

**CITY OF SAN ANTONIO
INTERDEPARTMENTAL MEMORANDUM
PARKS AND RECREATION DEPARTMENT**

TO: Mayor and City Council

FROM: Malcolm Matthews, Director, Parks and Recreation Department

THROUGH: Terry M. Brechtel, City Manager

COPIES: Christopher J. Brady; Finance; Management and Budget; Legal; File

SUBJECT: Bond Funding Contract with the Witte Museum

DATE: September 23, 2004

SUMMARY AND RECOMMENDATIONS

This ordinance authorizes the execution of an agreement with the Witte Museum for the expenditure of up to \$150,000.00 in 2003-2007 Park Bond Funds to provide funding for a Master Plan to incorporate Pioneer Hall into the overall plan for Witte Museum and for general building improvements to Pioneer Hall.

Staff recommends approval of this ordinance.

BACKGROUND INFORMATION

Ordinance 86520, passed and approved on August 28, 1997, established a ten year lease agreement whereby the San Antonio Museum Association D/B/A The Witte Museum operates a museum on City park property. Adjacent to the Witte is the Pioneer Hall, which also held a lease for use of public property and was operated by the Pioneers, Trail Drivers, and Former Rangers Association, Inc. Through a 1936 agreement with the State of Texas, this museum must be maintained as a memorial to the Texas pioneers, trail drivers and former Texas Rangers. On May 29, 2003, Ordinance 97698 approved Amendment No. 1 to the Witte Museum's agreement, which increased its lease space to include the Pioneer Hall and amended the length of the agreement to become a twenty-five year term that will expire on September 7, 2022.

The 2003 Bond Issue approved the use of \$150,000.00 in Park Bond Funds to assist the Witte Museum toward their development of the Pioneer Hall. The Witte plans to utilize up to \$50,000.00 of the funds to incorporate the Pioneer Hall into the overall plan for the Witte Museum. Funds of up to \$100,000.00 will be utilized for construction costs for Pioneer Hall improvements, including HVAC and related electrical and mechanical systems.

The bond funding agreement requires that the Witte complete the improvements by December 31, 2007.

POLICY ANALYSIS

This agreement is consistent with the City's policy to enter into agreements with other public or non-profit entities to assist with projects that benefit the citizens of San Antonio. The use of 2003-2007 Park Bond Funds is in compliance with the approved bond election.

FISCAL IMPACT


The amount of \$150,000.00 was approved in the 2003 Bond Issue for the Witte Museum. The funds will be paid on a reimbursement basis to the Witte. The General Fund is not impacted.

COORDINATION

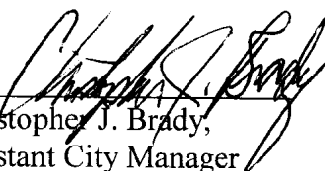
This item was coordinated with the City Attorney's Office, Finance and the Office of Management and Budget.

SUPPLEMENTARY COMMENTS

A Discretionary Contracts Disclosure Form is not required.



Malcolm Matthews,
Director of Parks and Recreation



Christopher J. Brady,
Assistant City Manager

Approved:



Terry M. Brechtel
City Manager

STATE OF TEXAS §
 § BOND FUNDING CONTRACT – WITTE
COUNTY OF BEXAR §

This CONTRACT is hereby made and entered into by and between the CITY OF SAN ANTONIO (hereinafter referred to as "CITY"), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. _____ dated _____, and the WITTE MUSEUM (hereinafter referred to as "GRANTEE"), a Texas non-profit corporation, acting by and through its President, hereto duly authorized.

