CONSENT AGENDA
ITEM NO. 20

CITY OF SAN ANTONIO
DEPARTMENT OF ASSET MANAGEMENT
CITY COUNCIL AGENDA MEMORANDUM

TO: Mayor and City Council

FROM: Rebecca Waldman, Director, Department of Asset Management

SUBJECT: Assignment of a Professional Services Agreement for Municipal Marketing Partnership Program with Public Enterprise Group, Inc. to Active Network, Inc.

DATE: May 12, 2005

SUMMARY AND RECOMMENDATIONS

This ordinance authorizes the assignment of a Professional Services Agreement between Public Enterprise Group, Inc. and the City of San Antonio to Active Network, Inc. and authorizes any remaining payments to be made to Active Network, Inc. upon acceptance by the City of certain deliverables as outlined in the Professional Services Agreement.

Staff recommends approval.

BACKGROUND INFORMATION

On February 10, 2005 the City entered into a Professional Services Agreement with Public Enterprise Group, Inc. (PEG) for the development of a comprehensive and integrated Municipal Marketing Partnership Program. The Program will identify opportunities and strategies that will generate cash, goods, and services for the City over a specified amount of time. The Program consists of two phases: (1) the Development Phase, and (2) the Implementation Phase. The Development Phase is currently underway and PEG is in the process of generating the following:

- Comprehensive inventory of existing City assets
- Program policies
- Four-year Strategic Marketing Plan, to include measurable goals and objectives for the Program and a prioritized schedule for implementation
- Targeted list of national, regional, and local businesses with whom to pursue partnership opportunities

In April 2005, City Staff was notified that PEG had been acquired as a wholly owned subsidiary of the Active Network, Inc (Active). An Inc. 500 company, Active is a leading provider of application and marketing services for community service organizations worldwide and parent company of top-ranked promotions agency, Active Marketing Group. Active delivers services to the largest customer base in its market, including local governments, non-profit and educational organizations, consumer product corporations, and national sports associations throughout the United States, Canada, Australia and New Zealand. The acquisition provides both productivity tools to manage the costs of running a public enterprise and innovative marketing programs to help those organizations generate additional revenues.

All PEG personnel currently assigned to the project will remain the same with the exception of accounting functions, which will be consolidated to the parent company of Active Network, Inc.
The terms of the Professional Services Agreement remain the same and it is anticipated that the results of the Development Phase will be presented to City Council as part of the FY 2005/2006 budget process.

POLICY ANALYSIS

Approval of this ordinance follows the routine business practice of accepting an assignment when there is substantially no change to the terms of original agreement.

FISCAL IMPACT

Funds were encumbered for the Development Phase of the Municipal Marketing Partnership Program. The financial terms of the Assignment of the Professional Services Agreement will remain the same and are authorized as follows:

$30,000	payable to Active Network, Inc. for professional services
$10,000	funding not to exceed this amount for miscellaneous reimbursable expenses

Subject to City Council approval of the Program and if City chooses to utilize Active Network, Inc. for the Implementation Phase, then the $30,000 fee for the Development Phase is 100% reimbursable to the City as a deductible draw from any future commission payments to Active Network, Inc. for eligible partnerships.

COORDINATION

This item has been coordinated with the Contract Services Department and the City Attorney's Office.

SUPPLEMENTARY COMMENTS

The Assignment of the Professional Services Agreement and a Discretionary Contracts Disclosure Form are attached.

Rebecca Waldman, Director
Department of Asset Management

Erik J. Walsh
Assistant to the City Manager

ASSIGNMENT OF THE PROFESSIONAL SERVICES AGREEMENT
FOR THE MUNICIPAL MARKETING PARTNERSHIP PROGRAM
BETWEEN
THE CITY OF SAN ANTONIO
AND
PUBLIC ENTERPRISE GROUP, INC.
TO
ACTIVE NETWORK, INC.

STATE OF TEXAS

COUNTY OF BEXAR

This Assignment ("Assignment") of the Professional Services Agreement for the Municipal Marketing Partnership Program is entered into between the City of San Antonio, a political subdivision of the State of Texas ("City") acting herein by and through its duly authorized representatives, pursuant to Ordinance No. _____ dated APRIL 26, 2005, and Active Network, Inc. ("Assignee"), and Public Enterprise Group, Inc. ("Assignor").

