

**CITY OF SAN ANTONIO
PARKS AND RECREATION DEPARTMENT
CITY COUNCIL AGENDA MEMORANDUM**

TO: Mayor and City Council

FROM: Malcolm Matthews, Director, Parks and Recreation Department

SUBJECT: Roosevelt Park Community Building and Park Improvements Project

DATE: March 10, 2005

SUMMARY AND RECOMMENDATIONS

This ordinance selects Bender Wells Clark Design, a SBE/DBE/WBE firm, for professional services associated with the Roosevelt Park Community Building and Park Improvements Project in City Council District 5; authorizes appropriations of \$106,875.00 from 1999-2004 Park Bond Funds; authorizes an architectural contract not to exceed \$91,250.00; and authorizes the encumbrance of funds for architectural contingencies, bid advertising and printing, and environmental assessment fees.

Staff recommends approval of this ordinance.

BACKGROUND INFORMATION

Funds were approved in the 1999 Bond Issue that were designated for the Lone Star Brewery Site Park Land Acquisition and Development Project in City Council District 5. After discussions with the property owner, it was determined that purchase of property at the site would exceed available project funds. The consensus from the local community, staff and Council District 5 was to utilize the funds for further improvements to Roosevelt Park located at 331 Roosevelt, which is directly across the San Antonio River from the Lone Star Brewery site. Roosevelt Park also was an approved project site in the 1999 Park Bond Issue. It may be possible to link the two areas in the future.

Staff conferred with the City's bond counsel for the 1999 Bond Issue, Thomas K. Spurgeon, to determine whether the proposed plan of action would be an acceptable use of the bond funds that had originally been internally allocated for the Lone Star Brewery Site park development. In his response, Mr. Spurgeon noted that if conditions have changed such that to proceed with an approved project would be an unwise and unnecessary expenditure of public funds, the governing body may abandon the project, as long as it does not act in an arbitrary manner. A copy of his letter is attached to this memo. Since staff has made a good faith effort to accomplish the Lone Star Brewery site project, but has been unable reach a reasonable price with the owner of the Lone Star Brewery land, it would be a prudent decision to redirect the internally allocated funds to another approved 1999 bond project.

This ordinance will hire an architect firm to design improvements which will include a community building, replacement of the park pavilion, additional outdoor restrooms and other park amenities to form a complex with the existing bath house and the existing restrooms. The community building will be available to the public as a rental facility for meetings or social functions. The services provided by this contract will include architecture, topographical surveying, soil testing, mechanical/engineering/plumbing, and civil engineering.

The firm of Bender Wells Clark Design, a SBE/DBE/WBE firm, was selected by the Public Works Architectural and Engineering Selection Committee as the best-qualified of six respondents to the City's solicitation. The Evaluation/Rating Summary Sheet is included herein as Attachment 1. Bender Wells Clark Design has four current City projects with total consultant fees of \$249,950.00.

The design phase of the project is scheduled to begin in March 2005 and to be completed in September 2005. It is anticipated that the construction phase will begin in January 2006 and will end in December 2006.

POLICY ANALYSIS

This action is consistent with the approved 1999 Bond Program, as verified by the City's bond counsel. The consultant was selected through the City's standard Request for Qualification process.

FISCAL IMPACT

The proposed ordinance will allocate a total of \$106,875.00 to the Roosevelt Park Community Building and Park Improvements Project from 1999-2004 Park Bond Funds. The architectural fee is \$91,250.00, the architectural contingency is \$9,125.00, bid advertising and printing is \$1,500.00, and environmental assessment fee is \$5,000.00. The General Fund is not impacted by this item.

COORDINATION

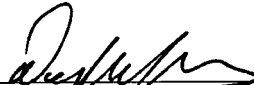
The Public Works, Economic Development, Finance, City Attorney and Office of Management and Budget have assisted with this action.

SUPPLEMENTARY COMMENTS

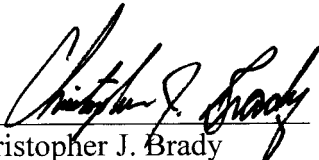
A Discretionary Contracts Disclosure Form is attached from Bender Wells Clark Design.



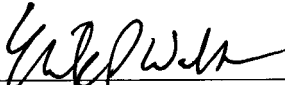
Malcolm Matthews
Director of Parks and Recreation



Thomas G. Wendorf, P.E.
Director of Public Works



Christopher J. Brady
Assistant City Manager



J. Rolando Bono
Interim City Manager

ATTACHMENT 2
City of San Antonio
Discretionary Contracts Disclosure*

For use of this form, see City of San Antonio Ethics Code, Part D, Sections 1&2
Attach additional sheets if space provided is not sufficient.
State "Not Applicable" for questions that do not apply.

* This form is required to be supplemented in the event there is any change in the information under (1), (2), or (3) below, before the discretionary contract is the subject of council action, and no later than five (5) business days after any change about which information is required to be filed.

Disclosure of Parties, Owners, and Closely Related Persons

For the purpose of assisting the City in the enforcement of provisions contained in the City Charter and the Code of Ethics, an individual or business entity seeking a discretionary contract from the City is required to disclose in connection with a proposal for a discretionary contract:

(1) the identity of any **individual** who would be a party to the discretionary contract:

None

(2) the identity of any **business entity**¹ that would be a party to the discretionary contract:

Bender Wells Clark Design
830 North Alamo
San Antonio, Texas 78215

and the name of:

(A) any individual or business entity that would be a **subcontractor** on the discretionary contract;

None

and the name of:

(B) any individual or business entity that is known to be a **partner**, or a **parent** or **subsidiary** business entity, of any individual or business entity who would be a party to the discretionary contract;

None

¹ A **business entity** means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, unincorporated association, or any other entity recognized by law.

Discretionary Contracts Disclosure

- (3) the identity of any *lobbyist* or *public relations firm* employed for purposes relating to the discretionary contract being sought by any individual or business entity who would be a party to the discretionary contract.

None

Political Contributions

Any individual or business entity seeking a discretionary contract from the city must disclose in connection with a proposal for a discretionary contract all political contributions totaling one hundred dollars (\$100) or more within the past twenty-four (24) months made directly or indirectly to any *current* or *former member* of City Council, any *candidate* for City Council, or to any *political action committee* that contributes to City Council elections, by any individual or business entity whose identity must be disclosed under (1), (2) or (3) above. Indirect contributions by an individual include, but are not limited to, contributions made by the individual's spouse, whether statutory or common-law. Indirect contributions by an entity include, but are not limited to, contributions made through the officers, owners, attorneys, or registered lobbyists of the entity.

To Whom Made:	Amount:	Date of Contribution:
Peoples Nine Committee	\$300.00	10-20-03

Disclosures in Proposals

Any individual or business entity seeking a discretionary contract with the city shall disclose any known facts which, reasonably understood, raise a question² as to whether any city official or employee would violate Section 1 of Part B, Improper Economic Benefit, by participating in official action relating to the discretionary contract.

None

Signature:	Title:	Date:
<i>Beth Bender Wells</i>	President	10-25-04
Company: Bender Wells Clark Design		

² For purposes of this rule, facts are "reasonably understood" to "raise a question" about the appropriateness of official action if a disinterested person would conclude that the facts, if true, require recusal or require careful consideration of whether or not recusal is required.

Evaluation of Qualification Statements for
Summary: Lone Star Brewery Site Park Land Development
 CITY OF SAN ANTONIO - ARCHITECT/ENGINEER REVIEW

[illegible]

Notes: * Special Considerations - special expertise regarding codes, ADA, rules, regulations, regulatory agency criteria, etc. of: TCEQ (Texas Natural Resource Conservation Commission), HDRC (Historic and Design Review Commission) and TxDOT as they relate to this project.

