

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

CITY CLERK DEPT.
2018 JUL 18 PM3:57

Item 2
Board
mzg.

DEPARTMENT: Capital Improvement Department

AGENDA DATE: July 23, 2018

CONTACT PERSON/PHONE: Sam Rodriguez, P.E., City Engineer, 212-0065

DISTRICT(S) AFFECTED: ALL

STRATEGIC GOAL: No. 4: Enhance El Paso's Quality of Life through Recreational, Cultural, and Educational Environments

SUBJECT:

Resolution of the Board of Directors of the El Paso Children's Museum Development Corporation (the "Corporation") approving funding agreement relating to the development of El Paso Children's Museum; and containing other related provisions.

BACKGROUND / DISCUSSION:

On November 6, 2012, the voters of El Paso approved the Quality of Life Bond, which included funding for new and improved amenities around El Paso. One of the projects which funding was included for was a new Children's Museum to be located within the City. On March 6, 2018, El Paso City Council approved the Memorandum of Understanding (MOU) by and between the City and EPC Museum, a Texas nonprofit corporation, to continue to negotiate the El Paso Children's Museum, and to direct the production of definitive documents for City Council's consideration to allow for the public-private partnership to construct and operate the El Paso Children's Museum. The El Paso Children's Museum Development Corporation (the Local Government Corporation or LGC) was created on March 20, 2018, which named the El Paso City Council as the Directors. This resolution provides for the approval of the funding agreement of the El Paso Children's Museum between the City of El Paso and the Corporation. This item is related to the other agenda items regarding the LGC and the proposed amendment to the 2019 Capital Funding Plan.

SELECTION SUMMARY:

N/A

PROTEST

☐ No protest received for this requirement.

☐ Protest received.

COUNCIL REPRESENTATIVE BRIEFING:

Was a briefing provided? ☒ Yes or ☐ Not Applicable (Routine)

If yes, select the applicable districts.

☐ District 1

- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☐ District 5
- ☐ District 6
- ☐ District 7
- ☐ District 8
- ☒ All Districts

PRIOR COUNCIL ACTION:

March 6, 2018 – El Paso City Council approved the Memorandum of Understanding

March 20, 2018 – El Paso Children's Museum Local Government Corporation was created, naming the El Paso City Council as the Directors

AMOUNT AND SOURCE OF FUNDING:

\$19,250,000, 2012 Quality of Life Bond

\$20,000,000, 2019 Amended Capital Funding Plan

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



RESOLUTION OF THE BOARD OF DIRECTORS OF THE EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION (THE "*CORPORATION*") APPROVING FUNDING AGREEMENT RELATING TO THE DEVELOPMENT OF EL PASO CHILDREN'S MUSEUM; AND CONTAINING OTHER RELATED PROVISIONS

WHEREAS, on March 20, 2018, pursuant to the authority granted by Subchapter D of Chapter 431, Texas Transportation Code, as amended, and Chapter 394, Texas Local Government Code, the City Council of the City of El Paso, Texas (the "*City*") authorized the creation of a public, nonprofit local government corporation to act as a duly constituted authority of the City to aid and assist the City in the performance of one or more of the City's governmental functions; and

WHEREAS, Chapter 791, Texas Government Code, as amended, authorizes the Corporation to contract for museum services; and

WHEREAS, the Corporation desires to approve certain contracts to undertake the development and operation of the El Paso Children's Museum, including the Funding Agreement by and between the City and the Corporation; and

WHEREAS, this meeting is open to the public as required by law, and public notice of the time, place and purpose of this meeting was given as required by Chapter 551, Texas Government Code, as amended;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE EL PASO CHILDREN'S MUSEUM DEVELOPMENT CORPORATION:

Section 1. The findings and declarations contained in the preamble of this Resolution are incorporated herein as part of this Resolution.

Section 2. The Board hereby approves the Funding Agreement entered into by and between the Corporation and the City effective upon mutual execution.

Section 3. The Board hereby give the Executive Director the authority to execute the Funding Agreement entered into by and between the Corporation and the City effective upon mutual execution.

Section 4. This Resolution shall take effect immediately from and after its adoption.

PASSED AND APPROVED this ____ day of July, 2018.