WITNESSETH

WHEREAS, on February 10, 2005, the City Council of the City of San Antonio passed and approved Ordinance No. 100413 authorizing a Professional Services Agreement for the Municipal Marketing Partnership Program ("Agreement") with Assignor and a true, complete and correct copy of the Agreement is attached hereto as Exhibit A; and

WHEREAS, Assignor has been acquired by Assignee as a wholly-owned subsidiary and Assignor requests the authorization to assign the rights and obligations of Assignor to Assignee; and

WHEREAS, the Assignee has agreed to (i) accept the rights of Assignor; and (ii) assume the obligations of Assignor under the Agreement;

NOW, THEREFORE, City, for good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, which consideration includes the agreement of Assignee to assume the obligations of Assignor under the Agreement; and Assignee, for good and valuable consideration, the adequacy of which and receipt of which are hereby acknowledged, do hereby agree as follows:

1. a. The Agreement remains in full force and effect.

   b. The Agreement has not been amended.

   c. Assignor is not in default under the Agreement.

2. City authorizes the Assignment by Assignor of all its rights and obligations under the Agreement to Assignee and Assignee hereby assumes all of the obligations of Assignor under the Agreement that may have occurred or accrued prior to or subsequent to the date of Assignment to Assignee. Further, (i) Assignor shall remain liable to City for any breach of the obligations of Assignor under the Agreement that may have occurred prior to the date of Assignment; and (ii) City releases and discharges Assignor from all liability and obligations of Assignor under the Agreement that may occur subsequent to the date of Assignment to Assignee.

EXECUTED IN DUPLICATE ORIGINALS this 26th day of APRIL, 2005.

CITY OF SAN ANTONIO

_____
J. Rolando Bono
Interim City Manager
City Manager

ATTEST:

_____
City Clerk

ASSIGNEE

ACTIVE NETWORK, INC.

Matt Landa
President

ATTEST:

_____

ASSIGNOR

PUBLIC ENTERPRISE GROUP, INC.

Don Schulte
Chief Operating Officer

ATTEST:

APPROVED AS TO FORM:

_____
City Attorney

Exhibit
A

PROFESSIONAL SERVICES AGREEMENT

FOR

MUNICIPAL MARKETING PARTNERSHIP PROGRAM

STATE OF TEXAS §
§
COUNTY OF BEXAR §

This Agreement is entered into by and between the City of San Antonio, a Texas Municipal Corporation (hereinafter referred to as "City") acting by and through its City Manager, pursuant to Ordinance No. 100413 passed and approved on the 10 day of February, 2005 and Public Enterprise Group, Inc. by and through its Chief Operating Officer, Don Schulte (hereinafter referred to as "Consultant"), both of which may be referred to herein collectively as the "Parties".

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. DEFINITIONS

As used in this Agreement, the following terms shall have meanings as set out below:

"City" is defined in the preamble of this Agreement and includes its successors and assigns.

"Consultant" is defined in the preamble of this Agreement and includes its successors.

"Director" shall mean the director of City's Asset Management Department.

"Eligible Partnership Agreements" shall mean agreements procured directly by Consultant, excluding agreements where the sponsor initiates the contact with City and there has been no previous contact between Consultant and that sponsor on behalf of City.

II. TERM

2.1 The Municipal Marketing Partnership Program ("Program") contains two phases: (1) the development phase ("Development Phase"), and (2) the implementation phase ("Implementation Phase"). The Development Phase will begin upon award ("Commencement

Date") and conclude upon the completion of the items outlined in section 3.2 and the acceptance of the Strategic Marketing Plan provided for in Section 3.2, below. City shall have the option to proceed with the Implementation Phase. If City chooses to utilize Consultant's services for the Implementation Phase, then this Agreement shall remain effective for a period of three (3) years from the Commencement Date of the Agreement. City shall have the sole option to renew the contract for two (2) additional one(1)-year periods, subject to City Council approval.