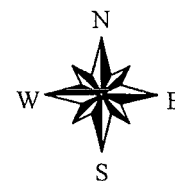
Reviewer:

Roosevelt Park Improvements

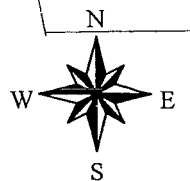
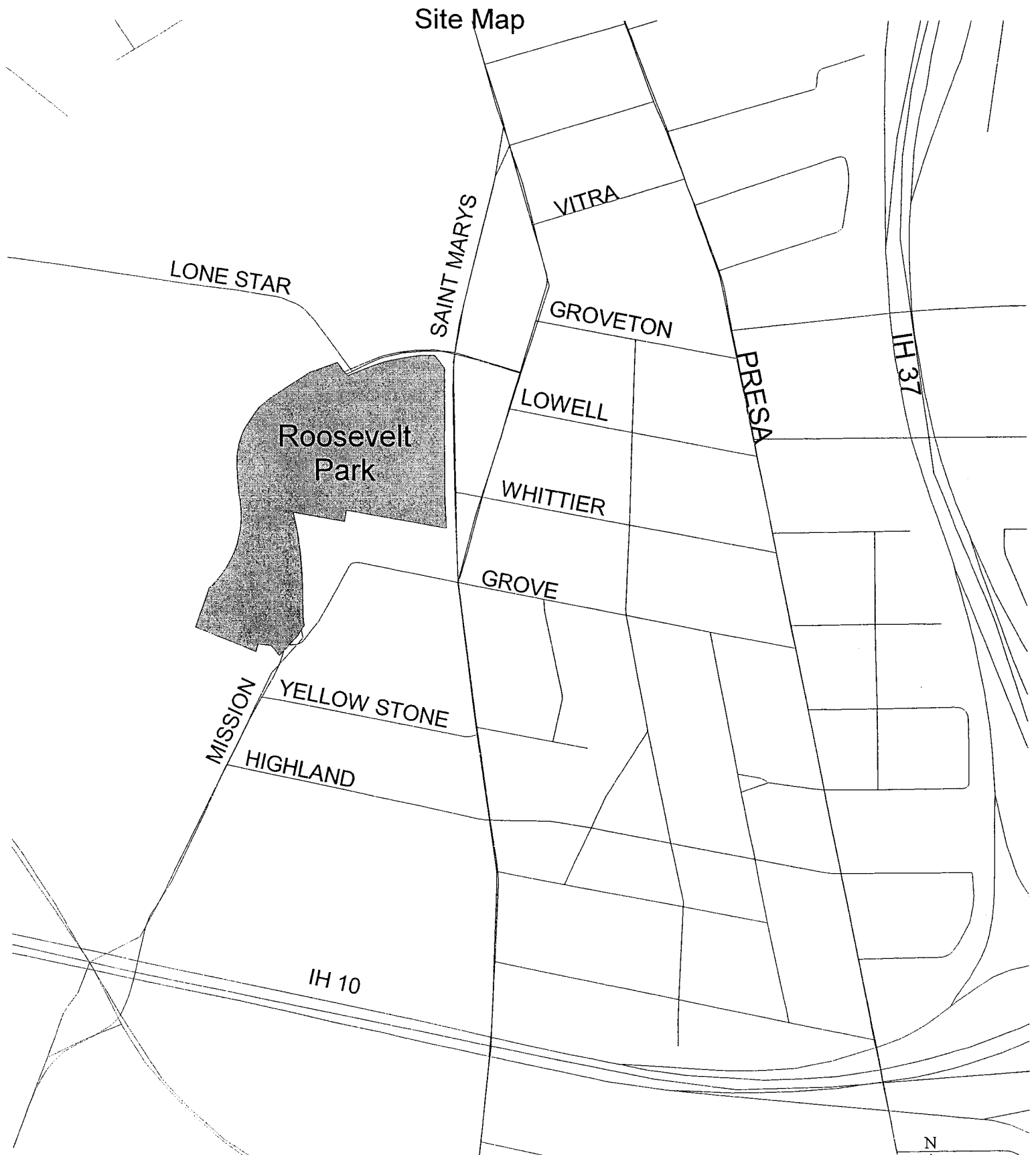
Site Map



City of San Antonio
Parks & Recreation Dept.



Roosevelt Park Improvements



LAW OFFICES
McCALL, PARKHURST & HORTON L.L.P.

717 NORTH HARWOOD
NINTH FLOOR
DALLAS, TEXAS 75201-6587
TELEPHONE: 214 754-9200
FACSIMILE: 214 754-9250

700 N. ST. MARY'S STREET
1525 ONE RIVERWALK PLACE
SAN ANTONIO, TEXAS 78205-3503
TELEPHONE: 210 225-2800
FACSIMILE: 210 225-2984

600 CONGRESS AVENUE
1250 ONE AMERICAN CENTER
AUSTIN, TEXAS 78701-3248
TELEPHONE: 512 478-3805
FACSIMILE: 512 472-0871

February 9, 2005

Mr. Stephen Whitworth
Assistant City Attorney
City Hall, 3rd Floor
100 Military Plaza
San Antonio, Texas 78205

**RE: ABILITY TO REDIRECT BOND AUTHORIZATION ORIGINALLY APPROVED TO
FINANCE "LONE STAR BREWERY SITE PARK ACQUISITION AND DEVELOPMENT"**

Dear Stephen:

This letter is in response to a question posed in an e-mail from you relating to whether bond proceeds from a 1999 bond authorization originally approved for "Lone Star Brewery Site Park Land Acquisition and Development" (which would have been located across from Roosevelt Park) could be used for additional park improvements at Roosevelt Park. It is important to note that "Roosevelt Park Improvements" was also a specifically approved park project in the 1999 bond authorization election.

BACKGROUND INFORMATION

According to our conversation, the request for change is due to the fact that the City and the owner of the Lone Star Brewery land which was intended to be purchased and developed as a public park with proceeds of bonds derived from the 1999 bond authorization have been unable to agree to a purchase price for such land. Consequently, the City has determined that it is no longer prudent to proceed with the purchase and development of such land and now desires to essentially redirect the funds which would have been used to purchase and develop the Lone Star Brewery land to make additional improvements to Roosevelt Park. As further explained below, we believe the City, under these specific circumstances, may redirect proceeds originally intended for the Lone Star Brewery land acquisition and development to another park project approved in the 1999 Parks Proposition (defined below) due to the fact that circumstances have changed since the bond election which now make it imprudent for the City to proceed with the originally intended acquisition.

LEGAL ANALYSIS

Texas courts have consistently held that proceeds of bonds approved by voters may only be expended for the purposes for which they were approved. *Moore v. Coffman*, 200 S.W. 374 (Tex. 1918); *Black v. Strength*, 246, S.W. 79 (Tex. 1922). They may not be expended for an additional or different purpose, for an approved bond proposition constitutes a contract with the voters. *Moore*,

200 S.W. at 374-375; *Black*, 246 S.W. at 80-81.

As we have discussed on numerous occasions with other members of the City staff with respect to questions regarding use of bond proceeds, the voters did not approve a specific amount of bonds for each particular park project listed in the "Parks and Recreation Improvements Proposition" (Proposition No. 4, herein referred to as the "1999 Parks Proposition") set forth in Ordinance No. 89168 (which called the 1999 bond election). Instead, the voters approved the issuance of a maximum amount of bonds for all park improvement projects listed in the 1999 Parks Proposition. The 1999 Parks Proposition further authorized the City Council, "*in its discretion,*" and "*after making due provision therefore,*" to "*use any excess funds for acquiring, constructing and equipping park, cultural and recreational facilities and improvements and making park additions, and acquiring of lands and rights-of-way necessary thereto....*"

Internally, the City allocated a certain portion of the total bonds authorized for park improvements to satisfy the intended improvements for each of the projects listed in the 1999 Parks Proposition; however, the specific improvements eventually to be made at each site may change over time based on numerous circumstances. Before any proceeds can be used for park projects which were not listed in the 1999 Parks Proposition, the City has to be certain that all of the park projects specifically named in the 1999 Parks Proposition have been completed or "due provision" has been made therefor (i.e. sufficient bond funds or voted authorization remains or other sources are available to complete a substantial portion of each project specifically approved by the voters in the 1999 Parks Proposition). This does not mean that the City is legally required to build or acquire every project approved by the voters in the 1999 Parks Proposition, for cost overruns, project revisions, etc. could result in a shortage of funds to complete all projects as originally intended. Furthermore, notwithstanding the general rule expressed in *Moore* and *Black* above, the Texas Supreme Court has ruled that if conditions have "*so materially changed*" since bonds were voted that proceeding with a specifically approved project "*would be an unwise and unnecessary expenditure of public...funds*", the governing body may abandon such project as long as it does not act "*arbitrarily in abandoning the project.*" *Hudson v. San Antonio Independent School District*, 95 S.W. 2d 673 (Tex. 1936). It certainly appears to be against good public policy to require the City, and we are not aware of any statute requiring the City, to purchase a voter approved site for park acquisition if, as in the case of the Lone Star Brewery land acquisition and development, the City and the land owner are unable to agree to a reasonable purchase price. Presumably the City will be able to demonstrate that proceeding with such acquisition of the Lone Star Brewery land at a price deemed unacceptable to the City would be "an unwise and unnecessary expenditure of public funds" and would, therefore, enable the City to withstand any possible legal challenge that it acted "arbitrarily" under these circumstances in abandoning the acquisition of the Lone Star Brewery land.

As stated in the second sentence of the previous paragraph, before the City can use bond proceeds derived from the 1999 Parks Proposition for any park project which was not listed in the 1999 Parks Proposition, the City must determine that "due provisions" have been made for all of the voter-approved projects. That is not the case, however, with respect to redirecting funds originally

intended to acquire and develop the Lone Star Brewery land if those funds are to be redirected to another park project, such as the "Roosevelt Park Improvements" project, which was included in the 1999 Parks Proposition. The voters have already approved the use of bond proceeds derived from the 1999 Parks Proposition to make improvements to Roosevelt Park. As long as the City has made a good faith determination that the Lone Star Brewery land originally intended to be purchased and developed under the 1999 Parks Proposition authority can no longer be purchased at a reasonable price, we believe the City Council may exercise its discretion to essentially abandon that project and redirect those funds to another project that was also approved in the 1999 Parks Proposition.