President, Board of Directors
El Paso Children's Museum
Development Corporation

ATTEST:

Secretary, Board of Directors
El Paso Children's Museum
Development Corporation

STATE OF TEXAS	§	FUNDING AGREEMENT WITH
COUNTY OF EL PASO	§	EL PASO CHILDREN'S MUSEUM
CITY OF EL PASO	§	DEVELOPMENT CORPORATION

THIS FUNDING AGREEMENT (the "**Contract**") is entered into by and between the City of El Paso ("**City**"), a Texas municipal corporation, acting by and through its City Manager and the El Paso Children's Museum Development Corporation, a local government corporation created by Resolution dated March 20, 2018 ("**Contractor**").

WHEREAS, Pursuant to Resolution dated November 19, 2012, City has allocated certain funds from the Quality of Life Bonds for the public purpose of a first-class, state of the art Children's Museum (the "**Museum**"); and

WHEREAS, Pursuant to Resolution dated June 11, 2018, City has agreed to provide additional funds from the issuance of certificates of obligation to further support the Museum (collectively, the allocated Quality of Life Bond funds and the referenced proceeds from certificates of obligation are the "**Development Contributions**"); and

WHEREAS, land has been and/or is being acquired by the City for development of the Museum using the Capital Funds and such land is located in a reinvestment zone and within 1,000 feet of City's Convention Center, providing a unique value to City, including improving the quality of life, generating new jobs, and increasing revenue sources, economic development, and tourism for the City (the "**Land**," is described further in Exhibit A hereto); and

WHEREAS, City has created the Contractor, for the purpose of aiding, assisting, and acting for and on behalf of the City in the performance of the City's governmental functions, including, but not limited to providing the means to acquire, develop, construct, operate, and maintain the Museum;

WHEREAS, The EPC Museum ("**EPC**"), a non-profit entity, has been created by private incorporators as a supporting organization of the El Paso Community Foundation to provide significant financial and other benefits for the Museum, as well as to be a private venture partner in developing and operating the Museum;

WHEREAS, City, Contractor, and EPC have entered into that certain non-binding Memorandum of Understanding (the "**MOU**") regarding the development and operations of the Museum;

WHEREAS, EPC has adopted a budget for the Museum and included in such budget are allocations of the Development Funds as well as continuing City funding for certain operational costs of the Museum (the "**Maintenance and Operations Contributions**"); and

WHEREAS, City wishes to enter an agreement with Contractor describing the City's funding for the Museum and the rights and responsibilities of the parties related thereto; NOW THEREFORE:

The Parties agree as follows:

I. SCOPE OF FUNDING

1.1 Development Contributions. City will provide Development Contributions to pay for all or part of the costs (including professional services, but excluding the cost of undertaking the design competition by EPC) of acquiring, developing, designing, and constructing the Museum, and acquiring exhibits, as follows:

- (A) Nineteen million two hundred fifty thousand dollars (\$19,250,000) in proceeds from voted Quality of Life Bonds (including funds already expended on acquisition and preparation of Site 1, as described in Exhibit A); and
- (B) Twenty million dollars (\$20,000,000) in proceeds from certificates of obligation.

1.2 Development Contributions – Not to Exceed Amount. The Development Contribution described in Section 1.1 reflects the maximum contribution City shall make toward land acquisition, development, design, and construction of the Museum. City shall not contribute to construction overruns or other development costs of the Museum beyond the Capital Contribution.

1.3 Maintenance and Operations Contributions.

- (A) Capital Repair Fund. Commencing on the opening of the Museum, and on each anniversary date thereafter through and including the fifth anniversary date, City shall deposit three hundred thousand dollars (\$300,000) per year into an account controlled by and accessible to Contractor, or its operator EPC, (the “**Capital Repair Fund**”). Funds in the Capital Repair Fund shall be used exclusively for Museum facility improvements and capital repairs. Beginning on the sixth anniversary date of the opening of the Museum, and on each anniversary date thereafter throughout the term of the Lease, including any and all extensions thereto (defined below), each of the City and Contractor, or its operator (the operator selected by the Contractor, shall be the “**Museum Operator**”; the initial Museum Operator shall be EPC), shall deposit one hundred fifty thousand dollars (\$150,000) per year into the Capital Repair Fund.
- (B) Stipend Commitment. The Museum is a public-private venture. As such, the parties intend for the City to contribute an amount equal to one-third of the approved Museum Budget each year by paying a stipend. Commencing on January 19, 2017 (“**Stipend Commencement**”) and throughout the term of the Lease, including all renewal periods, City shall pay Museum Operator a stipend equal to thirty three percent (33%) of Museum’s annual operating budget, as reflected in Museum Operator’s annual operating Budget for that fiscal year (the “**Stipend**”). The Stipend shall not exceed the maximum amount of two million five hundred thousand dollars (\$2,500,000) (the “**Stipend Cap**”).
 - (i) The Stipend shall be paid beginning on the Stipend Commencement in a prorated amount, and thereafter in one-fourth (1/4) installments on the first day of each calendar-quarter. At the end of the fourth quarter of each year of the Lease (as may be extended), Museum Operator shall provide City