2.2 If funding for the continuation of this Agreement for any fiscal year after the first fiscal year is not appropriated, City retains the right to terminate this Agreement at the expiration of each of City's budget periods, and any subsequent contract period is contingent upon such appropriation.

III. SCOPE OF SERVICES

3.1 Consultant agrees to provide the required services described in this Article III entitled Scope of Services and as further described in Section A of Consultant's proposal, which is attached hereto and incorporated herein as Exhibit I, in exchange for the compensation described in Article IV Compensation to Consultant. Consultant shall provide all the services outlined in Section 3.2, below, in order to develop a comprehensive Strategic Marketing Plan. In the event that City elects, subject to approval by City Council, to utilize Consultant's services for the Implementation Phase, compensation to Consultant shall continue into the Implementation Phase, as outlined in Section 3.3, below. Should City elect not to utilize Consultant's services for implementation, this Agreement shall terminate under the provisions of ArticleVII Termination.

3.2 Development Phase: Consultant shall perform the following tasks, within ninety (90) days of the Commencement Date, in conjunction with the development of the Program:

3.2.1 Develop a comprehensive inventory of existing City assets, including facilities, programs, activities, events, contracts, purchases and proposed capital improvements in order to identify potential opportunities for the Program.

3.2.2 Assist City in the development of a set of Program policies to guide the work of City during the implementation phase. Consultant will help City identify internal and community issues that should be addressed in the policy document. Program policy should show sensitivity to the ethnic, cultural, and historical uniqueness of San Antonio.

3.2.3 Develop a four year strategic marketing plan ("Strategic Plan") to include:

a) the establishment of measurable goals and objectives for the Program, including revenue projections and estimated expenses; and
b) the development of strategies to maximize the benefits of identified partnership opportunities. This will include any necessary national and/or San Antonio-based research in order to identify potential partners and to help City prioritize marketing outreach efforts based on the likelihood of achieving successful partnerships.

c) Assist staff with the presentation of the proposed Strategic Plan to City Officials, City Council, City Management Team and the media, when requested.

3.2.4 Develop a targeted list of national, regional and local businesses to pursue partnership opportunities.

3.3 Implementation Phase: Should the City elect, in its sole discretion, to utilize Consultant's services for the Implementation Phase, Consultant shall perform the following tasks:

3.3.1 Develop and implement a Program marketing plan and materials that outline the goals of the City's municipal marketing program and emphasize the potential value to corporate partners. This will include the creation, packaging and management of sales and marketing materials that outline the basic Program which can be mailed to interested organizations and used on the City's website.

3.3.2 At the direction of the City, set-up and meet with leadership of prospective partner companies to explain goals, policies, and objectives of the Program and to gather information on the company's marketing program goals and objectives, prior to any Requests for Proposals ("RFP") being issued.

3.3.3 Assist the City in the development of an RFP or Invitation for "Best Value" bids, which allow the City to maintain an open and competitive process for soliciting and securing corporate partnerships. This will also include the marketing of the RFP to any prospective respondents.

3.3.4 Assist the City with the review and evaluation of proposals received in response to potential partnership opportunities.

3.3.5 Under City's direction, conduct negotiations and develop partnership agreements. City reserves the right to reject any potential business partner or proposed marketing initiative.

3.3.6 Assist staff with the presentation of the proposed partnership agreements to City Officials, City Council, City Management Team and the media, when requested.

3.3.7 Develop a plan for managing any fulfillment obligations cost effectively and efficiently.

3.4 It is the understanding of the parties hereto that Consultant will provide advice on any potential partnership agreements that arise during the development phase. Such advice, so long as it falls within the scope of this Agreement, shall be provided free of charge.

3.5 In the event that City elects to utilize Consultant's services for the Implementation Phase, the Strategic Plan produced by Consultant shall be attached and incorporated into this

Agreement as an exhibit and City shall amend this Agreement, as provided by Section 15.1, by passage of an ordinance by the City Council, indicating City's election to use either the pricing option in Subsection 4.3.1 or the pricing option in Subsection 4.3.2.