Finally, to complete the analysis we also considered whether the provisions of Sections 1252.001 or 1332.001, Texas Government Code, apply to the situation covered by this letter. Specifically, Section 1252.001 applies in circumstances when an issuer desires to revoke previously voted authority to issue bonds when bonds have not already been issued for an approved project. Section 1252.001 reads as follows:

§ 1252.001. ELECTION TO REVOKE AUTHORITY.

The commissioners court of a county or the governing body of a municipality may order an election to determine whether to revoke the authority to issue bonds that:
(1) compose all or part of an issue authorized by an earlier election; and
(2) have not as of the date of the order been sold or delivered.

Note that Section 1252.001 is permissive, not mandatory. As long as the City has the need to issue the full amount of bonds approved in the 1999 Parks Proposition for other specifically listed projects, there is no need for the City to even consider revoking a portion of the voted authority granted in the 1999 Parks Proposition.¹

In contrast, Section 1332.001 applies in circumstances when bonds have already been issued for a specific project but the issuer determines it is necessary to abandon such project and desires to use those proceeds for another project. Section 1332.001 reads as follows:

§ 1332.001. USE OF UNSPENT BOND PROCEEDS FOR OTHER PURPOSES.

The governing body of a municipality may use the proceeds of municipal bonds that have been sold and delivered for a specific purpose for a purpose other than the specific purpose if:
(1) the specific purpose is accomplished by other means or is abandoned;
(2) the proceeds are unspent; and

¹As a practical matter, even if the City determines that it will not issue, or does not need to issue, all bonds approved by a bond proposition, the City is not legally required to call an election to revoke such voted authority. It simply never takes the next step to actually issue the bonds.

(3) a majority of the votes cast in an election held in the municipality approve the use of the proceeds for the proposed purpose.

In our view, Section 1332.001 also is not applicable under these circumstances. Ordinances of the City that authorize the issuance of general obligation bonds approved by the voters in various bond propositions generally do not list each specific project that will be financed with proceeds of a particular bond issue (i.e., finance acquisition and development of Lone Star Brewery land for a public park, for example), but instead provide that proceeds of such bonds will be used for more general purposes (i.e., finance park and recreation improvements, for example). Section 1332.001 would apply only if bonds were issued for a specific purpose but the City later desires to use proceeds of those bonds for another purpose not specifically listed in the bond ordinance. Due to the fact that improvements to Roosevelt Park is a specifically approved project in the 1999 Parks Proposition, no specific amounts were assigned to each park project in the 1999 Parks Proposition, and assuming that bonds have not been issued for the specific stated purpose of financing the acquisition and development of Lone Star Brewery land, we do not believe that Section 1332.001 is applicable to this case. In other words, we do not believe it is necessary to hold an election to permit the City to reallocate the proceeds which the City had internally designated for the purchase and development of the Lone Star Brewery site and use those proceeds to make additional improvements to Roosevelt Park.

CONCLUSION

The City may redirect bond proceeds derived from the 1999 Parks Proposition which were originally intended to be used to finance the acquisition and development of the Lone Star Brewery land and make additional park and recreation improvements to Roosevelt Park with such redirected proceeds as long as the City is able to demonstrate that it has not acted arbitrarily in abandoning the Lone Star Brewery project. The City would need to demonstrate that, after good faith efforts, it has been unable to agree to a reasonable purchase price with the owner of the Lone Star Brewery Land and that proceeding with the purchase of such land at a price deemed unacceptable by the City would be an unwise and unnecessary expenditure of public funds.

We trust that this letter addresses the question you posed relating to the Lone Star Brewery site acquisition and development; however, please do not hesitate to call if you have any questions or need further clarification with respect to anything contained herein.

Cordially yours,


Thomas K. Spurgeon

**PROFESSIONAL SERVICES AGREEMENT
ARCHITECTURAL/ENGINEERING SERVICES**

STATE OF TEXAS
COUNTY OF BEXAR
CITY OF SAN ANTONIO

**CONTRACT FOR
ROOSEVELT PARK COMMUNITY BUILDING AND PARK IMPROVEMENTS**

SECTION 1

This Agreement made and entered into in San Antonio, Bexar County, Texas, between the City of San Antonio, a Municipal Corporation in the State of Texas, hereinafter termed "City" and

**BENDER WELLS CLARK DESIGN
830 NORTH ALAMO STREET
SAN ANTONIO, TEXAS 78215**

Architect(s), duly licensed, and practicing under the laws of the State of Texas, hereinafter termed "Consultant", said Agreement being executed by the City pursuant to the City Charter, Ordinances, and Resolutions of the City Council, and by said Consultant for architectural and/or engineering services hereinafter set forth in connection with the above designated Project for the City of San Antonio.

- I. The Consultant shall not commence work on this proposed Project until being thoroughly briefed on the scope of the project and has been notified in writing to proceed. The scope of the project and the Consultant's services required shall be reduced by the Consultant to a written summary of the scope meeting and included as a product of this Agreement. Should the scope subsequently change, either the Consultant or the City may request a review of the anticipated services, with an appropriate adjustment in fees.

The Consultant, in consideration for the compensation herein provided, shall render the following professional services necessary for the development of the Project to substantial completion, including plans and specifications, construction services and any special and general conditions and instructions to bidders as acceptable to the Director of Public Works, or his duly authorized representative, hereinafter termed "Director", subject to other provisions of this Agreement.

The Consultant shall be represented by a registered professional architect licensed to practice in the State of Texas at meetings of any official nature concerning the Project, including but not limited to scope meetings, review meetings, pre-bid meetings, and pre-construction meetings.

All completed documents submitted for final approval or issuance of a permit shall bear the seal with signature and date adjacent thereto of a registered professional architect.

RECEIVED

NOV 18 2005

SERVICE
DEPT.
[Signature]

- II. The Consultant shall perform his obligations under this Agreement in four (4) Phases, namely, (A) the Schematic Design Phase, (B) the Design Development Phase, (C) the Construction Documents Phase, and (D) the Construction Phase as indicated in Consultant's Proposal attached and incorporated herein as Exhibit "1.A".

A. Schematic Design Phase

The Consultant shall:

1. Review the scope of work furnished by the City to ascertain the requirements of the Project and shall review the understanding of such requirements with the City. All field surveys (topography) necessary for the completion of the Plans and Specifications will be furnished by the City to the Consultant.
2. Provide a preliminary evaluation of the program and the Project budget requirements, each in terms of the other, subject to the limitations such as inflation, competitive market prices, negotiations, etc.
3. Review with the Director alternative approaches to design and construction of the Project.
4. Coordinate the proposed Project with all utility companies that may effect this Project and request the most current available records showing the location of utilities. Consultant shall identify particular problems and conflicts arising from existing utilities which affect the Project and shall make recommendations with respect thereto. The Consultant shall document the status of each utility effecting the Project with a Memorandum of Record to be submitted with the Schematic Design Phase documents. The City will assist the Consultant in obtaining data and services requested of the utility companies by the Consultant after diligent effort has been made by the Consultant to no avail. The Consultant shall coordinate with the following utility companies:

City Public Service Board (Gas and Electric)
San Antonio Water System
Bexar Metropolitan Water District
Edwards Aquifer Authority
Time Warner Cable System
Southwestern Bell Telephone Company
Other utility companies which may be affected

Detailed measurements and surveys for exploration of utilities, if required, will be an additional service as provided in Appendix "A".

5. Prepare for approval by the Director based on mutually agreed upon program and Project budget requirements, Schematic Design documents consisting of drawings and other documents illustrating the scale and relationship of the Project alternatives.
6. Submit to the Director a Statement of Probable Construction Cost based on current area, volume or other unit costs.
7. Furnish the Director with three (3) copies of the Schematic Design Phase documents. Upon review of said documents, the Director will furnish to the Consultant, in writing, authority to proceed with the Design Development Phase on the alternatives selected from the Schematic Design Phase.
8. Plan and coordinate foundation investigations, soil borings, and other tests required for the design of the Project.

B. Design Development Phase

The Consultant shall:

1. Prepare for approval by the Director based on the approved program or Project budget, Design Development documents consisting of drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. Prepare and provide a Statement of Probable Construction Cost based on unit costs.
2. Attend three (3) citizens meetings and as deemed necessary meet with City officials.
3. Furnish the City Architect with three (3) copies of the Design Development documents. One (1) copy will be distributed to the Administrative Department responsible for the Project and two (2) copies will be retained by the City.

Architect of which one red lined set will be returned to the Consultant. Upon review and approval of said documents, the Director will furnish to the Consultant, in writing, authority to proceed with the Construction Documents Phase.

