

LAST MINUTE AGENDA INFORMATION

10/01/08 Regular Meeting

(Agenda Related Writings/Documents provided to a majority of the City Council after distribution of the Agenda Packet for the October 1, 2008 Regular meeting.)

ITEM NO. **DESCRIPTION**

6.2	<p>RESOLUTION NO. R-08-162 – APPROVING CHANGE ORDER NO. 3 TO THE OLD PALM AVENUE STREETScape IMPROVEMENT PROJECT (CIP R04-201) AND AUTHORIZING THE EXECUTIVE DIRECTOR TO ENTER INTO AGREEMENT WITH FABRICATION ARTS, FOR THE CONSTRUCTION AND INSTALLATION OF SURFBOARD SCULPTURES. (0620-20 & 0720-25)</p> <p>a. Revised Contract for Professional Services.</p>
------------	---

RECEIVED

2008 SEP 30 P 4: 22

**CONTRACT FOR PROFESSIONAL SERVICES
BETWEEN THE IMPERIAL BEACH REDEVELOPMENT AGENCY AND
FABRICATION ARTS**

THIS agreement ("AGREEMENT") is made and entered into this by and between the IMPERIAL BEACH REDEVELOPMENT AGENCY, a public body, corporate and politic ("AGENCY"), and FABRICATION ARTS, a DBA of Graphics Solutions, LTD ("CONSULTANT") (collectively "PARTIES").

WHEREAS, the Agency is engaged in activities necessary to carry out and implement the Redevelopment Plan for the Palm Avenue/Commercial Redevelopment Project Area; and

WHEREAS, in order to carry out and implement the Redevelopment Plan, the Agency advertised for public bid for the construction of public improvements on Palm Avenue Street from Seacoast Drive to 3rd Street [the "Project"]; and

WHEREAS, the Agency's bid document included a stipulated bid item by Fabrication Arts; and

WHEREAS, on May 28, 2008, the Agency adopted Resolution No. R-08-149 to award the Project to Portillo Concrete, Inc. ("Portillo"); and

WHEREAS, during construction of the project, it was determined that to facilitate the efficient and effective construction of public improvements on the Project it was desirable to change the delivery of the stipulate bid services; and

WHEREAS, The AGENCY desires to employ a CONSULTANT to furnish the stipulated bid services ("SERVICES"); and

WHEREAS, The AGENCY has determined that CONSULTANT is qualified by experience and ability to perform the services desired by AGENCY, and CONSULTANT is willing to perform such services; and

WHEREAS, CONSULTANT will conduct all the work as described and detailed in this AGREEMENT to be provided to the AGENCY.

NOW, THEREFORE, the PARTIES hereto mutually covenant and agree with each other as follows:

1. SERVICES.

Scope of Services. Consultant agrees to fabricate and install 25 surfboard sculptures based on drawings by CWA, Inc. and the subsequent modifications made through 9-04-08. Surfboard sculptures are fabricated from (type 304) stainless steel with an acrylic paint finish; Interpretative

a-1

10/1/08 Item 6.2
Last Minute Agenda Info

plaques are etched stainless steel (type 316) with a one-color paint fill. The work shall include bolt down installation using four stainless steel j-bolts each and rebar per structural engineering calculations.

Consultant shall, in a professional manner, furnish all of the labor, technical, administrative, professional and other personnel, all supplies and materials, equipment, printing, vehicles, transportation, office space and facilities, and all tests, testing and analyses, calculation, and all other means whatsoever, except as herein otherwise expressly specified to be furnished by Agency, necessary or proper to perform and complete the work and provide the professional services required of Consultant by this Agreement.

Consultant understands that the City of Imperial Beach's Public Works Department has contracted with Portillo Concrete Inc. for the installation of streetscape improvements on Palm Avenue from Seacoast Drive to 3rd Street and that Consultant shall coordinate its services hereunder with Portillo Concrete Inc., and Agency and City staff.

1.1 Project Coordinator. Larry Martin is hereby designated as the Project Coordinator for Agency and will monitor the progress and execution of this Agreement. Project Coordinator shall have overall responsibility for the progress and execution of this Agreement for Consultant.

1.2 Modification of Scope of Services. AGENCY may order changes to the Scope of Services within the general scope of this AGREEMENT consisting of additions, deletions, or other revisions. If such changes cause a change in the CONSULTANT'S cost of, or time required for, completion of the Scope of Services, an equitable adjustment to CONSULTANT'S compensation and/or contract time shall be made, subject to the AGENCY'S approval. All such changes shall be authorized in writing, executed by CONSULTANT and AGENCY.