3.6 Nothing in this Agreement shall prevent City from electing to implement all or part of the Program on its own. As provided in Section 5.1, below, City shall own the Program and, therefore, shall have the option, in its sole discretion, as to whether to use, in whole or in part, Consultant's services for implementation. City reserves the right to implement all or part of the Program with another consultant. If City elects to implement all or part of the Program on its own or with another consultant, Consultant will not be eligible for revenue sharing for such implementation.

3.7 All work performed by Consultant hereunder shall be performed to the satisfaction of the Director. The determination made by Director shall be final, binding and conclusive on all Parties hereto. City shall be under no obligation to pay for any work performed by Consultant, which is not satisfactory to Director. City shall have the right to terminate this Agreement, in accordance with Article VII Termination, in whole or in part, should Consultant's work not be satisfactory to Director; however, City shall have no obligation to terminate and may withhold payment for any unsatisfactory work, as stated herein, even should City elect not to terminate.

IV. COMPENSATION TO CONSULTANT

4.1 In consideration of Consultant's performance in a satisfactory and efficient manner, as determined solely by Director, of all services and activities set forth in this Agreement, City agrees to pay Consultant the consideration provided in this Article IV Compensation to Consultant.

4.2 City shall pay Consultant an amount not to exceed thirty thousand dollars ($30,000.00) as compensation for the Development Phase. This amount shall be fully reimbursable in the event that City elects to utilize the Consultant's services for the Implementation Phase, as set forth in Subsection 4.2.1 below. Consultant shall be paid fifteen thousand dollars ($15,000.00) within thirty (30) days of the Commencement Date and shall be paid the remaining fifteen thousand dollars ($15,000.00) within thirty (30) days of final acceptance of the Strategic Plan by City.

4.2.1 Upon the City's election to proceed with utilizing Consultant's services for the Implementation Phase, as evidenced by the passage of an ordinance by the City Council, and the successful execution of the first resulting Eligible Partnership Agreement, City shall deduct the recoverable draw that totals thirty thousand dollars ($30,000.00) in equal installments over the term of the agreement from Consultant's Commission Payments, as set forth in Subsections 4.3.1 and 4.3.2 below. In the event that the commissions due Consultant under the first Eligible Partnership Agreement do not satisfy the recoverable draw of thirty thousand dollars ($30,000.00), City and Consultant shall mutually agree on a method for reimbursement of the full amount.

4.3 Upon City's election to utilize Consultant's services for the Implementation Phase, as evidenced by the passage of a City Council ordinance, City shall also elect to compensate Consultant in one of the following manners:

4.3.1 Monthly Fee/Revenue Sharing Structure. Under this compensation method, City shall pay Consultant a five thousand dollar ($5,000.00) monthly retainer for a period of twelve (12) months, beginning on October 1, 2005. In addition to these retainer fees, Consultant shall be entitled to receive a commission of ten percent (10%) on total gross revenues generated by the Eligible Partnership Agreements and on budgeted cost avoidance measures realized by Eligible Partnership Agreements ("Commission Payment"). City shall pay Consultant said commission within sixty (60) days following receipt of revenues from said Eligible Partnership Agreements. If the Agreements are multi-year in nature, and payments are made annually or in installments, then Consultant shall be paid said commission within sixty (60) days after receipt of payment by City. The packaging and pricing of Eligible Partnership Agreements may be changed by City, in its sole discretion, from time to time, and Consultant shall not receive any increased commission as a result of such change, unless Consultant directly negotiated the change. Under this Subsection, budgeted cost avoidance measures shall mean procurement by Consultant of items previously included in the City's annual adopted budget. Consultant shall receive a Commission Payment for said items if and only if City would have purchased said items from another source outside the scope of this Agreement. The Commission payment for said items shall be based on the amount budgeted. The City shall not owe nor pay a Commission Payment if said items do not offset or reduce items in City's Annual Budget. Whether or not a particular item falls within the definition of budgeted cost avoidance measures shall be left to the sole discretion of City.