with a financial statement providing budget versus actual variances for the year. City shall "true up" any amounts owed or overpaid to Museum Operator in its next quarterly payment.

- (ii) Museum Operator may use the Stipend for any Museum operational expenses, including salaries, exhibits, and repairs. No portion of the Stipend shall be required to be set aside for improvements or capital repairs. Notwithstanding the foregoing, any expense relating to the architectural design competition process and/or a design procurement process shall be excluded from the operating budget for purposes of determining the amount of the stipend to be paid hereunder.
 - (iii) Provided the Stipend never exceeds the Stipend Cap, City, Contractor, and Museum Operator may establish mutually acceptable benchmarks (such as fundraising, expansion, etc.) that if reached will result in increases to the amount of the stipend. To the extent that the actual financial performance deviates substantially from the budget performance, City, Contractor, and Museum Operator will also establish a mutually acceptable manner for adjusting the Stipend.
 - (iv) The Stipend shall be subject to annual appropriation.
 - (v) The City, the Contractor, and the EPC shall review the Stipend and Stipend Cap every third year to assess whether the Stipend cap of \$2.5 million is achieving the thirty-three percent (33%) goal stated above. If demonstrated to be necessary, and agreeable to the City, the City may increase the Stipend Cap to maintain the City's thirty-three percent (33%) funding goal. The three-year review shall be conducted and completed in accordance with the City's budget cycle, beginning in 2021 for fiscal year 2022.
- (C) Lease Payments. Under the Lease, described in Section 2.3 below, Contractor shall pay, or cause the Museum Operator to pay, the City twenty four thousand dollars (\$24,000) per year in lease payments (the "**Lease Payments**"). Contractor may assign the Lease Payment obligation to Museum Operator. Provided Contractor and/or Museum Operator has fulfilled certain conditions in the Lease, including maintenance of the building and operation of the Museum consistent with a first-class, state of the art children's museum, all Lease Payments shall be deposited into an account controlled by and accessible to Contractor and/or Museum Operator. Funds from the Lease Payment account shall be used exclusively for the purpose of maintaining the Site and making minor repairs thereto and shall not be used for capital improvements or capital repairs to Site.

II. SCOPE OF WORK

2.1 Museum. Contractor shall aid, assist, and act for and on behalf of the City in the performance of the City's governmental functions related to the Museum, including, but not limited to providing the means to acquire, develop, construct, operate, and maintain the Museum.

2.2 Museum Operator. Prior to the receipt of any City funds, Contractor agrees to enter into an operating agreement with Museum Operator. The initial Museum Operator shall be EPC. The Museum Operator Agreement shall include the following obligations for the Museum Operator:

- (A) Selecting the Museum design/architecture firm through a design competition process and/or a procurement process. This selection process shall be paid for by the Museum Operator. Selecting the contractor to construct the Site.
- (B) Designing and constructing the Site, including all improvements to the Site, to wit: the Museum building, and any on-site parking and other surface improvements.
- (C) Assuming Contractor's rights and obligations under the Lease, including the Lease Payments as described in Section I.(C) above.
- (D) Operating the Museum under the governance of a board of directors. The City shall have not less than two (2) appointees to this board and if the board exceeds fifteen (15) members, City appointees shall equal twenty percent (20%) of the total number of board members.
- (E) Provide appropriate staffing for the Museum, including a qualified executive director.
- (F) Maintaining the Site, including landscaping and all exhibits.
- (G) Contracting directly with an exhibit design consultant specializing in children's museums and of national recognition to design the exhibits and content for the Museum. The Museum exhibits shall be of a quality consistent with a first-class, state of the art children's museum from the grand opening of the Museum and at all times thereafter. The exhibits shall also be maintained and updated from time to time in a manner consistent with a first-class, state of the art children's museum.
- (H) Performing in compliance with all local, state, and federal laws, including, but not limited to, Texas Local Government Code Chapter 171 pertaining to conflicts of interest; Texas Local Government Code Chapter 252 pertaining to purchasing and contracting authority of municipalities; and Texas Government Code Chapter 2254 pertaining to Professional and Consulting Services.
- (I) Securing a minimum of twenty million dollars (\$20,000,000) in contributions and/or pledges from donors (the "**Equity**") by the tenth anniversary date of term of the Lease, including contributions and/or pledges secured before the date of this Contract. The Equity will be used for exhibit design and exhibits and to pay Museum operational expenses, including employee salaries. In this context, the term "donors" does not include the City or El Paso County.