2. DURATION OF AGREEMENT

2.1 The Agreement between Consultant and Agency will be terminated upon acceptance of the work by the Project Coordinator and completed as set forth in **1. Services**.

2.2 Should Consultant begin work on any phase in advance of receiving written authorization to proceed, any professional services performed by Consultant in advance of the said date of authorization shall be considered as having been done at Consultant's own risk and as a volunteer unless said professional services are so authorized.

2.3 Any delay occasioned by causes beyond the control of Consultant may, in the sole discretion of the Agency, merit for the granting of extension of time for the completion of the aforesaid services. When such delay occurs, Consultant shall immediately notify the Project Coordinator in writing of the cause and the extent of the delay, whereupon the Project Coordinator shall ascertain the facts and the extent of the delay and grant an extension of time for the completion of the professional services when justified by the circumstances in the sole discretion of the Project Coordinator.

A-2

2.4 AGENCY's Right to Terminate for Default. Should CONSULTANT be in default of any covenant or condition hereof, AGENCY may immediately terminate this AGREEMENT for cause if CONSULTANT fails to cure the default within ten (10) calendar days of receiving written notice of the default.

2.5 AGENCY'S Right to Terminate without Cause. Without limiting its rights in the event of CONSULTANT's default, AGENCY may terminate this AGREEMENT, without cause, by giving written notice to CONSULTANT. Such termination shall be effective upon receipt of the written notice. CONSULTANT shall be compensated for all effort and material expended on behalf of AGENCY under the terms of this AGREEMENT, up to the effective date of termination. All personal property remaining in AGENCY facilities or on AGENCY property thirty (30) days after the expiration or termination of this AGREEMENT shall be, at AGENCY's election, considered the property of AGENCY.

3. COMPENSATION.

3.1 TOTAL AMOUNT. The total cost for all work described in **1. SERVICES** shall not exceed **TWO HUNDRED AND SEVEN THOUSAND NINE HUNDRED AND NINETY-THREE DOLLARS AND TWENTY-TWO CENTS (\$207,993.22)** without prior written authorization from Agency.

3.2 The Consultant shall submit, in duplicate, a requisition to the Agency for a down payment of **ONE HUNDRED THREE THOUSAND NINE HUNDRED NINETY-SIX DOLLARS AND SIXTY-ONE CENTS (\$103,996.61)**.

3.3 For subsequent compensation, the Consultant shall submit a requisition to the Agency specifying the amount due for services performed by the Consultant. The Consultant shall be paid based upon the approval of the Project Coordinator.

3.4 Upon approval of the requisition, the Agency shall make payment of approved requisition by approximately the 15th of a given month if the requisition is submitted to the Agency no later than the first of said given month. Payments will be made to the Consultant at the address below.

4. INDEPENDENT CONTRACTOR. Consultant and any sub-contractors employed by Consultant shall be independent contractors and not agents of Agency hereunder. Any provision in this Agreement that may appear to give Agency the right to direct Consultant or sub-contractors as to the details of doing the work or to exercise a measure of control over the work means that Consultant shall follow the direction of the Agency as to end results of the work only.

5. STATEMENT OF EXPERIENCE. CONSULTANT agrees that it has the financial resources, service experience, completion ability, personnel, and experience in dealing with public agencies necessary for performing the Scope of Services and that such performance shall be in accordance with the standards customarily adhered to by an experienced and competent sculpting

firm using the degree of care and skill ordinarily exercised by reputable professionals practicing in the same field of service in the State of California. By executing this AGREEMENT, CONSULTANT represents that it has demonstrated trustworthiness and possesses the quality, fitness, and capacity to perform the AGREEMENT in a manner satisfactory to AGENCY.

6. AUDIT OF RECORDS.

6.1 At any time during normal business hours and as often as may be deemed necessary the Consultant shall make available to a representative of Agency for examination all of its records with respect to all matters covered by this Agreement and will permit Agency to audit, examine and/or reproduce such records. Consultant will retain such financial and program service records for at least four (4) years after termination or final payment under this Agreement.

6.2 The CONSULTANT shall include the AGENCY 's right under this section in any and all of their subcontracts, and shall ensure that these sections are binding upon all subcontractors.

