years, or as required by state law, following the conclusion of this Agreement or, in the event of litigation concerning this contract, for a minimum of four years, or as required by state law, following the final determination of litigation, whichever is later.

7. In instances wherein the SBO determines that a Commercially

Useful Function is not actually being performed by the applicable S/M/WBE or HUBZone firms listed in a CONTRACTOR's Subcontractor / Supplier Utilization Plan, the CONTRACTOR shall not be given credit for the participation of its S/M/WBE or HUBZone subcontractor(s) or joint venture partner(s) toward attainment of S/M/WBE or HUBZone firm utilization goals, and the CONTRACTOR and its listed S/M/WBE firms or HUBZone firms may be subject to sanctions and penalties in accordance with the SBEDA Ordinance.

D. SBEDA Program Compliance – Affirmative Procurement Initiatives

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

SBE Subcontracting Program. In accordance with SBEDA Ordinance Section III. D. 1. (c), this contract is being awarded pursuant to the SBE Subcontracting Program. CONTRACTOR agrees to subcontract at least _____% of its prime contract value to certified SBE firms headquartered or having a significant business presence within the San Antonio Metropolitan Statistical Area (SAMSA). The Subcontractor / Supplier Utilization Plan that CONTRACTOR submits to CITY pursuant to this Agreement, and that contains the names of the certified SBE Subcontractors to be used by CONTRACTOR pursuant to this contract, the respective percentages of the total prime contract dollar value to be awarded and performed by each SBE Subcontractor, and documentation including a description of each SBE Subcontractor's scope of work and confirmation of each SBE Subcontractor's commitment to perform such scope of work for an agreed upon dollar amount shall be attached and incorporated by reference into the material terms of this Agreement. In the absence of a waiver granted by the SBO, the failure of CONTRACTOR to attain this subcontracting goal for SBE firm participation in the performance of a Commercially Useful Function under the terms of its contract shall be a material breach and grounds for termination of the Agreement with the CITY, and may result in debarment from performing future CITY contracts, withholding of payment for retainage equal to the dollar amount of the underutilization below the agreed upon SBE subcontracting goal, and/or shall be subject to any other remedies available under the terms of this Agreement for violations of the SBEDA Ordinance, or under any other law.

F. Commercial Nondiscrimination Policy Compliance

As a condition of entering into this Agreement, the CONTRACTOR represents and warrants that it has complied with throughout the course of this contract award process, and will continue to comply with, the CITY's Commercial Nondiscrimination Policy, as described under Section III. C. 1. of the SBEDA Ordinance. As part of such compliance, CONTRACTOR shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination

in the solicitation, selection, hiring or commercial treatment of Subcontractors, vendors, suppliers, or commercial customers, nor shall CONTRACTOR retaliate against any person for reporting instances of such discrimination. CONTRACTOR shall provide equal opportunity for Subcontractors, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the CITY's Relevant Marketplace. CONTRACTOR understands and agrees that a material violation of this clause shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification of CONTRACTOR from participating in CITY contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party. CONTRACTOR's certification of its compliance with this Commercial Nondiscrimination Policy as submitted to the CITY pursuant to this Agreement is hereby incorporated into the material terms of this Agreement. CONTRACTOR shall incorporate this clause into each of its Subcontractor and supplier agreements entered into pursuant to CITY contracts.

G. Prompt Payment

Upon execution of this Agreement by CONTRACTOR, CONTRACTOR shall be required to submit to CITY accurate progress payment information with each invoice regarding each of its Subcontractors, including HUBZone Subcontractors, to ensure that the CONTRACTOR's reported subcontract participation is accurate. CONTRACTOR shall pay its Subcontractors in compliance with Chapter 2251, Texas Government Code (the "Prompt Payment Act") within ten days of receipt of payment from CITY. In the event of CONTRACTOR's noncompliance with these prompt payment provisions, no final retainage on this Agreement shall be released to CONTRACTOR, and no new CITY contracts shall be issued to the CONTRACTOR until the CITY's audit of previous subcontract payments is complete and payments are verified to be in accordance with the specifications of the Agreement.

H. Violations, Sanctions and Penalties

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

1. Fraudulently obtain, retain, or attempt to obtain, or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain Certification status as an SBE, MBE, WBE, M/WBE, HUBZone firm, Emerging M/WBE, or ESBE for purposes of benefitting from the SBEDA Ordinance;

2. Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of the SBEDA Ordinance;

3. Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE or HUBZone firm;

4. Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of the SBEDA Ordinance; and

5. Make false statements to any entity that any other entity is, or is not, certified as an S/M/WBE for purposes of the SBEDA Ordinance.

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

1. Suspension of contract;

2. Withholding of funds;

3. Rescission of contract based upon a material breach of contract pertaining to S/M/WBE Program compliance;

4. Refusal to accept a response or proposal; and

5. Disqualification of CONTRACTOR or other business firm from eligibility for providing goods or services to the City for a period not to exceed two years (upon City Council approval).