WHEREAS, CITY and GRANTEE entered into a lease agreement for the Witte Museum facility pursuant to Ordinance No. 86520, passed and approved by the City Council of the City of San Antonio on August 28, 1997; and

WHEREAS, CITY and GRANTEE amended that lease agreement to Ordinance No. 97698, passed and approved by the City Council of the City of San Antonio on May 29, 2003; and

WHEREAS, the amendment added Pioneer Hall, a building owned by the City of San Antonio in Brackenridge park to the leased premises and required that GRANTEE submit (1) an operating plan for Pioneer Hall and (2) a capital improvement plan for Pioneer Hall and to effectuate such plans after review and approval by CITY; and

WHEREAS, In response to the amendment the City proposed a Bond issue to partially fund the capital improvements to Pioneer Hall required under the amendment to be undertaken by GRANTEE and these bond funds are now available; and

WHEREAS, GRANTEE hereby accepts the funding offered by CITY as well as the responsibilities and duties necessary to fully implement and manage the 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. TERM

1.01 This CONTRACT shall continue in full force and effect until the public purposes of the expenditures provided for herein, as more particularly identified in Section 6.01, have been fully satisfied.

II. GENERAL RESPONSIBILITIES

2.01 Provided GRANTEE receives the funding described in Section 6.01, GRANTEE hereby accepts full responsibility for the performance of all services and activities described in this CONTRACT to fully implement the Project. The funds provided for under this CONTRACT shall only be used for work directly related to the Project, namely renovations to Pioneer Hall to include the following:

- a) Up to \$50,000 on Master Planning to incorporate Pioneer Hall into the overall campus plan for Witte Museum. Such master planning will be focused on two issues: 1) identifying a joint entrance, access and possible expansion of Pioneer Hall and the adjacent Witte Museum; and 2) the location of HVAC and other equipment necessary for upgrades relative to other structures and future plans.
- b) Up to \$100,000 on construction costs for Pioneer Hall Upgrades including Pioneer Hall HVAC and related electrical and mechanical systems. The City recognizes that the Witte will need additional funds to complete the Pioneer Hall HVAC installation, including associated architectural and structural work. It is the responsibility of the Witte, per the lease amendment, to complete these improvements, and Witte hereby agrees to complete these improvements within the allocated time given for the 2003 Bond Issue which requires substantial completion of all projects by December 31, 2007.

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

2.03 The Parks and Recreation Director or his designee, is responsible for the administration of this CONTRACT on behalf of CITY.

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

III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS

3.01 GRANTEE warrants and represents that it will comply with all Federal, State and Local laws and regulations and will use all reasonable efforts to ensure said compliance by any and all contractors and subcontractors that may work on the Project.

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

IV. LEGAL AUTHORITY

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

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

V. PERFORMANCE BY GRANTEE

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

VI. FUNDING AND ASSISTANCE BY CITY

6.01 In consideration of GRANTEE's performance of all services and activities set forth in this CONTRACT which will serve the public purpose of promoting cultural tourism by encouraging, promoting and improving the arts and by enhancing CITY's ability to generate future exhibits which will increase cultural tourism, CITY agrees to reimburse GRANTEE for all eligible expenses incurred hereunder. Notwithstanding any other provisions of this AGREEMENT, the total of all payments and other obligations made or incurred by CITY hereunder shall not exceed the sum of \$150,000.00

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

6.03 It is expressly understood and agreed by CITY and GRANTEE that CITY's obligations under this Article are contingent upon the actual sale of applicable 2003 Parks General Obligation Bonds. Should CITY not receive funds from the sale of said Bonds to make payments pursuant to this AGREEMENT or should proceeds of sales be less than anticipated, CITY shall notify GRANTEE in writing within a reasonable time after such fact has been determined and may, at its option, either terminate this AGREEMENT or reduce the amount of its obligation accordingly. It is expressly understood by CITY and GRANTEE that this CONTRACT in no way obligates CITY's general fund monies or any other monies or credits of CITY.

VII. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY GRANTEE

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

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

- (A) That maintenance of said records shall be in compliance with all terms, provisions and requirements of this CONTRACT and with all generally accepted accounting practices; and
- (B) That GRANTEE's record system shall contain sufficient documentation to provide in detail full support and justification for each expenditure.

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

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

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

(A) have not been spent by GRANTEE strictly in accordance with the terms of this CONTRACT; or

(B) not be supported by adequate documentation to fully justify the expenditure.