7. CONFIDENTIALITY. All services performed by CONSULTANT, including but not limited to all drafts, data, correspondence, proposals, reports, research and estimates compiled or composed by CONSULTANT, pursuant to this AGREEMENT, are for the sole use of the AGENCY, its agents and employees. Neither the documents nor their contents shall be released to any third party without the prior written consent of the AGENCY. This provision does not apply to information that (a) was publicly known, or otherwise known to CONSULTANT, at the time that it was disclosed to CONSULTANT by the AGENCY, (b) subsequently becomes publicly known through no act or omission of CONSULTANT or (c) otherwise becomes known to CONSULTANT other than through disclosure by the AGENCY. Except for any subcontractors that may be allowed upon prior agreement, neither the documents nor their contents shall be released to any third party without the prior written consent of the AGENCY. The sole purpose of this section is to prevent disclosure of AGENCY's confidential and proprietary information by CONSULTANT or subcontractors.

8. CONFLICTS OF INTEREST.

8.1 CONSULTANT shall at all times comply with all federal, state and local conflict of interest laws, regulations, and policies applicable to public contracts and procurement practices, including but not limited to California Government Code §§ 81000 et seq. (Political Reform Act) and §§ 1090 et seq. CONSULTANT shall immediately disqualify itself and shall not use its official position to influence in any way any matter coming before the AGENCY in which the CONSULTANT has a financial interest as defined in Government Code § 87103. CONSULTANT represents that it has no knowledge of any financial interests which would require it to disqualify itself from any matter on which it might perform services for the AGENCY.

8.2 CONSULTANT shall comply with all of the reporting requirements of the Political Reform Act. The CONSULTANT shall file a Fair Political Practices Commission Form 700 (Assuming Office Statement) within thirty (30) calendar days of the AGENCY's determination that the CONSULTANT is subject to a conflict of interest code. The CONSULTANT shall also file a

Form 700 (Annual Statement) on or before April 1, disclosing any financial interests held during the previous calendar year for which the CONSULTANT was subject to a conflict of interest code.

8.3 If, in performing the SERVICES set forth in this AGREEMENT, the CONSULTANT makes, or participates in, a "governmental decision" as described in Title 2, section 18701(a)(2) of the California Code of Regulations, or performs the same or substantially all the same duties for the AGENCY that would otherwise be performed by a AGENCY employee holding a position specified in the department's conflict of interest code, the CONSULTANT shall be subject to a conflict of interest code requiring the completion of one or more statements of economic interests disclosing the CONSULTANT's relevant financial interests.

9. OWNERSHIP OF DOCUMENTS. All documents, data, studies, drawings, maps, models, photographs and reports prepared by CONSULTANT under this AGREEMENT shall be considered the property of AGENCY. CONSULTANT shall be permitted to reference and use said materials for use in future studies, work, and marketing so long as said materials are considered "public documents" and are not subject to attorney-client privilege, or the subject of pending closed or executive session discussions.

10. INSURANCE

10.1 CONSULTANT shall procure and maintain for the duration of the AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder and the results of that work by the CONSULTANT, their agents, representatives, employees or subcontractors. Insurance shall be placed with insurers with a current A.M. Best's rating of no less than "A" and "VII" unless otherwise approved in writing by the AGENCY's Risk Manager.

10.2 CONSULTANT's liabilities, including but not limited to CONSULTANT's indemnity obligations, under this AGREEMENT, shall not be deemed limited in any way to the insurance coverage required herein. All policies of insurance required hereunder must provide that the AGENCY is entitled to thirty (30) days prior written notice (ten (10) days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies. Maintenance of specified insurance coverage is a material element of this AGREEMENT.

10.3 Types and Amounts Required. CONSULTANT shall maintain, at minimum, the following insurance coverage for the duration of this AGREEMENT:

10.3.1 Commercial General Liability (CGL). Insurance written on an ISO Occurrence form CG 00 01 07 98 or equivalent providing coverage at least as broad which shall cover liability arising from any and all personal injury or property damage in the amount of **\$2,000,000** per occurrence and subject to an annual aggregate of **\$2,000,000**. There shall be no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured claims or contractual liability. All defense costs shall be outside the limits of the policy.

a-5

10.3.2 Commercial Automobile Liability. For all of the CONSULTANT's automobiles including owned, hired and non-owned automobiles, automobile insurance written on an ISO form CA 00 01 12 90 or a later version of this form or an equivalent form providing coverage at least as broad for bodily injury and property damage for a combined single limit of **\$1,000,000** per occurrence. Insurance certificate shall reflect coverage for any automobile (any auto).