4.3.2 Revenue Sharing Structure. Consultant shall be entitled to receive a commission of twelve percent (12%) on total gross revenues generated by the Eligible Partnership Agreements and on budgeted cost avoidance measures realized by Eligible Partnership Agreements ("Commission Payment"). City shall pay Consultant said commission within sixty (60) days following receipt of revenues from said Eligible Partnership Agreements. If the Agreements are multi-year in nature, and payments are made annually or in installments, then Consultant shall be paid said commission within sixty (60) days after receipt of payment by City. The packaging and pricing of Eligible Partnership Agreements may be changed by City, in its sole discretion, from time to time, and Consultant shall not receive any increased commission as a result of such change, unless Consultant directly negotiated the change. Under this Subsection, budgeted cost avoidance measures shall mean procurement by Consultant of items previously included in the City's annual adopted budget. Consultant shall receive a Commission Payment for said items if and only if City would have purchased said items from another source outside the scope of this Agreement. The Commission payment for said items shall be based on the amount budgeted. The City shall not owe nor pay a Commission Payment if said items do not offset or reduce items in City's Annual Budget. Whether or not a particular item falls within the definition of budgeted cost avoidance measures shall be left to the sole discretion of City.

4.4 Reimbursable expenses. For the Development Phase of this Agreement, City will reimburse Consultant only for City requested marketing and promotional materials and reasonable travel costs in a total amount not to exceed ten thousand dollars ($10,000.00). Travel costs must be authorized or requested by City, necessary to fulfill Consultant services, supported by appropriate documentation, and consistent with City policies and procedures related to travel. Travel costs shall include airfare, rental car and gas, parking, lodging and a per diem for meals. City will reimburse for coach airfare only and not for first class, business class, or upgrade charges. Lodging expenses will not be reimbursed at higher than the maximum lodging expenses as outlined by City's policies and procedures related to travel. Per diem rates will be allowable at the maximum established rate as outlined by City's policies and procedures. City will not reimburse Consultant for hourly personnel costs solely for travel time. No costs associated with Consultant's office(s) or business expenses not provided for in this Section will be reimbursable. All reimbursable expenses must be approved, in advance, by City. The total amount available for reimbursable expenses during the Implementation Phase, if City elects to proceed with Consultant's services, shall be determined at a later date by an amendment to this Agreement under Section 15.1.

4.5 Final acceptance of work products and services require written approval by the Director. Payment will be made to Consultant following written approval of the final work products and services by Director. City shall not be obligated or liable under this Agreement to any party, other than Consultant, for the payment of any monies or the provision of any goods or services.

V. OWNERSHIP OF DOCUMENTS

5.1 Any and all writings, documents or information in whatsoever form and character produced by Consultant pursuant to the provisions of this Agreement is the exclusive property of City and no such writing, document or information shall be the subject of any copyright or proprietary claim by Consultant.

5.2 Consultant understands and acknowledges that as the exclusive owner of any and all such writings, documents and information, City has the right to use all such writings, documents and information as City desires, without restriction.

VI. RECORDS RETENTION

6.1 Consultant and its subcontractors, if any, shall properly, accurately and completely maintain all documents, papers, and records, and other evidence pertaining to the services rendered hereunder (hereafter referred to as "documents"), and shall make such materials available to the City at their respective offices, at all reasonable times and as often as City may deem necessary during the Agreement period, including any extension or renewal hereof, and the record retention period established herein, for purposes of audit, inspection, examination, and making excerpts or copies of same by City and any of its authorized representatives.

6.2 Consultant shall retain any and all documents produced as a result of services provided hereunder for a period of four (4) years (hereafter referred to as "retention period")

from the date of termination of the Agreement. If, at the end of the retention period, there is litigation or other questions arising from, involving or concerning this documentation or the services provided hereunder, Consultant shall retain the records until the resolution of such litigation or other such questions. Consultant acknowledges and agrees that City shall have access to any and all such documents at any and all times, as deemed necessary by City, during said retention period. City may, at its election, require Consultant to return said documents to City prior to or at the conclusion of said retention.