C. Construction Documents Phase

The Consultant shall:

1. Furnish when necessary all data required by the City for the development of any applications or supporting documents for State or Federal Government permits, grants or planning advances, provided that such data shall not extend beyond that actually developed in the performance of other provisions of this Agreement.
2. Attend not more than three (3) citizens meetings and as deemed necessary meet with City officials.
3. Prepare detailed contract drawings and specifications, after authorization has been received from the Director to proceed with the Construction Documents Phase. These designs shall combine in all respects the applications of sound architectural principles with a high degree of economy.
 - a. Detailed specifications shall be developed as applicable, to the particular project.
 - b. A specimen copy of standard general provisions, instructions to bidders, and applicable prevailing wage rates will be furnished to the Consultant by the Director for incorporation in the specifications of the proposed Project.
4. Prior to the actual printing of the final Construction Documents (plans, specifications and proposals) one (1) advance copy shall be submitted to the City Architect. Upon review and approval of said documents, the Consultant shall provide and submit same to the following:
 - a. City Architect's Office
 - 1 set of Plans and Specifications for City Architect
 - 1 set of Plans and Specifications for Building Maintenance
 - 1 set of Plans and Specifications for each utility
 - 1 set of Plans and Specifications for Department Director
 - b. Building and Inspections Department
 - 2 sets of Plans and Specifications
 - c. Plans and Records, Engineering Division, Public Works Department
 - 9 sets of Plans and Specifications
 - d. State Department of Licensing & Regulation
 - Architectural Barriers, Program Manager, E. O. Thompson
 - State Office Building, P. O. Box 12157
 - Austin, Texas 78711
 - 1 set of Plans and Specifications for review of State Handicapped Requirements
5. Advise the Director of any adjustments to previous Statements of Probable Construction Cost indicated by changes in requirements or general market conditions.
6. Upon the direction of the City, issue Plans and Specifications for bidding purposes, receive and record plan deposits; prepare, issue and deliver all addenda required to perfect the bid documents; maintain a record of issuance and receipt of same; furnish to the City a statement that the Consultant has provided and all bidders have received the Plans and Specifications and any necessary addenda thereto prior to opening of the bids. Attend the Pre-Bid Conference as scheduled by the City to provide clarification and interpretation to bidders.

In consultation with the City set a charge for plans and specifications (bid documents) based on the cost of printing and handling, said charge to be assessed all bidders and vendors. Return of bid documents and any refund to be made will be in accordance with normal city policy.

Once the Construction Contract is signed, the successful bidder's document deposit along with all available sets of documents will be turned over to the contractor. Consultant shall provide to the City additional sets of contract

documents as required for the successful bidder and subcontractors to use during the construction phase. The Consultant will then be reimbursed by the City for the cost of all document sets furnished to bidders for bid purposes and to the Contractor for construction purposes in accordance with Appendix "A".

7. Attend the formal opening of bids of the City Clerk and shall tabulate and furnish to the City an original and five (5) copies of the bid tabulation together with his recommendation regarding the award of the contract.

D. Construction Phase

The Consultant shall:

1. Attend a Pre-Construction Conference with the Representatives of the interested Departments.
2. Visit the site in intervals appropriate to the stage of construction or as otherwise agreed by the Consultant in writing to become generally familiar with the progress and quality of the work and to determine in general if the work is proceeding in accordance with the Contract Documents. However, the Consultant shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work. On the basis of such on site observations as a professional consultant, the Consultant should keep the City informed of the progress and quality of each major division of the work and shall endeavor to guard the City against defects and deficiencies in the work of the Contractor. The Consultant shall provide the City Architect a Memorandum Record of each jobsite visit and shall submit a Monthly Report to the City Architect, Capital Program Manager, Facility User, plus two additional copies as determined by the City. The Monthly Report shall include the status of the project, completed Contract Time Statement (City Form PW-19A), and information to indicate the progress and performance of the Contractor in accordance with the Contract Documents.
3. Review Contractor's building construction layout, specifically foundation elevations.
4. Not be responsible for the means, methods, techniques, sequences or procedures of construction selected by the Contractor or the safety precautions and programs incident to the work of the Contractor.
5. The Consultant's efforts will be directed towards providing assurance for the City that the completed project will conform to the Plans and Specifications. The Consultant shall not be responsible for the failure of the Contractor to perform the construction work in accordance with the Plans and Specifications and the Contractor's contract. However, the Consultant shall report to the City any deficiencies in the work actually detected by the Consultant.
6. Submittals: Review and take other appropriate action (approve with modifications, reject, etc.) upon the Contractor's submittals such as shop drawings, product data and samples, but only for conformance with the design concept of the Project and compliance with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay. Such reviews and approvals, or other actions, shall not extend to means, methods, techniques, sequences, or procedures of construction, or to safety precautions and program incident thereto. The approval of a specific item shall not indicate approval of an assembly of which the item is a component.
7. Receive and review certificates of inspections, testing (to include field, laboratory, shop and mill testing of materials) and approvals required by laws, rules, regulations, ordinances, codes, orders or the Contract Documents to determine generally that the results certified substantially comply with the Contract Documents which are submitted to him. The Consultant shall also recommend to the City special inspection or testing when deemed necessary to assure that materials, products, assemblages and equipment conform to the design concept and the Contract Documents.
8. Review and approve in concert with the City all colors, materials, fabrics, etc., relating to finishes required.
9. Review and approve in concert with the City equipment required to be submitted and tested by the Plans and Specifications for compliance with Project design and performance specifications.
10. Determine the amounts owing to the Contractor based on observations at the site and on evaluations of the Contractor's Monthly Estimates (and Final Estimate) and issue recommendations to the City for payment of such amounts as provided in the Contract Documents.

The issuance of a Recommendation For Payment shall constitute a representation by the Consultant to the City based on the Consultant's observations at the site as provided herein and in the data comprising the Contractor's Monthly Estimate (and Final Estimate), that the work has progressed to the point indicated; that to the best of the Consultant's knowledge, information and belief, the quality of work is in accordance with the Contract Documents (subject to an evaluation of the work for conformance with the Contract Document upon substantial completion, to the results of any subsequent test required by or performed under the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in the Recommendation For Payment); and that the Contractor is entitled to payment in the amount recommended. However, the issuance of a Recommendation For Payment shall not be representation that the Consultant has made an examination to ascertain how, and for what purpose the Contractor has used the monies paid on account of the contract sum.

11. Observe the initial start-up of the Project and the necessary performance tests required by the Specifications of any machinery or equipment installed in and made a part of the Project. The Consultant shall advise the City representatives if, in his opinion, the machinery or equipment is not operating properly.
12. Perform in company with the City representative(s) a "conditional approval" and a "final" inspection of the Project to observe any apparent defects in the completed construction, assist the City in consultation and discussions with the Contractor(s) concerning such deficiencies, and make recommendations as to replacements or corrections of the defective work.
13. After completion of the work, and before final payment to the Contractor, it shall be the City's responsibility to require a set of "Record Drawings" from the Contractor, who has control of the work and who is in a position to know how the Project was constructed. The Consultant, after receiving this information shall transfer the information to a set of "Mylar" tracings as "Record Drawings" or documents for the City's permanent file. The Consultant shall not be held liable for the information supplied him by the Contractor and/or City representative.
14. The City will require the Contractor to submit to the Consultant who shall assemble and deliver to the City all manufacturer's warranties or bonds, equipment maintenance and operating manuals, and similar data on materials and equipment incorporated in the Project as required by the Contract Document.
15. Develop, at the request of the City, any changes, alterations or modifications to the Project which appear to be advisable and feasible, and in the best interest of the City. Such alterations shall appear on or be attached to the City's form "Field Alteration Request". A supply of these forms will be furnished to the Consultant by the City for this purpose. The Consultant shall obtain the Contractor's acceptance of the proposed alteration prior to submitting it to the City for its approval. No work shall be authorized to be done by the Contractor prior to receipt of the City's approval of the "Field Alteration Request".

III. Period of Service

- A. The Consultant shall complete the various phases of work under Section 1, I, and II of this Agreement in accordance with the Production Schedule in Appendix "B" of this Agreement. Once the Consultant has submitted a completed phase of work, no further work days shall be charged against that phase of work as total calendar days. If, upon review of phase work, corrections, modifications, alterations, or additions are required of the Consultant, these items shall be completed by the Consultant before that phase is approved. Calendar days shall be charged for this period when changes are being made.
- B. Upon acceptance and approval of the Schematic Design, Design Development, or Construction Documents Phases, the Director will authorize in writing the Consultant to proceed with the next appropriate phase of work. However, if the City elects to discontinue the Consultant's effort at the end of any phase for any reason (see Section 1, VIII), the total time expended up to that time will be charged against the total allowable time in the same manner as if no delay or suspension had occurred. However, if circumstance dictates, the Director may authorize extra calendar days or make adjustments to the Production Schedule as he deems necessary to complete the required design.

- C. If the Consultant fails to furnish the completed work as herein required, the Consultant by the execution of this Agreement acknowledges that the City will sustain damages and hereby agrees to forfeit to the City, as liquidated damages and not as a penalty, an amount for each day beyond the required day for completion and submittal until day of completion and submittal as determined by the following schedule with said amount to be withheld and deducted from any amount due or owing the Consultant.