- (J) Maintaining tax exempt, non-profit status.
- (K) Preparing and submitting budgets and audits as required under this Contract.
- (L) Providing insurance coverage as required under this Contract.

2.3 Museum Lease.

- (A) City shall enter into a lease with Contractor for the Land and the Museum facility (collectively, the “Site”) whereby City is the Landlord and Contractor is the Tenant (the “Lease”). The Lease term will be for thirty (30) years with two (2) ten (10)-year extensions available. Under the terms of the Lease, Museum Operator will assume the rights and responsibilities of, or become a sublessee of, Contractor.
- (B) If there is any material, uncured default under the Lease by Contractor, or Museum Operator, the Lease shall terminate, all Museum exhibits shall be assigned and transferred to the City, and the City shall assume operations of the Museum in a manner consistent with a first-class, state of the art children’s museum.

2.4 Museum Budget.

- (A) Five-Year Projected Budget. Prior to commencement of construction, Contractor and/or Museum Operator shall deliver to the City an initial five (5)-year operating budget (which includes two (2) years of pre-opening operations and three (3) years of Site-open operations) that considers anticipated revenue generating activities, like retail sales, concessions, special events, and educational opportunities (such activities shall also be contemplated in the Museum design).
- (B) Annual Budget. Contractor shall adopt an annual budget (the “Budget”) prior to the beginning of each fiscal year that considers anticipated revenue generating activities, like retail sales, concessions, special events and educational opportunities (such activities shall also be contemplated in the design). The Budget shall be presented to the City prior to adoption. The Budget shall be prepared in a manner consistent with a first-class, state of the art children’s museum.

III. TERM

3.1 Term. Except as otherwise provided for pursuant to the provisions hereof, this Contract shall begin on April 3, 2018 and shall terminate on April 2, 2048. If the Lease is extended, this Contract shall automatically be extended for the same period.

3.2 Termination. This Contract shall automatically terminate if the Lease is terminated in accordance with Section 2.3(B) above. Notwithstanding any other remedy contained herein or provided by law, City may delay, suspend, limit, or cancel funds, rights or privileges herein given Contractor for failure to comply with the terms and provisions of this Contract. Specifically, at the sole option of City, Contractor may be placed on probation during which time City may withhold payments in cases where it determines that Contractor is not in compliance with this Contract.

Contractor shall not be relieved of liability to the City for damages sustained by the City by virtue of any breach of this Contract, and City may withhold funds otherwise due as damages, in addition to retaining and utilizing any other remedies available to City.

IV. PAYMENT

4.1 Allowable Costs. Contractor agrees that City's liability hereunder is limited to making payments for allowable costs incurred as a direct result of City-funded services provided by Contractor in accordance with the terms of this Contract ("**Allowable Costs**"). Allowable Costs are defined as those costs which are necessary, reasonable, and allowable under applicable federal, state, and local law, for the proper administration and performance of the services to be provided under this Contract and in compliance with the Budget. In addition, Allowable Costs include those all costs and expenses which City could incur if it was operating the Museum. In no event shall City be liable for any cost of Contractor or its Museum Operator not eligible for payment as defined within the Contract.

4.2 Direct Payments. Upon receipt of a verified invoice by Contractor for an Allowable Cost, City shall be authorized to make a direct payment to Contractor's (or Museum Operator's) vendor. Contractor agrees that all requests for disbursement shall be accompanied with documentation as may be required by City.

4.3 Payment Schedule.

- A. City shall make payments pursuant to the Maintenance and Operations Contributions schedules provided in Section 1.3.
- B. City shall pay Contractor invoices under Section 4.3 within fifteen (15) business days, subject to the receipt of the required documents and support materials set forth in this Contract.