6.3 Consultant shall notify City immediately in the event Consultant receives any requests for information from a third party, which pertain to the documentation and records referenced herein. Consultant understands and agrees that City will process and handle all such requests. Consultant shall not, under any circumstances, release any records created during the course of performance of this Agreement to any entity without City's written permission, unless required to do so by a Court of competent jurisdiction.

6.4 In accordance herewith, Consultant shall comply with all applicable federal, state and local laws, rules and regulations governing documents and ownership, access and retention thereof.

6.5 Public Statements. Consultant shall not issue nor cause the issuance of any public statement regarding its services under this Agreement without the City's prior approval.

6.6 Public Release of Information. Consultant shall not release any information concerning the services provided under this Agreement or the Program without City's prior approval.

VII. TERMINATION

7.1 For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term, as stated in Article II Term, or earlier termination pursuant to any of the provisions hereof.

7.2 Termination Without Cause. This Agreement may be terminated by either party upon thirty (30) calendar days written notice, which notice shall be provided in accordance with Article VIII Notice.

7.3 Termination For Cause. Upon written notice, which notice shall be provided in accordance with Article VIII Notice, City may terminate this Agreement as of the date provided in the notice, in whole or in part, upon the occurrence of the following event, which shall constitute an Event for Cause under this Agreement:

7.3.1 The sale, transfer, pledge, conveyance or assignment of this Agreement without prior approval, as provided in Article XI Assignment and Subcontracting, below.

7.4 Defaults With Opportunity for Cure. Should Consultant default in the performance of this Agreement in a manner stated in this Section 7.4 below, same shall be considered an event of default. City shall deliver written notice of said default specifying such matter(s) in default. Consultant shall have fifteen (15) calendar days after receipt of the written notice, in accordance with Article VIII Notice, to cure such default. If Consultant fails to cure the default within such fifteen-day cure period, City shall have the right, without further notice, to terminate this Agreement in whole or in part as City deems appropriate, and to contract with another consultant to complete the work required in this Agreement. City shall also have the right to offset the cost of said new Agreement with a new consultant against Consultant's future or unpaid invoice(s), subject to the duty on the part of City to mitigate its losses to the extent required by law.

7.4.1 Failure to comply with the terms and conditions stated in Article XIII SBEDA.
7.4.2 Bankruptcy or selling substantially all of company's assets
7.4.3 Failing to perform or failing to comply with any covenant herein required
7.4.4 Performing unsatisfactorily

7.5 City's Election to Terminate after Development Phase. In the event that City elects not to utilize Consultant's services during the Implementation Phase of the Program and to exercise its right to terminate this Agreement after the Development Phase, as provided in Section 3.1, this Agreement shall terminate upon written notice to Consultant, which notice shall be provided in accordance with Article VIII Notice, as of the date provided in said notice.

7.6 Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.

7.7 Regardless of how this Agreement is terminated, Consultant shall affect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City, all completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by Consultant, or provided to Consultant, hereunder, regardless of storage medium, if so requested by City, or shall otherwise be retained by Consultant in accordance with Article VI Records Retention. Any record transfer shall be completed within thirty (30) calendar days of a written request by City and shall be completed at Consultant's sole cost and expense. Payment of compensation due or to become due to Consultant is conditioned upon delivery of all such documents, if requested.

7.8 Within forty-five (45) calendar days of the effective date of termination or expiration of this Agreement, Consultant shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. Failure by Consultant to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of City and constitute a **Waiver** by Consultant of any and all

right or claims to collect moneys that Consultant may rightfully be otherwise entitled to for services performed pursuant to this Agreement.

7.9 Upon the effective date of expiration or termination of this Agreement, Consultant shall cease all operations of work being performed by Consultant or any of its subcontractors pursuant to this Agreement.

7.10 Termination not sole remedy. In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit, in any way, at law or at equity, City's right to seek damages from or otherwise pursue Consultant for any default hereunder or other action.

VIII. NOTICE

8.1 Except where the terms of this Agreement expressly provide otherwise, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or three (3) days after depositing same in the U.S. mail, first class, with proper postage prepaid, or upon receipt if sending the same by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier, at the addresses set forth below or to such other address as either party may from time to time designate in writing.