<u>Construction Cost of Project</u>		<u>Amount of Liquidated Damages Per Day</u>
Up to	\$ 500,000	\$100.00
\$ 500,001 to	1,000,000	200.00
1,000,001 to	2,000,000	300.00
2,000,001 to	3,000,000	400.00
3,000,001 to	4,000,000	500.00
4,000,001 to	5,000,000	600.00
Over \$5,000,000		700.00

The Consultant further acknowledges the said amount is fixed and agreed upon by and between the Consultant and the City because of the impracticality and extreme difficulty of fixing and ascertaining the actual damages the City would in such event sustain, and said amount is agreed to be the amount of damages which the City would sustain and said amount shall be retained by the City. These liquidated damages will be implemented following notification of the City to consultant of said failure to furnish completed work.

- D. The Consultant shall not be liable or responsible for, and there shall be excluded from the computation of the aforesaid periods of time, any delays due to strikes, riots, acts of God, national emergency, acts of the public enemy, governmental restrictions, laws or regulations, or any other causes beyond Consultant's reasonable control. Within thirty (30) days from the occurrence of any event for which time for performance by Consultant shall be significantly extended under this provision, Consultant may give written notice thereof to the City stating the reason for such extension and the actual or estimated time thereof.
- E. This Agreement shall remain in force for a period which may reasonably be required for the design, award of the contract, and construction of the Project including any extra work and any required extensions thereto unless discontinued as provided for elsewhere in this Agreement.

IV. Coordination with the City.

- A. The Consultant shall hold periodic conferences with the Director or his representatives to the end that the Project as developed shall have the full benefit of the City's experience and knowledge of existing needs and facilities, and be consistent with its current policies and standards. To assist the Consultant in this coordination, the City shall make available for the Consultant's use in planning and designing the Project all existing plans, maps, statistics, computations and other data in its possession relative to existing facilities and to this particular Project at no cost to the Consultant. However, any and all such information shall remain the property of the City and shall be returned if instructed to do so by the Director.
- B. The Director will act on behalf of the City with respect to the work to be performed under this Agreement. He shall have complete authority to transmit instructions, receive information, interpret and define the City's policies and decisions with respect to materials, equipment, elements and systems pertinent to the Consultant's services.
- C. The City will give prompt written notice to the Consultant whenever the City observes or otherwise becomes aware of any defect in the Consultant's services, in the work of the Contractor, or any development that affects the scope or timing of the Consultant's services.
- D. The City shall furnish approvals and permits from all governmental authorities having jurisdiction over the Project and such approvals and consents from others as may be necessary for the completion of the Project. The Consultant will provide the City reasonable assistance in connection with such approvals and permits such as the furnishing of data compiled by the Consultant pursuant to other provisions of the Agreement, but shall not be obligated to develop additional data, prepare extensive reports or appear at hearings or the like unless compensated therefor under other provisions of this Agreement.

V. Fee Schedule

For and in consideration of the services to be rendered by the Consultant in this Agreement, the City shall pay and the Consultant shall receive the fee set forth in attachment hereto which is made a part hereof and identified as Exhibit 1.

VI. Revisions to Drawings and Specifications

The Consultant shall make without expense to the City such revisions to the Schematic Design Phase drawings, reports or other documents as may be required to meet the needs of the City which are within the Scope of the Project, but after the approval of the Schematic Design Phase any revisions, additions, or other modifications made at the City's request which involves extra services and expenses to the Consultant shall be subject to additional compensation to the Consultant for such extra services and expenses.

The Director may require the Consultant to revise the drawings and specifications, at no cost to the City, if the lowest bona fide bid is in excess of fifteen percent (15%) of the amount of the fixed limit or the Design Development Phase cost estimate as submitted by the Consultant, and accepted by the City.

VII. Ownership of Documents

All documents including the original drawings, estimates, specifications, and data, will remain the property of the Consultant as instruments of service. However, it is to be understood that the City shall have free access to all such information with the right to make and retain copies of drawings and all other documents and data. Any reuse without specific written verification or adaptation by Consultant will be at City's sole risk and without liability or legal exposure to Consultant.

VIII. Termination and/or Suspension of Work

A. Right of Either Party to Terminate

This Agreement may be terminated by either party for substantial failure by the other party to perform (through no fault of the terminating party) in accordance with the terms of this Agreement.

The terminating party must issue a signed, written notice of termination (citing this paragraph) to the other party. Upon receipt of such written notice of termination, the party in receipt shall have a period of ten (10) days to cure any failure to perform under this Agreement. Upon the completion of such ten day period commencing upon receipt of notice of termination, if such party has not cured any failure to perform, such termination shall become effective.

B. Right of City to Terminate

The City of San Antonio reserves the right to terminate this Agreement for reasons other than substantial failure by the Consultant to perform by issuing a signed, written notice of termination (citing this paragraph) which shall take effect on the twentieth day following receipt of said notice and upon the scheduled completion date of the performance phase in which Consultant is then currently working, whichever effective termination date occurs first.

C. Right of City to Suspend Giving Rise to Right of Consultant to Terminate

The City of San Antonio reserves the right to suspend this Agreement at the end of any phase for the convenience of the City by issuing a signed, written notice of suspension (citing this paragraph) which shall outline the reasons for the suspension and the duration of the suspension but in no way will guarantee the total number of days of suspension. Such suspension shall take effect immediately upon receipt of said notice of suspension by the Consultant (effective date of suspension).

The Consultant is hereby given the right to terminate this Agreement in the event such suspension extends for a period in excess of one hundred twenty (120) days. Consultant may exercise this right to terminate by issuing a signed, written notice of termination (citing this paragraph) to the City after the expiration of one hundred twenty (120) days from the effective date of the suspension. Termination (under this paragraph) shall become effective immediately upon receipt of said written notice by the City.

D. Procedures Consultant to follow upon Receipt of Notice of Termination

Upon receipt of a notice of termination and prior to the effective date of termination, unless the notice otherwise directs or Consultant immediately takes action to cure a failure to perform under the cure period set out hereinabove, Consultant shall immediately begin the phase-out and the discontinuance of all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement. Within thirty (30) days after receipt of such notice of termination (unless Consultant has successfully cured a failure to perform) the Consultant shall submit a statement showing in detail the services performed under this Agreement prior to the effective date of termination. The City shall have the option to grant an extension to the time period for submittal of such statement.

Copies of all completed or partially completed specifications and reproducibles of all completed or partially completed designs and plans prepared under this Agreement prior to the effective date of termination shall be delivered to the City as a pre-condition to final payment. These documents shall be subject to the restrictions and conditions set forth in VII above.

Upon the above conditions being met, the City shall promptly pay the Consultant that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less previous payments of the fee.

Failure of the Consultant to comply with the submittal of the statement and documents as required above shall constitute a waiver by the Consultant of any and all rights or claims to collect monies that Consultant may rightfully be entitled to for services performed under this Agreement.

E. Procedures Consultant to Follow upon Receipt of Notice of Suspension

1. Upon receipt of written notice of suspension, which date shall also be the effective date of the suspension, the Consultant shall, unless the notice otherwise directs, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement.

Consultant shall prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

Copies of all completed or partially completed designs, plans and specifications prepared under this Agreement prior to the effective date of suspension shall be prepared for possible delivery to the City but shall be retained by the Consultant until such time as Consultant may exercise the right to terminate.

2. In the event that Consultant exercises the right to terminate thirty (30) days after the effective suspension date, within thirty (30) days after receipt by the City of Consultant's notice of termination, Consultant shall submit the above referenced statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

Additionally, any documents prepared in association with this Agreement shall be delivered to the City as a pre-condition to final payment.

Upon the above conditions being met, the City shall promptly pay the Consultant that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less previous payments of the fee.

The City, as a public entity, has a duty to document the expenditure of public funds. Consultant acknowledges this duty on the part of the City. To this end, Consultant understands that failure of Consultant to substantially comply with the submittal of the statements and documents as required herein shall constitute a waiver by the Consultant of any portion of the fee for which Consultant did not supply such necessary statements and/or documents.

IX. Consultant's Warranty

The Consultant warrants that he has not employed or retained any company or person other than a bona fide employee working solely for the Consultant to solicit or secure this Agreement, and that he has not for the purpose of soliciting or securing this Agreement paid or agreed to pay any company or person, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach of this warranty, the City shall have the right to terminate this Agreement under the provisions of VIII above.