4.4 No Third Party Liability. Contractor agrees that City shall not be obligated to any third parties (including any subcontractors or third party beneficiaries of Contractor).

4.5 Accounting Management. Museum Operator shall maintain a financial management system, and acceptable accounting records that provide for accounting records that are supported by source documentation (i.e., timesheets, employee benefits, professional services agreements, purchases, and other documentation as required by City). Museum Operator shall maintain records and shall meet necessary requirements under Generally Accepted Accounting Principles ("GAAP").

4.6 Warranty. Contractor agrees that costs claimed under this Contract will not be claimed under another contract or grant from another agency or City Department, and Contractor warrants that each invoice submitted for payment does not include any costs paid for by another funding source or submitted for payment to any other funding source.

4.7 Unused Funds. Upon completion or termination of this Contract, all unused funds must be returned by Contractor to City.

V. FISCAL AGENT ADMINISTRATION OF CONTRACT

5.1 Fiscal Agent. City shall serve as the fiscal agent for Contractor.

5.2 Administration of Contract. In the event that any disagreement or dispute should arise between the Parties pertaining to the interpretation or meaning of any part of this Contract or its governing rules, regulations, laws, codes or ordinances, City shall have the final authority to render or secure an interpretation. Said interpretation shall become the final governing authority to dispute resolution and shall be appropriately conveyed to the Parties.

VI. AUDIT

6.1 Annual Audit. Contractor shall cause Museum Operator to complete an independent audit of its financial statements prepared by a certified public accountant performed within a period not to exceed ninety (90) days immediately succeeding the end of Museum Operator's fiscal year or termination of this Contract, whichever is earlier. Contractor understands and agrees to furnish or cause the Museum Operator to furnish City with a copy of the audit report within fifteen (15) days of receipt of the report. Contractor further agrees to cause Museum Operator to provide a financial statement audit prepared by an independent certified public accountant. If City determines, in its sole discretion, that Contractor is in violation of the above requirements, City shall have the right to dispatch auditors of its choosing to conduct the required audit and to have Museum Operator pay for such audit from non-City resources.

6.2 Outside Reviews and Audits. Contractor agrees and understands that upon notification from Museum Operator and/or federal, state, or local entities that have conducted program reviews and/or audits of Contractor, Museum Operator, or its programs, and said reviews and/or audits resulted in findings of accounting deficiencies, or violations of Contractor or Museum Operator's financial operations, a copy of the notification, review, investigation, and audit violations report must be forwarded to City within ten (10) days of receipt of the report.

6.3 City Audit. City reserves the right to conduct, or cause to be conducted an audit of all funds received directly or indirectly under this Contract at any and all times deemed necessary by City. City audit staff, a Certified Public Accounting firm, or other auditors as designated by City, may perform such audit(s). City reserves the right to determine the scope of every audit. In accordance herewith, Contractor agrees to make available to City all accounting and Museum records.

6.4 Available Records. Contractor shall, during normal business hours, and as often as deemed necessary by City and/or the applicable state or federal governing agency or any other auditing entity, cause to make available to the auditing entity, books, records, documents, reports, and evidence with respect to all matters covered by this Contract and shall continue to be so available for a minimum period of four (4) years after termination, unless there is litigation or if the audit report covering such agreement has not been accepted, Contractor and/or Museum Operator shall retain the records until the resolution of such issues has satisfactorily occurred. The auditing entity shall have the authority to audit, examine, and make copies of excerpts, transcripts, books, records, documents, and evidence, including all books and records used by Contractor in accounting for

expenses incurred under this Contract, all other non-City executed contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to matters covered by this Contract.

6.5 Accounting Procedures. City may, at its sole discretion, require Contractor to use any and all of City's accounting or administrative procedures used in the planning, controlling, monitoring and reporting of all fiscal matters relating to this Contract, and Contractor shall abide by such requirements.

6.6 Response. When an audit or examination determines that Contractor or Museum Operator has expended funds or incurred costs which are questioned by City, Contractor and/or Museum Operator shall be notified by City and provided an opportunity to address the questioned expenditure or costs.