10.3.3 Workers' Compensation. For all of the CONSULTANT's employees who are subject to this AGREEMENT and to the extent required by applicable state or federal law, a Workers' Compensation policy providing at minimum **\$2,000,000** employers' liability coverage. The CONSULTANT shall provide an endorsement that the insurer waives the right of subrogation against the AGENCY and its respective elected officials, officers, employees, agents and representatives.

10.3.4. Professional Liability. Professional liability (errors and omissions) coverage with a limit of **\$2,000,000** per claim and **\$2,000,000** annual aggregate. The CONSULTANT shall ensure both that (1) the policy retroactive date is on or before the date of commencement of the Scope of Services; and (2) the policy will be maintained in force for a period of three years after substantial completion of the Scope of Services or termination of this AGREEMENT whichever occurs last. The CONSULTANT agrees that for the time period defined above, there will be no changes or endorsements to the policy that increase the AGENCY 's exposure to loss. All defense costs shall be outside the limits of the policy.

10.4. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions are the responsibility of the CONSULTANT and must be declared to and approved by the AGENCY. At the option of the AGENCY, either (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the AGENCY, its officers, officials, employees and volunteers, or (2) the CONSULTANT shall provide a financial guarantee satisfactory to the AGENCY guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

10.5. Additional Required Provisions. The commercial general liability and automobile liability policies shall contain, or be endorsed to contain, the following provisions:

10.5.1. The AGENCY, its officers, officials, employees, and representatives shall be named as additional insureds. The AGENCY 's Additional Insured status must be reflected on additional insured endorsement form which shall be submitted to the AGENCY.

10.5.2. The policies are primary and non-contributory to any insurance that may be carried by the AGENCY, as reflected in an endorsement which shall be submitted to the AGENCY.

10.6. Verification of Coverage. CONSULTANT shall furnish the AGENCY with original certificates and amendatory endorsements effecting coverage required by this Section 5. All

certificates and endorsements are to be received and approved by the AGENCY before work commences. The AGENCY reserves the right to require complete, certified copies of all required insurance policies, including endorsements affecting the coverage required by these specifications at any time.

11. INDEMNIFICATION. To the fullest extent permitted by law, CONSULTANT shall indemnify, defend, and hold harmless the AGENCY, and its officers, officials, agents and employees from any and all claims, demands, costs or liability that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of CONSULTANT, its employees, agents, and subcontractors in the performance of services under this AGREEMENT. CONSULTANT's duty to indemnify under this section shall not include liability for damages for death or bodily injury to persons, injury to property, or other loss, damage or expense arising from the active or sole negligence or willful misconduct by the AGENCY or its elected officials, officers, agents, and employees. CONSULTANT's indemnification obligations shall not be limited by the insurance provisions of this AGREEMENT. The PARTIES expressly agree that any payment, attorney's fees, costs or expense AGENCY incurs or makes to or on behalf of an injured employee under the AGENCY 's self-administered workers' compensation is included as a loss, expense, or cost for the purposes of this section, and that this section will survive the expiration or early termination of this AGREEMENT.

12. SUBCONTRACTORS.

12.1 The CONSULTANT's hiring or retaining of third parties (i.e. subcontractors) to perform services related to the PROJECT is subject to prior approval by the AGENCY.

12.2 All contracts entered into between the CONSULTANT and its subcontractor shall also provide that each subcontractor shall obtain insurance policies which shall be kept in full force and effect during any and all work on this PROJECT and for the duration of this AGREEMENT. The CONSULTANT shall require the subcontractor to obtain, all policies described in Section 10.3 of this Agreement in the amounts required by the AGENCY, which shall not be greater than the amounts required of the CONSULTANT.

12.3 In any dispute between the CONSULTANT and its subcontractor, the AGENCY shall not be made a party to any judicial or administrative proceeding to resolve the dispute. The CONSULTANT agrees to defend and indemnify the AGENCY as described in Section 11 of this Agreement should the AGENCY be made a party to any judicial or administrative proceeding to resolve any such dispute.

13. NON-DISCRIMINATION. CONSULTANT shall not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin, nor shall CONSULTANT discriminate against any qualified individual with a disability. CONSULTANT shall take affirmative action to insure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex or national origin and shall make reasonable accommodation to qualified individuals with disabilities. Such action shall include, but not be limited to the following: employment, upgrading, demotion, transfer, recruitment, or

recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. CONSULTANT agrees to post in conspicuous places available to employees and applicants for employment any notices provided by AGENCY setting forth the provisions of this non-discrimination clause.