7.06 Upon termination of this CONTRACT, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in section 7.05 above as a result of any auditing or monitoring by CITY, GRANTEE shall refund such amount to CITY within thirty (30) working days of CITY's written request therefor wherein the amount disallowed or disapproved shall be specified.

VIII. ALLOWABLE EXPENDITURES AND OWNERSHIP OF PROPERTY

8.01 Upon preparation of a construction plan and budget by GRANTEE, GRANTEE shall submit said budget to CITY for approval of any costs to be paid from funds received hereunder. Costs shall be considered allowable only if so approved in GRANTEE'S construction budget, or otherwise approved in advance by CITY in writing, and incurred directly and specifically in the performance of and in compliance with this AGREEMENT and with all city, state and federal laws; regulations and ordinances affecting GRANTEE's operations hereunder. Only the following categories of costs shall be considered allowable:

Bid Advertising
Architectural Contract
Architectural Contingencies
Engineer Contract
Engineer Contingencies
Construction Contract
Construction Contingencies

Expenditures of the funds provided under this CONTRACT shall only be allowed if incurred directly and specifically in the performance of and in compliance with this CONTRACT and all applicable city, state and federal laws, regulations and/or ordinances.

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

- Personnel costs, salaries or wages paid directly by GRANTEE
- Out of town travel
- Costs or fees for consultant and/or professional services, except for those directly related to the project
- Costs or fees associated with attendance at meetings, seminars or conferences

8.03 Written requests for prior approval shall be GRANTEE's responsibility and shall be made within sufficient time to permit a thorough review by CITY. Written approval by CITY through the Director of Parks and Recreation, or his designee, must be obtained prior to the commencement of procedures to solicit or purchase services, equipment, or real or personal property. Procurements and/or purchases which must be approved pursuant to the terms of this CONTRACT shall be conducted entirely in accordance with all applicable terms, provisions and requirements hereof.

8.04 CITY and GRANTEE agree and understand that the Pioneer Hall is owned by CITY and any improvements made to the facility, shall be the sole property of CITY.

IX. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

9.01 GRANTEE further represents and warrants that:

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

X. ACCESSIBILITY OF RECORDS

10.01 At any reasonable time and as often as CITY may deem necessary, upon three (3) days written notice, GRANTEE shall make all of its records pertaining to this CONTRACT available to CITY or any of its authorized representatives, and shall permit CITY or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

10.02 GRANTEE agrees and represents that it will cooperate with CITY, at no charge to the CITY, to satisfy, to the extent required by law, any and all requests for information received by CITY under the Texas Public Information Act or related laws pertaining to this CONTRACT.

XI. MONITORING AND EVALUATION

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

XII. INDEMNITY

12.01 GRANTEE covenants and agrees to FULLY INDEMNIFY and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually or collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal bodily injury, death and property damage, made upon the city, directly or indirectly arising out of, resulting from or related to GRANTEE'S activities under this CONTRACT, including any acts or omissions of GRANTEE, any agent, officer, director, representative, employee, consultant or subcontractor of GRANTEE, and their respective officers, agents, employees, directors and representatives while in the exercise or performance of the rights or duties under this CONTRACT, all without, however, waiving any governmental immunity available to the CITY under Texas law and without waiving any defenses of the parties under Texas law. IT IS FURTHER COVENANTED AND AGREED THAT SUCH INDEMNITY SHALL APPLY EVEN WHERE SUCH COSTS, CLAIMS, LIENS, DAMAGES, LOSSES, EXPENSES, FEES, FINES, PENALTIES, ACTIONS, DEMANDS, CAUSES OF ACTION, LIABILITY, AND/OR SUITS ARISE IN ANY PART FROM THE NEGLIGENCE OF THE CITY, THE ELECTED OFFICIALS, EMPLOYEES, OFFICERS, DIRECTORS AND/OR REPRESENTATIVES OF CITY, UNDER THIS CONTRACT. The provisions of this INDEMNITY are solely for the benefit of the parties hereto and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity. GRANTEE shall promptly advise the CITY in writing of any claim or demand against the CITY or GRANTEE known to the GRANTEE related to or arising out of GRANTEE'S activities under this CONTRACT and shall see to the investigation and defense of such claim or demand at GRANTEE'S cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving GRANTEE of any of its obligations under this paragraph.