X. Equal Employment Opportunity/Minority Business Advocacy

- A. Consultant shall not engage in employment practices which have the effect of discriminating against any employee or applicant for employment, and, will take affirmative steps to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, national origin, sex, age, handicap, or political belief or affiliation. Specifically, Consultant agrees to abide by all applicable provisions of San Antonio City ordinance number 69403 on file in the City Clerk's office.
- B. Consultant hereby acknowledges that it is the policy of the City of San Antonio to assist in increasing the competitiveness and qualifications of small ("SBE"), women ("WBE"), handicapped and minority-owned business ("MBE") enterprises in order to afford greater opportunities for obtaining and participating in contracts, related subcontracts, and leases and concessions awarded by City. This policy and its implementation is known as the Small Business Economic Development Advocacy Program (hereinafter referred to as "SBEDA Program").
- C. Consultant agrees to implement the plan submitted in Consultant's response to City's Request for Interest Statement under the SBEDA Program for Small, Minority and Women-owned Business Participation in this Agreement, thereby meeting the percentages for participation of those groups as submitted therein. Consultant agrees to be in full compliance with this article by meeting the percentages listed in Consultant's Interest Statement no later than 60 days from the date of execution of this Agreement, and to remain in compliance throughout the term of this Agreement. Consultant further agrees to continue to make every effort to utilize businesses for subcontracting and supplying during the duration of this Agreement, as may be approved pursuant to this Agreement, that will meet the percentages submitted in Consultant's Interest Statement. Changes in contract value by changes in work orders, Agreement amendments, or use of contract alternatives, which result in an increase in the value of the Agreement by 10% or greater require the Consultant to increase its use of business enterprises described in this section, if such is necessary to maintain the same percentages as exist in Consultant's Interest Statement. However, the delegation of any duties hereunder by any means must be approved by City as stated herein.
- D. Consultant shall maintain records showing all contracts, subcontracts, and supplier awards to SBE/MBE/WBE's. Consultant shall submit annual reports to City's Department of Economic Development, identifying the above activity and other efforts at increasing SBE/MBE/WBE participation in the Agreement. Further, such records shall be open to inspection by City or its authorized agent at all reasonable times. Should City find that Consultant is not in compliance with this article, City shall give notice of non-compliance to Consultant. Consultant shall have 30 calendar days to correct any and all deficiencies in compliance with this article. Failure to comply with this article and/or to correct any deficiencies within the time allotted shall be considered a material breach of this Agreement and may subject Consultant to any of the penalties listed in City of San Antonio Ordinance No. 77758, at City's option. Further, such failure may be considered a default for which City may terminate this Agreement in accordance with Article VIII, Termination.
- E. Consultant shall appoint a representative of its company to administer and coordinate its efforts to carry out these requirements.
- F. In all events, Consultant shall comply with the City's Small, Business Economic Development Advocacy Program, contained in San Antonio Ordinance No. 77758, and the amendments thereto. Said ordinances are incorporated herein for all purposes, as if fully set forth herein.

- G. It is City's understanding, and this Agreement is made in reliance thereon, that Consultant, in the performance of services required hereunder, will use the subcontractor(s) listed in its response to City's Request for Interest Statement.

XI. Assignment or Transfer of Interest

The Consultant shall not assign or transfer Consultant's interest in this Agreement without the written consent of the City.

XXI. Insurance requirements

- A. Prior to the commencement of any work under this Agreement, Consultant shall furnish a completed Certificate of Insurance to the City's Public Works Department and City Clerk's Office, which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, and which shall furnish and contain all required information referenced or indicated thereon. The City shall have no duty to pay or perform under this Agreement until such certificate shall have been delivered to the City's Public Works Department and the City Clerk's Office, and no officer or employee shall have authority to waive this requirement.
- B. The City reserves the right to review the insurance requirements of this section during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverage and their limits when deemed necessary and prudent by the City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will the City allow modification whereupon the City may incur increased risk.
- C. A Consultant's financial integrity is of interest to the City, therefore, subject to Consultant's right to maintain reasonable deductibles in such amounts as are approved by the City, Consultant shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Consultant's sole expense, insurance coverage written on an occurrence except professional liability basis, by companies authorized and admitted to do business in the State of Texas and rated A - or better by A.M. Best Company and/or otherwise acceptable to the City, in the following types and amounts:

1. Workers' Compensation ** Employers' Liability **	Statutory \$1,000,000/\$1,000,000/\$1,000,000
2. Commercial General (Public) Liability Insurance to include coverage for the following: a. Premises operations *b. Independent contractors c. Products/completed operations d. Personal Injury e. Contractual Liability *f. Explosion, collapse, underground *g. Broad form property damage, to include fire legal liability	For <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage \$50,000
3. Business Automobile Liability a. Owned/leased vehicles b. Non-owned vehicles c. Hired Vehicles	<u>Combined Single Limit</u> for <u>Bodily Injury</u> and <u>Property Damage</u> of \$1,000,000 per occurrence
4. Professional Liability (Claims Made Form)	\$1,000,000 per claim to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any act, malpractice, error or omission in professional services.
* If Applicable	
** Alternate Plans Must Be Approved by Risk Management	

- D. The City shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by the 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 hereto or the underwriter of any such policies). Consultant shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided in Section 12.6 herein within 10 days of the requested change. Consultant shall pay any costs incurred resulting from said changes.
- E. Consultant agrees that with respect to the above required insurance, all insurance contracts and Certificate(s) of Insurance will contain the following required provisions.
- Name the City and its officers, employees, and elected representatives as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the Workers' compensation and professional liability policies;
 - Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the City is an additional insured shown on the policy;
 - Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of the City.
- F. When there is a cancellation, non-renewal or material change in coverage which is not made pursuant to a request by City, Consultant shall notify the City of such and shall give such notices not less than thirty (30) days prior to the change, if Consultant knows of said change in advance, or ten (10) days notice after the change, if the Consultant did not know of the change in advance. Such notice must be accompanied by a replacement Certificate of Insurance. All notices shall be given to the City at the following address:

City of San Antonio
_____,

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

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

- G. If Consultant fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, the City may obtain such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under the agreement; however, procuring of said insurance by the City is an alternative to other remedies the City may have, and is not the exclusive remedy for failure of Consultant to maintain said insurance or secure such endorsement. In addition to any other remedies the City may have upon Consultant's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the City shall have the right to order Consultant to stop work hereunder, and/or withhold any payment(s) which become due to Consultant hereunder until Consultant demonstrates compliance with the requirements hereof. (Note: This is not applicable to Tenants.)
1. Nothing herein contained shall be construed as limiting in any way the extent to which Consultant may be held responsible for payments of damages to persons or property resulting from Consultant's or its subcontractors' performance of the work covered under this agreement.
 2. It is agreed that Consultant's insurance shall be deemed primary with respect to any insurance or self insurance carried by the City of San Antonio for liability arising out of operations under this Agreement.

XIII. INDEMNIFICATION

- A. Consultant, whose work product is the subject of this Agreement for professional services, agrees to **INDEMNIFY AND HOLD CITY, ITS ELECTED OFFICIALS, OFFICERS AND EMPLOYEES HARMLESS** against any and all claims, lawsuits, judgments, cost, liens, losses, expenses, fees (including attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may **ARISE OUT OF OR BE OCCASIONED OR CAUSED BY CONSULTANT'S NEGLIGENT ACT, ERROR, OR OMISSION OF CONSULTANT, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUBCONSULTANT OF CONSULTANT, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES** while in the exercise of performance of the rights or duties under this **AGREEMENT**. 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 CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**
- B. Consultant shall advise City in writing within 24 hours of any claim or demand against City or Consultant, known to Consultant, related to or arising out of Consultant's activities under this Agreement.
- C. The provisions of this section are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.
- D. Acceptance of the final plans by City shall not constitute nor be deemed a release of the responsibility and liability of Consultant, its employees, associates, agents or subcontractors for the accuracy and competency of their designs, working drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by City for any defect in the designs, working drawings, specifications or other documents and work prepared by said Consultant, its employees, subcontractors, and agents.

XIV. Severability

If for any reason, any one or more paragraphs of this Agreement are held invalid, such judgment shall not affect, impair or invalidate the remaining paragraphs of this Agreement but shall be confined in its operations to the specific section, sentences, clauses or parts of this Agreement held invalid and invalidity of any section, sentence, clause or parts of this Agreement in any one or more instance shall not affect or prejudice in any way the validity of this Agreement in any other instance.

XV. Estimates of Cost

Since the Consultant has no control over the cost of labor, materials or equipment or over the contractor's methods of determining prices, or over competitive bidding or market conditions, Consultant's opinions of probable Project Cost or Construction Cost provided for herein are to be made on the basis of Consultant's experience and qualifications and represent Consultant's best judgment as a design professional familiar with the construction industry but the Consultant cannot and does not guarantee that proposals, bids or the construction cost will not vary from opinions of probable Cost prepared by Consultant.

XVI. Interest in City Contracts Prohibited

No officer or employee of the City shall have a financial interest, directly or indirectly, in any contract with the City, or shall be financially interested, directly or indirectly, in the sale to the City of any land, materials, supplies or service, except on behalf of the City as an officer or employee. This prohibition extends to the City Public Service Board, the City Water Board, and City boards and commissions other than those which are purely advisory.

All Consultants must disclose if they are associated in any manner with a City Official or employee in a business venture or business dealings. Failure to do so will constitute a violation of the City's Ethics Ordinance (#76933). To be "associated" in a business venture or business dealings Includes being in a partnership or joint venture with the officer or employee, having a contract with the officer or employee, being joint owners of a business, owning at least 10% of the stock in a corporation in which a city officer or employee also owns at least 10%, or having an established business relationship as client or customer.