If intended for City, to:

Mailing Address:
City of San Antonio, Attn: Director
Asset Management Department
P.O. Box 839966
San Antonio, Texas 78283-3966

Physical Address:
City of San Antonio, Attn: Department of Asset Management
114 W. Commerce
2nd floor, Municipal Plaza
San Antonio, Texas 78205

With a copy to:

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

Physical Address:
City Clerk's Office, Attn: Department of Asset Management
100 Military Plaza
2nd floor, City Hall
San Antonio, Texas 78205

If intended for Consultant, to:

Public Enterprise Group, Inc.
Attn: Don Schulte
101 Main Street
Huntington Beach, California 92648

IX. INSURANCE

9.1 Prior to the commencement of any work under this Agreement, Consultant shall furnish an original completed Certificate(s) of Insurance to the City's Asset Management Department and City Clerk's Office, and which shall be clearly labeled "Municipal Marketing Partnership Program" in the Description of Operations block of the Certificate. The original Certificate(s) 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, containing all required information referenced or indicated thereon. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed directly from the agent to the City. The City shall have no duty to pay or perform under this Agreement until such certificate shall have been delivered to City's Asset Management Department and the Clerk's Office, and no officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.

9.2 The City reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement, but in no instance will City allow modification whereupon City may incur increased risk.

9.3 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 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. 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.

9.4 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 9.6 herein within 10 days of the requested change. Consultant shall pay any costs incurred resulting from said changes.

9.5 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, volunteers, 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 polices;

- 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 policies will provide a waiver of subrogation in favor of the City.

9.6 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. Notices shall be sent to City as follows:

City of San Antonio Asset Management Department 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

9.7 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 this 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.

9.8 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.

9.9 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.

X. INDEMNIFICATION

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

10.2 It is the EXPRESS INTENT of the parties to this AGREEMENT, that the INDEMNITY provided for in this section, is an INDEMNITY extended by CONSULTANT to INDEMNIFY, PROTECT and HOLD HARMLESS, 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 CITY is a CONTRIBUTORY CAUSE of the resultant injury, death, or damage, and shall have no application when the negligent act of CITY is the sole cause of the resultant injury, death, or damage. CONSULTANT 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 CITY and its elected officials, employees, officers, directors, volunteers and representatives, in connection with any such injury, death, or damage for which this INDEMNITY shall apply, as set forth above.

10.3 The provisions of this INDEMNIFICATION 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.

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

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

XI. ASSIGNMENT AND SUBCONTRACTING

11.1 Consultant shall supply qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees or subcontractors of Consultant. Consultant, its employees or its subcontractors shall perform all necessary work.

11.2 It is City's understanding and this Agreement is made in reliance thereon, that Consultant intends to use the following subcontractors in the performance of the Implementation Phase of this Agreement, should City elect to utilize Consultant's services for the Implementation Phase: Neighborhood Marketing, Ltd, Laser Printers and Mailing Services, L.L.C. and Partners Two, Inc. Any deviation from this subcontractor list, whether in the form of deletions, additions or substitutions, requires the approval of Director and the Director of the Economic Development.

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

11.4 Except as otherwise stated herein, Consultant may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the consent of the City Council, as evidenced by passage of an ordinance. As a condition of such consent, if such consent is granted, Consultant shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Consultant, assignee, transferee or subcontractor.

11.5 Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void ab initio and shall confer no rights upon any third person. Should Consultant assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement, City may, at its option, cancel this Agreement and all rights, titles and interest of Consultant shall thereupon cease and terminate, in accordance with Article VII Termination, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Consultant shall in no event release Consultant from any obligation under the terms of this Agreement, nor shall it relieve or release Consultant from the payment of any damages to City, which City sustains as a result of such violation.

XII. INDEPENDENT CONTRACTOR

12.1 Consultant covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of City; that Consultant shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between City and Consultant, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between City and Consultant. The parties hereto understand and agree that the City shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by the Consultant under this Agreement and that the Consultant has no authority to bind the City.

XIII. SBEDA

13.1 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"), African American ("AABE"), 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 the City. This policy and its implementation are known as the Small, Business Economic Development Advocacy Program (hereinafter referred to as "SBEDA Program").