6.7 Refund. Should any expense or charge that has been paid be subsequently disapproved or disallowed as a result of any site review or audit, Contractor will immediately refund or cause an immediate refund of such amount to City no later than ten (10) business days from the date of notification of such disapproval or disallowance by City. At its sole option, City may, instead, deduct such claims from subsequent payments. If Contractor or Museum Operator is obligated to refund a disapproved or disallowed cost, such refund shall be made to City by cashier's check or money order. If Contractor and/or Museum Operator elects to deduct such claims from subsequent payments, during such time, Contractor/Museum Operator is forbidden to reduce Museum expenditures or agreed upon performance measures under this Contract. Contractor and/or Museum Operator must also use its own non-City funds to maintain the Site and to comply with any and all agreed upon performance measures under this Contract.

6.8 Delinquent Debts. Contractor agrees and understands that all expenses associated with the collection of delinquent debts owed by Contractor or Museum Operator shall be the sole responsibility of Contractor and shall not be paid from any City funds received by Contractor or Museum Operator under this Contract.

VII. RECORDS AND REPORTING

7.1 Public Information and Open Meetings. Contractor shall comply with Chapter 551, Texas Government Code, which requires Contractor to hold open, public meetings. Contractor shall comply with all applicable provisions of the Public Information Act, Texas Government Code Section 552.021, which requires the City and Contractor to make public information available to the public. If Contractor or Museum Operator receives inquiries regarding documents within its possession pursuant to this Contract, Contractor and/or Museum Operator shall, within twenty-four (24) hours of receiving the requests, forward such requests to City for disposition. If the requested information is confidential pursuant to state or federal law, Contractor and/or Museum Operator shall submit to City the list of specific statutory authority mandating confidentiality no later than three (3) business days after Contractor's receipt of such request.

7.2 Records Retention. Contractor agrees to comply with official records retention schedules in accordance with the Local Government Records Act of 1989 official record retention schedules found at <http://www.tsl.state.tx.us/slrn/recordspubs/gr.html> and any amendments thereto.

VIII. INSURANCE

8.1 Proof of Insurance. Prior to the commencement of any work under the Museum Operator Agreement pursuant to this Contract, Contractor shall furnish copies of all required endorsements and a completed Certificate(s) of Insurance to the City, which shall be clearly labeled "El Paso Children's Museum Operator Agreement" in the "Description of Operations" block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The City will not accept a Memorandum of Insurance or Binders as proof of insurance. The certificate(s) or form must have the agent's signature and phone number with an original copy mailed to the City and emailed to assigned Contract Officer. Copies of all applicable endorsements, directly from the insurer's authorized representative to the City. The City shall have no duty to pay or perform under this Contract until such certificate and endorsements have been received and approved by the City. No officer or employee, other than the City Attorney, shall have authority to waive this requirement.

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

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

8.4 Copies of Policies. City shall be entitled, upon request and without expense, to receive copies of the policies, declarations page and all endorsements thereto as they apply to the limits required by City, and may require the deletion, revision, or modification of particular policy terms, conditions, limitations or exclusions (except where policy provisions are established by law or regulation binding upon either of the Parties or the underwriter of any such policies). Contractor shall cause Museum Operator to be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City within ten (10) days of the requested change. Museum Operator shall pay any costs incurred resulting from said changes.

8.5 Required Provisions. Contractor agrees that with respect to the above required insurance, all insurance policies of Museum Operator are to contain or be endorsed to contain the following required provisions:

- Name City and its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with City
- Provide for an endorsement that the "other insurance" clause shall not apply to City where City is an additional insured shown on the policy;
- Provide advance written notice directly to City of any suspension, cancellation, non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.

8.6 Cancellation. Within five (5) calendar days of a suspension, cancellation, or non-renewal of coverage, Contractor shall cause Museum Operator to provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to suspend Contractor's performance, or terminate the remaining terms of this Contract, should there be a lapse in coverage at any time during this Contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this Contract.

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

8.8 No Limit of Obligation. Nothing herein contained shall be construed as limiting in any way the extent to which Contractor or Museum Operator may be held responsible for payments of damages to persons or property resulting from Contractor's or its subcontractors', including Museum Operator and its subcontractors, performance of the work covered under this Contract.

8.9 Primary Insurance. It is agreed that Museum Operator's insurance shall be deemed primary and non-contributory with respect to any insurance or self-insurance carried by City for liability arising out of operations under this Contract.

8.10 Claims Not Limited. It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Contract and that no claim or action by or on behalf of City shall be limited to insurance coverage provided.

8.11 Responsibility for Damage. Contractor and its subcontractors, including Museum Operator and its subcontractors, are responsible for all damage to their own equipment and/or property.