XVII. Standard of Care

The Texas Board of Architectural Examiners, 333 Guadalupe, Suite 2-350, Austin, Texas 78701-3942, (512) 305-9000 has jurisdiction over individuals licensed under Title 22 of the Texas Administrative Code.

XVIII. Entire Agreement

This Agreement represents the entire and integrated Agreement between the City and Consultant and supersedes all prior negotiations, representations, or agreements, either oral or written. This Agreement may be amended only by written instrument signed by both the City and Consultant.

SECTION 2

IN WITNESS WHEREOF, the City of San Antonio has lawfully caused these presents to be executed by the hand of the City Manager of said City, and the corporate seal of said City to be hereunto affixed and this instrument to be attested by the City Clerk, and the said Consultant, acting by the hand of Beth Bender Wells, thereunto authorized President, does now sign, execute and deliver this document.

DONE at San Antonio, Texas, on this _____ day of _____, A. D. 2004.

CITY OF SAN ANTONIO

CONSULTANT:

BENDER WELLS CLARK DESIGN

INTERIM CITY MANAGER


BETH BENDER WELLS, PRESIDENT

CITY CLERK DATE

APPROVED AS TO FORM:

CITY ATTORNEY

EXHIBIT 1

COMPENSATION FOR PROFESSIONAL SERVICES LUMP SUM METHOD/SCOPE OF SERVICES

Section 1 - Basis of Compensation

- 1.1 The Total Fee for all services defined by this Agreement is to be a lump sum in the amount of **_NINETY ONE THOUSAND TWO HUNDRED FIFTY AND NO/100 DOLLARS (\$91,250.00)** and it is agreed and understood that this amount will constitute full compensation to the Consultant. This amount has been approved and appropriated by the San Antonio City Council for expenditure under this Agreement. Unless and until the City sees fit to make further appropriations, the obligation of the City to the Consultant for Total Fee in connection with this Agreement cannot and will not exceed the sum of \$91,250.00 without further amendment to this Agreement.
- 1.2 For the purpose of establishing portion of the above fee for separate phases, the following percentage allocations of fee shall apply:

<u>PHASE</u>	<u>PERCENT OF TOTAL FEE</u>
Schematic Design Phase	15
Design Development Phase	20
Construction Documents Phase	45
Construction Phase	20

Section 2 - Changes

- 2.1 The Consultant and the City acknowledge the fact that the Total Fee amount contained in paragraph 1.1 above has been established predicated upon the total estimated costs of services to be rendered under this Agreement. For additional services or if the scope of services are changed materially, compensation shall be in accordance with 1.1 above.

Section 3 - Method of Payments

- 3.1 Payment may be made to the Consultant based upon the several phases as described heretofore and in accordance with the following:
- 3.1.1 Schematic Design Phase - the total amount due the Consultant under the Schematic Design Phase shall be payable after approval and acceptance of this Phase by the City.
- 3.1.2 Design Development Phase - the total amount due the Consultant under the Design Development Phase shall be payable after approval and acceptance of this Phase by the City.
- 3.1.3 Construction and Bid Documents Phase - the total amount due the Consultant under the Construction Documents Phase shall be payable after the bid opening provided the low qualified bid is in conformance with Section 1, VI of the Agreement.
- 3.1.4 Construction Phase - Payment during the Construction Phase will be made in monthly installments for this Phase in proportion to the construction work completed by the construction Contractor. The final payment to be made by the City to the Consultant will be payable upon submission of the "Record Drawings".

APPENDIX "A"

COMPENSATION FOR ADDITIONAL PROFESSIONAL SERVICES

The fees as described in Exhibit 1 of this Agreement for the Schematic Design, Design Development, Construction Documents, and Construction Phases of the Project shall provide compensation to the Consultant for all services specified under this Agreement to be performed by Consultant for all services specified under this Agreement to be performed by Consultant or under his direction except the services as set forth below. These additional services and the compensation to be paid by the City to the Consultant for their performance when authorized in writing by the Director or his representative, are set forth as follows:

A. The basis for compensation for additional services may be in one or more of the following forms:

1. \$100.00 per hour for testimony of principals.
2. Salary cost times a multiplier of 2.5 with a stated maximum not to be exceeded, other than testimony of principals.
3. Reimbursement of non-labor expense and subcontract expense at invoice cost plus a 15% service charge.
4. Lump sum.
5. Lump sum per item of work.

B. Examples of additional services (not all inclusive).

1. Assistance to the City as an expert witness in any litigation with third parties, arising from the development or construction of the Project including the preparation of architectural data and reports.
2. Preparation of applications and supporting documents for Governmental grants, loans or advances in connection with the Project; Preparation or review of environmental assessment and impact statements; Review and evaluation of the effect on the design requirements of the Project of any such statements and documents prepared by others; and assistance in obtaining approval of authorities having jurisdiction over the anticipated environmental impact of the Project.
3. Making revisions in Drawings, Specifications or other documents when such revisions are inconsistent with written approvals or instructions previously given, are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents or are due to other causes not solely within the control of the Consultant.
4. Preparing documents of alternate, separate or sequential bids or providing extra services in connection with bidding, negotiation or construction, when requested by the City.
5. Providing detailed information of:
 - a. Owning, operation, maintenance and overhead costs of material and equipment, or
 - b. Quantity surveys of material, equipment and labor, or
 - c. Inventories of material and equipment, or
 - d. Detailed Construction cost estimates, or
 - e. Investigations, surveys, valuations, inventories or detailed appraisals of facilities, construction and/or services not required by the Base Contract.
6. Providing Value Engineering during the course of design.
7. Preparation of feasibility studies not required in the Base Contract.
8. Cash flow and economic evaluations, rate schedules and appraisals.

9. Audit or inventories required in connection with construction performed by the City.
10. Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitutions proposed by Contractor(s); and services after the award of each contract in evaluating and determining the acceptability of an unreasonable or excessive number of substitutions proposed by Contractor.
11. Services during out of town travel required of consultants.
12. Additional services during construction made necessary by:
 - a. Work damaged by fire or other cause during construction.
 - b. A significant amount of defective or neglected work of Contractor(s).
 - c. Failure of performance of Contractor(s).
 - d. Acceleration of the progress schedule required by the City involving services beyond normal working hours.
 - e. The completion date of the construction contract being extended beyond the original completion date.
 - f. Default by Contractor(s).
13. Providing extensive assistance in the utilization of any equipment or system such as initial start-up or testing, adjusting and balancing, preparation of operation and maintenance manuals, training personnel for operation and maintenance, and consultation during operation.
14. Providing services relative to future facilities, systems and equipment which are not intended to be constructed during the Construction Phase.
15. Services after completion of the construction phase, such as inspections during any guaranteed period and reporting observed discrepancies under guarantee called for in any contract for the Project.
16. Providing services of Geotechnical Engineering Firm to perform test borings and other soil or foundation investigations and related analysis.
17. Providing the services of material testing laboratory for detailed mill, shop and/or laboratory inspection of materials or equipment.
18. Additional copies of contract documents, review documents, bidding documents, reports, drawings and specifications over the number specified in the Base Contract.
19. Providing photographs, renderings or models for City use.
20. Providing services of aerial mapping firm.
21. Providing services to investigate existing conditions or facilities or to make measured drawings thereof or to verify the accuracy of drawings or other information furnished by the City.
22. Providing services for exploration of utilities to include detailed measurements, surveys and verification of information provided by City and/or utility companies.
23. Providing services in connection with the work of a construction manager or separate consultants retained by the City.
24. Providing interior design and other similar services required for or in connection with selection, procurement or installation of furniture, furnishings and related equipment.
25. Preparing drawings, specifications and supporting data and providing other services in connection with Field Alteration Requests to the extent that the adjustment in the basic compensation resulting from the adjusted construction cost is not

commensurate with the services required of the Consultant, provided such Field Alteration Requests are required by causes not solely within the control of the Consultant.

26. Providing services of Consultants for other than the normal architectural, engineering, structural, mechanical, civil and electrical services for the Project.
27. Providing other services not otherwise included in this Agreement which are not customarily furnished in accordance with generally accepted architectural practice.

C. Field Alterations:

1. Compensation through the Construction Documents Phase for all Field Alterations that have been deemed fee eligible, shall be invoiced separately based upon the approved cost of the Field Alteration(s) times the percent fee factor as determined by the amount of the Contract award times 80 percent. The remaining 20 percent fee due for the Construction Phase will be automatically included when the final in-place cost of the project is determined and the Consultant submits the final invoice for the Construction Phase of the completed and accepted Project.
2. Compensation for Field Alterations that have been deemed fee eligible whose net amount involved a combination of increases and decreases in contract cost shall be based on the amount of the increase in accordance with C.1. above.
3. Compensation for Field Alterations that have been deemed fee eligible reflecting only a deduction in contract cost shall be negotiated.
4. Compensation for Field Alterations not covered by C.1., 2., or 3. are to be negotiated.