13.2 Consultant shall implement the plan (hereafter "SBEDA plan") submitted with its proposal under the SBEDA Program for Small, African American, Minority and Women-owned Business Participation in this Agreement, thereby meeting the percentages for participation of those groups as submitted in its proposal. Consultant's SBEDA plan, as submitted with Consultant's proposal, is attached hereto and incorporated herein by reference as Exhibit II. In

the event that City elects to utilize Consultant's services to undertake the Implementation Phase of this Agreement, as specified in Section 3.3, City and Consultant shall work together to complete a revised SBEDA plan within thirty (30) days of the passage of a City Council ordinance authorizing Consultant to provide services for the Implementation Phase. Upon completion, said revised SBEDA plan shall be attached to this Agreement and incorporated herein as an exhibit. Consultant shall be in full compliance with this Article by meeting the percentages listed in its proposal no later than 60 days from the date of execution of this Agreement, and shall 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, which will meet the percentages submitted in its proposal.

13.3 Consultant shall maintain records showing all contracts, subcontracts, and supplier awards to SBE/MBE/AABE/WBE's. 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 15 calendar days after notice of non-compliance 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, for which this Agreement may be terminated in accordance with Article VII Termination.

13.4 In all events, Consultant shall comply with the City's Small Business Economic Development Advocacy Program, contained in San Antonio Ordinance No. 96754, and the amendments thereto. Said ordinances are incorporated herein for all purposes, as if fully set forth herein.

XIV. CONFLICT OF INTEREST

14.1 Consultant acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in Part B, Section 10 of the Ethics Code, from having a financial interest in any contract with City or any City agency such as city owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a City officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a City contract, a partner or a parent or subsidiary business entity.

14.2 Pursuant to the subsection above, Consultant warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of City. Consultant further warrants and certifies that is has tendered to City a Discretionary Contracts Disclosure Statement in compliance with City's Ethics Code.

XV. AMENDMENTS

15.1 Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both City and Consultant, and subject to approval by the City Council, as evidenced by passage of an ordinance.

XVI. SEVERABILITY

16.1 If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the parties hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

XVII. LICENSES/CERTIFICATIONS

17.1 Consultant warrants and certifies that Consultant and any other person designated to provide services hereunder has the requisite training, license and/or certification to provide said services, and meets all competence standards promulgated by all other authoritative bodies, as applicable to the services provided herein.

XVIII. COMPLIANCE

18.1 Consultant shall provide and perform all services required under this Agreement in compliance with all applicable federal, state and local laws, rules and regulations.

XIX. NONWAIVER OF PERFORMANCE

19.1 Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of City, such changes must be approved by the City Council, as described in Article XV Amendments. No act or omission by a Party shall in any manner impair

or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

XX. LAW APPLICABLE

20.1 **THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.**

20.2 Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

XXI. LEGAL AUTHORITY

21.1 The signer of this Agreement for Consultant represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on behalf of Consultant and to bind Consultant to all of the terms, conditions, provisions and obligations herein contained.

XXII. PARTIES BOUND

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

XXIII. CAPTIONS

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

XIV. INCORPORATION OF EXHIBITS

24.1 Each of the exhibits listed below is an essential part of the Agreement and governs the rights and duties of the parties. In any conflict between the terms of this Agreement and any attached exhibits, this Agreement shall take precedence.

XXV. ENTIRE AGREEMENT

25.1 This Agreement, together with its authorizing ordinance and its exhibits, constitute the final and entire agreement between the parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto, unless same be in writing, dated subsequent to the date hereto, and duly executed by the parties, in accordance with Article XV Amendments.

EXECUTED and **AGREED** to this the 15th day of February, 2005.

CITY:
CITY OF SAN ANTONIO

for Interim City Manager

RPW

CONSULTANT:
PUBLIC ENTERPRISE GROUP, INC

Don Schulte
Chief Operating Officer

ATTEST:

City Clerk

Approved as to Form:

City Attorney

Exhibit I: Section A of Consultant's Proposal
Exhibit II: Consultant's SBEDA plan