IX. INDEMNITY

9.1 CONTRACTOR covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, CITY and the elected officials, employees, officers, directors, volunteers and representatives of CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily

injury, death property damage or intellectual property right infringement, made upon CITY directly or indirectly arising out of, resulting from or related to CONTRACTOR'S activities under this CONTRACT, including any acts or omissions of CONTRACTOR, any agent, officer, director, representative, employee, consultant or subcontractor of CONTRACTOR, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this CONTRACT. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT CONTRACTOR AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

9.2 The provisions of this INDEMNIFICATION are solely for the benefit of the Parties and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

9.3 CONTRACTOR shall advise CITY in writing within twenty-four (24) hours of any claim or demand against CITY or CONTRACTOR known to CONTRACTOR related to or arising out of CONTRACTOR'S activities under this CONTRACT.

9.4 Defense Counsel. City shall have the right to select or to approve defense counsel to be retained by Contractor in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. Contractor shall retain City approved defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Contract. If Contractor fails to retain Counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Contractor shall be liable for all costs incurred by City. City shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

9.5 Employee Litigation. In any and all claims against any party indemnified hereunder by any employee of Contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor under worker's compensation or other employee benefit acts.

9.6 Museum Operator. The Museum Operator Agreement shall require the Museum Operator to make all of the covenants to and agreements with the City of this Article 9.

X. APPLICABLE LAWS

10.1 Compliance. All of the work performed under this Contract by Contractor and Museum Operator shall comply with all applicable federal, state and local laws, rules, and regulations as amended from time to time.

10.2 Non-Discrimination. As a party to this Contract, Contractor understands and agrees to not to discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein. Additionally, Contractor agrees to comply and to cause the Museum Operator to comply fully with all applicable nondiscrimination, minimum wage, and equal opportunity policies, laws, and regulations.

10.3 Taxes. Contractor warrants that all taxes, which Contractor or the Museum Operator may be obligated for, are current, and paid to the fullest extent liable as of the execution date of the Contract.

10.4 State Law Requirements. The following provisions shall only apply to Contractor in the event that it meets the definition of Company found below:

Texas Government Code §2270.002 provides that a governmental entity may not enter into a contract with a company for goods or services, unless the contract contains a written verification from the company that it:

- (1) does not boycott Israel; and
- (2) will not boycott Israel during the term of the contract.

"Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

"Company" means a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit.

By submitting an offer to or executing contract documents with the City, Contractor verifies that it does not boycott Israel, and will not boycott Israel during the term of this Contract. City relies on Contractor's verification. If found to be false, City may terminate this Contract for material breach, without providing the opportunity to cure.

10.5 Copyright. Contractor shall be responsible for ensuring all copyrighted works performed under this Contract are covered by all necessary licenses and shall take all other necessary steps to insure that all use of all copyrighted materials in the Museum complies with United States and any other applicable trademark and copyright law.

XI. PROHIBITION OF POLITICAL ACTIVITIES

Contractor agrees that no funds provided from or through City shall be contributed or used to conduct political activities, including political activities for the benefit of any candidate for elective

office, political party, organization or measure, whether partisan or non-partisan, nor shall the personnel involved in the administration of the Museum provided for in this Contract be assigned to work for or on behalf of any partisan or non-partisan political activity.

XII. ADVERSARIAL PROCEEDINGS

Contractor agrees to comply and cause the Museum Operator to comply with the following provisions:

- (A) Under no circumstances will the funds received under this Contract be used, either directly or indirectly, to pay costs or attorney fees incurred in any adversarial proceeding against City or any other public entity; and
- (B) Contractor, at City's option, could be ineligible for consideration to receive any future funding while any adversarial proceeding against City remains unresolved.

XIII. SPECIAL PROVISIONS

13.1 Indecency. Contractor shall not knowingly encourage, foster, promote or fund any exhibit, project, production, workshop or program that includes obscene material as defined by Section 43.21 of the Texas Penal Code.

13.2 Religious Activity. Contractor agrees that none of the performance or activity rendered under this Contract shall involve, and no portion of the funds received shall be used, directly or indirectly, for the construction, operations, maintenance, or administration of any sectarian or religious facility or activity, nor shall said performance rendered or funds received be utilized so as to benefit, directly or indirectly, any such sectarian or religious facility or activity.