D. Fee Eligible

1. Fee eligible as it relates to Field Alterations is defined as requiring significant architectural and/or engineering effort to compute and document the work effort reflected by the Field Alteration. Determination of "Fee Eligible" shall be made by the City Architect.

E. Salary Cost

1. Salary cost is defined as the cost of salaries of architects, engineers, draftsmen, stenographers, surveyors, clerks, laborers, etc. for time directly chargeable to the Project, plus customary and statutory benefits including but not limited to social security contributions, unemployment, excise and payroll taxes, employment compensation insurance, retirement benefits, medical and insurance benefits, sick leave, vacation and holiday pay applicable thereto.
 - a. The amount of customary and statutory benefits of all personnel other than Principals of the Consulting Firm will be considered equal to 43% of salaries or wages.

F. Principals of the Consulting Firm

1. For the purpose of this provision, the Principals of the Consulting Firm and their total hourly charge will be as follows, except as stated previously for testimony as expert witnesses:

Beth Bender Wells

\$100.00

APPENDIX "B"
PROFESSIONAL SERVICES AGREEMENT
PRODUCTION SCHEDULE

Project: ROOSEVELT PARK COMMUNITY BUILDING AND PARK IMPROVEMENTS

Architect/Engineer Firm: BENDER WELLS CLARK DESIGN

	<u>SCHEDULED</u>	<u>ACTUAL</u>
SCHEMATIC DESIGN PHASE:		
Beginning Date:	_____	_____
Completion Date:	_____	_____
Calendar Days Used:	_____ Days	_____ Days
City Review & Approval:	_____ Days	_____ Days

DESIGN DEVELOPMENT PHASE:

Beginning Date:	<u>1/2005</u>	_____
Completion Date:	<u>09/2005</u>	_____
Calendar Days Used:	_____ Days	_____ Days
City Review & Approval:	_____ Days	_____ Days

CONSTRUCTION DOCUMENTS PHASE

Beginning Date:	<u>01/2006</u>	_____
Completion Date:	<u>09/2006</u>	_____
Calendar Days Used:	_____ Days	_____ Days
City Review & Approval:	_____ Days	_____ Days
Total Contract Time:	_____ Days	_____ Days

BY: Beth Bender Wells
Beth Bender Wells, President

Roosevelt Park Community Building and Park Improvements
Project 26-00147

<u>WBS Element</u>	<u>Current Budget:</u>	<u>Revisions:</u>	<u>Revised Budget:</u>
REVENUES:			
1999 Bond Project District 5 Lone Star Brewery Site Park Land Acquisition and Development (\$1,000,000)	<u>\$0.00</u>	<u>\$106,875.00</u>	<u>\$106,875.00</u>
Total:	\$0.00	\$106,875.00	\$106,875.00
EXPENDITURES:			
26-00147-01-19-01 Landscape Architectural Fees	\$0.00	\$91,250.00	\$91,250.00
26-00147-01-19-02 Landscape Architectural Contingency	\$0.00	\$9,125.00	\$9,125.00
26-00147-01-10 Bid Advertisement and Printing	\$0.00	\$1,500.00	\$1,500.00
26-00147-01-19-03 Environmental Assessment Fees	<u>\$0.00</u>	<u>\$5,000.00</u>	<u>\$5,000.00</u>
Total:	\$0.00	\$106,875.00	\$106,875.00

October 25, 2004

Mr. Scott Stover
Parks & Recreation Department
City of San Antonio
506 Dolorosa
San Antonio, Texas 78205



Dear Scott:

Re: Roosevelt Park Community Buildings and Park Improvements

We are very excited about working on these additional improvements in Roosevelt Park. We understand the desires of the community to have these improvements fit into the existing development of Roosevelt Park. We have reviewed the scope information from the public meeting as well as the information discussed with you and are pleased to have the opportunity to present you the following proposal for Landscape Architectural and other design services.

The following is a description of our proposed services:

PROPOSED BASIC SERVICES

A. Programming and Schematic Design Phase

In this phase we will assist the Parks & Recreation Department in establishing the program for development. We realize more planning will be required with respect to incorporating the community building into the existing development and incorporating the needs of the neighborhood. The new building will require the removal of the existing pavilion and possible addition of more parking. Assuring the improvements will fit with the existing architecture will be very important.

We will provide the services listed below:

- a. Attend project initiation meeting to discuss project
- b. Prepare programming and schematic designs for areas associated with the site elements
- c. Prepare schematic designs for community building

Bender Wells Clark Design

**830 North Alamo Street
San Antonio, Texas 78215
(210) 692-9221
Fax (210) 223-8582
www.bwcdesign.com**

- d. Survey limited area of community building
- e. Develop schematic level cost information for review by Parks & Recreation staff

Schedule: Programming and Schematic Design Phase to begin immediately upon acceptance of this proposal and NTP.

B. Design Development Phase

In this phase, we will provide Design Development Documents in the number specified in the standard City of San Antonio Professional Services contract that describe the scale and relationship of the elements of the Project, materials, and other elements, as appropriate for the areas outlined below. We will also attend design conferences with you or your staff to review design criteria and overall objectives of the Project, as necessary.

The areas addressed in the Design Development Phase will be:

Design Development Drawings, appropriate scale

- a. Attend public meetings for input as required
- b. Design grading studies of building, parking, etc. if required, based on survey information
- c. Site development plans including:
 - planting
 - paths
 - furniture
 - parking lot
- d. Design Development level plans and details for community building
- e. Additional Parking Lot lighting design development if required
- f. Planting irrigation design development if required
- g. Preliminary opinion of probable cost for the above
- h. Review of above with you, additional staff, and any others, as directed by you

Bender Wells Clark Design

Schedule: Design Development Phase to begin immediately upon acceptance of the Schematic Design Phase and Notice to Proceed.

C. Construction Documents Phase

We will provide Drawings and Specifications setting forth in detail the requirements for installation of the Project, based upon the approved Design Development Drawings, and any further adjustments in the scope or budget of the Project. The product of this phase will be a complete set of Construction Documents in the number specified in the standard City of San Antonio Professional Services contract, including:

1. Site Development Plans showing grading and layout of hardscape and softscape items
2. Site Development details for hardscape and softscape items
3. Site Development hardscape and softscape specifications
4. Architectural plans & details for community building (including structural, mechanical, plumbing, and electrical)
5. Architectural specifications
6. Lighting Plans for parking lot if required
7. Lighting Details
8. Lighting Specifications
9. Engineering drainage report for permit
10. Soil testing for structural engineer at building site
11. Engineering utility plan for permit if required
12. Opinion of probable cost based on current volume, area, or other unit costs
13. Preparation of submission package and presentations to City and Board's for approval
14. Submission of package to TDLR

Schedule: Construction Documents phase to begin upon completion and acceptance of Design Development Phase and Notice to Proceed.

D. Bidding and Negotiation

We will issue plans and specifications for bidding purposes, prepare and issue all addenda required, attend a pre-bid conference, attend the formal bid opening, and make a recommendation regarding the contract award.

E. Construction Administration

We will perform periodic site visits to observe construction and Contractor's compliance with Construction Documents. Review and approval of shop drawings, samples, and submittals will be conducted; and we will coordinate with City staff, the Contractor, and other members of the design and construction team during construction. A monthly report of site observations will be provided with billing statements.

F. Fee Schedule

Our fee is based upon our current understanding of the Project scope and Project schedule.

The base fee for all phases of the project will be \$91,250.00.

Fees for additional survey and topographic information or other services not identified in this proposal will be billed as an additional service with approval by CSA Parks Department.

For the purpose of establishing portions of the above fee for separate Phases, the following percentage allocations of fee shall apply:

<u>Phase</u>	<u>Percent of Total Fee</u>
Schematic Design Phase	15
Design Development Phase	20
Construction Documents Phase	45
Construction Phase	20

Additional Services and Fees

Additional Services will be provided, if requested and authorized by the Owner, and will be billed at our standard hourly rate of \$100.00 per hour or as provided in an additional services contract with our sub-consultants. If additional services are required with a sub-consultant a 10% handling fee will be added by BWCD. Any work required on the existing pool house building or restroom would be negotiated as an additional service and not as a part of this current proposal.

G. Limit of Liability

Bender Wells Clark Design agrees to the liability limits on this project as defined in the standard City of San Antonio contract for professional services.

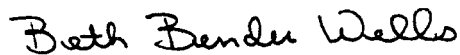
Texas law requires the following consumer protection statement:

The Texas Board of Architectural Examiners, 8213 Shoal Creek Boulevard, Suite 107, Austin, Texas 78758, (512) 485-1363, has jurisdiction over individuals licensed under the Landscape Architects' Registration Law, as amended by SB 435 of the 68th session of the legislature, 1983.

If this proposal meets with your approval, please sign below, and return one copy for our files. We look forward to working with you on this project.

Sincerely,

BENDER WELLS CLARK DESIGN



Beth Bender Wells
President

BBW/mh

Accepted: San Antonio Parks & Recreation Department

By

Title

Date

Bender Wells Clark Design