14. NOTICES. All communications to either party by the other party shall be delivered to the persons listed below. Any such written communications by mail shall be conclusively deemed to have been received by the addressee five (5) calendar days after the deposit thereof in the United States Mail, postage prepaid and properly addressed as noted below.

Gerard E. Selby
Redevelopment Coordinator
City of Imperial Beach
825 Imperial Beach Blvd.
Imperial Beach, CA 91932

John O'Connell
Fabrication Arts
2926 Main Street
San Diego CA 92113

15. ASSIGNABILITY. This AGREEMENT and any portion thereof shall not be assigned or transferred, nor shall any of the CONSULTANT's duties be delegated or sub-contracted, without the express written consent of the AGENCY.

16. RESPONSIBILITY FOR EQUIPMENT. AGENCY shall not be responsible nor held liable for any damage to persons or property consequent upon the use, misuse, or failure of any equipment used by CONSULTANT or any of CONSULTANT's employees or subcontractors, even if such equipment has been furnished, rented, or loaned to CONSULTANT by AGENCY. The acceptance or use of any such equipment by CONSULTANT, CONSULTANT's employees, or subcontractors shall be construed to mean that CONSULTANT accepts full responsibility for and agrees to exonerate, indemnify and hold harmless AGENCY from and against any and all claims for any damage whatsoever resulting from the use, misuse, or failure of such equipment.

17. CALIFORNIA LAW; VENUE. This AGREEMENT shall be construed and interpreted according to the laws of the State of California. Any action brought to enforce or interpret any portion of this AGREEMENT shall be brought in the county of San Diego, California.

18. COMPLIANCE WITH LAWS. The CONSULTANT shall comply with all laws, ordinances, regulations, and policies of the federal, state, and local governments applicable to this AGREEMENT. In addition, CONSULTANT shall comply with all applicable prevailing wage provisions of California Labor Code Sections 1770, et seq.

19. ENTIRE AGREEMENT. This AGREEMENT sets forth the entire understanding of the PARTIES with respect to the subject matters herein. There are no other understandings, terms or other agreements expressed or implied, oral or written, except as set forth herein. No change, alteration, or modification of the terms or conditions of this AGREEMENT, and no verbal understanding of the PARTIES, their officers, agents, or employees shall be valid unless agreed to in writing by both PARTIES.

a-8

20. NO WAIVER. No failure of either the AGENCY or the CONSULTANT to insist upon the strict performance by the other of any covenant, term or condition of this AGREEMENT, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this AGREEMENT shall constitute a waiver of any such breach of such covenant, term or condition.

21. SEVERABILITY. The unenforceability, invalidity, or illegality of any provision of this AGREEMENT shall not render any other provision unenforceable, invalid, or illegal.

22. DRAFTING AMBIGUITIES. The PARTIES agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this AGREEMENT, and the decision of whether or not to seek advice of counsel with respect to this AGREEMENT is a decision which is the sole responsibility of each Party. This AGREEMENT shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the AGREEMENT.

23. CONFLICTS BETWEEN TERMS. If an apparent conflict or inconsistency exists between the main body of this AGREEMENT and the Exhibits, the main body of this AGREEMENT shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this AGREEMENT, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this AGREEMENT, the Exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this AGREEMENT.

24. EXHIBITS INCORPORATED. All Exhibits referenced in this AGREEMENT are incorporated into the AGREEMENT by this reference.

25. SIGNING AUTHORITY. The representative for each Party signing on behalf of a corporation, partnership, joint venture or governmental entity hereby declares that authority has been obtained to sign on behalf of the corporation, partnership, joint venture, or entity and agrees to hold the other Party or PARTIES hereto harmless if it is later determined that such authority does not exist.

(Signatures follow on next page)

A-9

Fabrication Arts
Consultant Agreement
Old Palm Avenue

IN WITNESS WHEREOF, the PARTIES hereto have executed this AGREEMENT the day and year first hereinabove written.

IMPERIAL BEACH REDEVELOPMENT
AGENCY,
a public entity

FABRICATION ARTS
a DBA of Graphics Solutions, LTD

Gary Brown, Executive Director

By: _____
John O'Connell, Vice President

APPROVED AS TO CONTENT:

Gary Brown, Executive Director

APPROVED AS TO FORM:

James P. Lough, AGENCY Counsel

a-10