XIV. ASSIGNMENT

14.1 No Assignment without Consent. Contractor shall not assign or transfer Contractor's interest in this Contract or any portion thereof without the approval of the City Counsel, evidenced by passage of a subsequent ordinance, and if applicable, the Grantor of the grant source. Any attempt to transfer, pledge or otherwise assign shall be void *ab initio* and shall confer no rights upon any third person or party.

14.2 Museum Operator. Section 14.1 does not apply to an assignment of interest and obligations under this Contract to a Museum Operator, provided such assignment is approved by the City Manager.

XV. AMENDMENT

Any alterations, additions or deletions to the terms of this Contract shall be by amendment in writing executed by both City and Contractor and evidenced by passage of a subsequent City resolution, as to City's approval.

XVI. SUBCONTRACTING

Any work or services subcontracted hereunder shall be subcontracted only by written contract and, unless specific waiver is granted in writing by City, shall be subject by its terms to each and every provision of this Contract. Compliance by subcontractors, including the Museum Operator and its subcontractors, with this Contract shall be the responsibility of Contractor. City shall in no event be obligated to any third party, including any subcontractor of Contractor, for performance of services or payment of fees.

XVII. OFFICIAL COMMUNICATIONS

For purposes of this Contract, 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:

City of El Paso
PO Box 1890
El Paso, Texas 79950
Attention: City Manager

with copies of all notices to City relating to defaults, remedies or indemnification being sent to:

City of El Paso
PO Box 1890
El Paso, Texas 79950
Attention: City Attorney

Contractor:

El Paso Children's Museum Development Corporation
300 N. Campbell
El Paso, Texas 79901
Attention: City Manager/CEO

XVIII. VENUE

Contractor and City agree that this Contract shall be governed by and construed in accordance with the laws of the State of Texas. Any action or proceeding brought to enforce the terms of this Contract or adjudicate any dispute arising out of this Contract shall be brought in a court of competent jurisdiction in El Paso, El Paso County, Texas.

XIX. AUTHORITY

The signer of this Contract for Contractor represents, warrants, assures, and guarantees that he has full legal authority to execute this Contract on behalf of Contractor and to bind Contractor to all

of the terms, conditions, provisions and obligations herein contained. Contractor must be authorized to do business in the State of Texas and be formed under and operating in accordance with all applicable laws of the State of Texas.

XX. INDEPENDENT CONTRACTOR

20.1 Independent Contractors. It is expressly understood and agreed that the Contractor is and shall be deemed to be an independent contractor, responsible for its respective acts or omissions and that City shall in no way be responsible therefore, and that neither party hereto has authority to bind the other nor to hold out to third parties that it has the authority to bind the other. Nothing contained in this Contract shall be deemed or construed by the Parties or by any third party as creating the relationship of employer-employee, principal-agent, partners, joint venture, or any other similar such relationship, between the Parties.

20.2 Employees. Any and all of the employees of Contractor, wherever located, while engaged in the performance of any work required by City under this Contract shall be considered employees of Contractor only, and not of City, and any and all claims that may arise from the Workers' Compensation Act on behalf of said employees while so engaged shall be the sole obligation and responsibility of Contractor.

XXI. SEVERABILITY

If any clause or provision of this Contract 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 City, then and in that event it is the intention of the parties that such invalidity, illegality or unenforceability shall not affect any other clause or provision and that the remainder of this Contract shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained; it is also the intention of the Parties that in lieu of each clause or provision of this Contract that is invalid, illegal or unenforceable, there be added as a part of this Contract a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

XXII. ENTIRE CONTRACT

This Contract and its attachments constitute the entire and integrated Contract between the parties and contain all of the terms and conditions agreed upon, and supersede all prior negotiations, representations, or contracts, either oral or written.

[remainder of page intentionally blank]

IN WITNESS WHEREOF, the Parties have executed this Agreement to be effective as of the Effective Date.

CITY OF EL PASO, TEXAS


By: _____
Tomàs Gonzàlez
City Manager

APPROVED AS TO FORM:



Assistant City Attorney
Leslie B. Jean-Pierre

APPROVED AS TO CONTENT:



Sam Rodriguez, City Engineer
Capital Improvement District

**EL PASO CHILDREN'S MUSEUM
DEVELOPMENT CORPORATION**

By: _____
Name: Tomàs Gonzàlez
Title: Executive Director