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

XIII. INSURANCE

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

XIV. NONDISCRIMINATION

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

XV. CONFLICT OF INTEREST

15.01 GRANTEE covenants that neither it nor any member of its governing body or of its staff presently has any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this CONTRACT. GRANTEE further covenants that in the performance of this CONTRACT, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

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

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

- (A) Participate in any decision relating to this CONTRACT 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 CONTRACT or the proceeds thereof.

XVI. POLITICAL ACTIVITY

16.01 None of the activities performed hereunder shall involve, and no portion of the funds received hereunder shall be used, either directly or indirectly, for any political activity including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

XVII. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

17.01 All finished or unfinished reports, documents, data, studies, surveys, charts, drawings, maps, models, photographs, designs, plans, schedules, or other appended documentation to any proposal or contract, and any responses, inquiries, correspondence and related material submitted by GRANTEE, shall, upon receipt, become the property of CITY.

XVIII. CONTRACTING

18.01 Any work or services contracted hereunder shall be contracted only by written contract or agreement and, unless specific waiver is granted in writing by CITY, shall be subject by its terms to each and every provision of this CONTRACT. Compliance by contractors with this CONTRACT shall be the responsibility of GRANTEE. GRANTEE is responsible to ensure that all permits required for the activities under this CONTRACT are obtained.

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

XIX. CHANGES AND AMENDMENTS

19.01 Except when the terms of this CONTRACT expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall only be by amendment in writing executed by both CITY and GRANTEE under authority granted by formal action of the Parties' respective governing bodies.

19.03 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 CONTRACT and that any such changes shall be automatically incorporated into this CONTRACT without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

XX. ASSIGNMENTS

20.01 GRANTEE shall not transfer, pledge or otherwise assign this CONTRACT, any interest in and to same, or any claim arising thereunder, without first procuring the written approval of CITY. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person.

XXI. SEVERABILITY OF PROVISIONS

21.01 If any clause or provision of this 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 the City of San Antonio, Texas, then and in that event it is the intention of the Parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this CONTRACT 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 CONTRACT that is invalid, illegal, or unenforceable, there be added as a part of the 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. NON-WAIVER OF PERFORMANCE

22.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this CONTRACT shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this CONTRACT, 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 CONTRACT shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

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

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

XXIII. ENTIRE AGREEMENT

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

XXIV. NOTICES

24.01 For purposes of this 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: Director Parks and Recreation
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

GRANTEE: President
Witte Museum
3801 Broadway
San Antonio, Texas 78209

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

XXV. PARTIES BOUND

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

XXVI. RELATIONSHIP OF PARTIES

26.01 Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of principal and agent, partners, joint venturers or any other similar such relationship between the Parties hereto.

XXVII. TEXAS LAW TO APPLY

27.01 This CONTRACT shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the Parties created hereunder are performable in Bexar County, Texas.

XXVIII. CAPTIONS

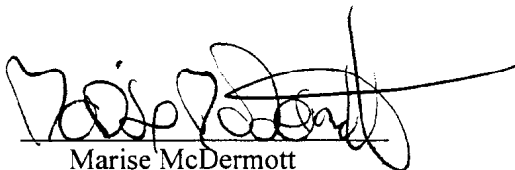
28.01 The captions contained in this CONTRACT are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this CONTRACT.

EXECUTED IN DUPLICATE ORIGINALS, each of which shall have the full force and effect of an original this the ____ day of _____, 2004.

CITY OF SAN ANTONIO

WITTE MUSEUM

By: _____
Terry M. Brechtel
City Manager

By: _____
Marise McDermott
President

ATTEST: _____
CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY