

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

DEPARTMENT: Museums and Cultural Affairs Dept. and International Bridges

AGENDA DATE: August 18, 2009

CONTACT PERSON/PHONE: Sean McGlynn 541-4898 and Said Larbi-Cherif 858-4673

DISTRICT(S) AFFECTED: 8

SUBJECT:

A resolution that the City Manager be authorized to sign a Service Agreement by and Between the City of El Paso and Enrique Carbajal ("Artist"), to design, fabricate and provide instructions and consultation for public art to be known as the Paso Del Norte International Bridge Public Art Project in the amount of Three Hundred Thousand and No/100 Dollars (\$300,000.00).

BACKGROUND / DISCUSSION:

Discussion of the what, why, where, when, and how to enable Council to have reasonably complete description of the contemplated action. This should include attachment of bid tabulation, or ordinance or resolution if appropriate. What are the benefits to the City of this action? What are the citizen concerns?

A public art project to be located at Paso Del Norte International Bridge Public Art Project to encourage the integration of art into the architecture of municipal structures for the City of El Paso. Artist Enrique Carbajal has been selected and approved to create and integrate a public artwork at the Paso Del Norte International Bridge Project formerly known as 8th Street, between Santa Fe Street and the Federal Property and between lot 11, Block 44 and Lot 20, Block 61 Campbell Addition. A 40' to 45' tall steel sculpture in geometric shapes uniquely designed for the City of El Paso.

PRIOR COUNCIL ACTION

Has the Council previously considered this item or a closely related one?

Ordinance No. 16324 adopted on April 4, 2006 providing for art in municipal places, establishing the El Paso public art committee and describing its powers and duties, and establishing a means of funding acquisition or commissioning of art for municipal places and repealing ordinances 15245 and 15073.

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

Fund 43005
Account # 5080000
Dept 32000080

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

N/A

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

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____
(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____

DATE: _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the City Manager be authorized to sign a Service Agreement by and between the City of El Paso and Enrique Carbajal ("Artist"), to design, fabricate and provide instructions and consultation for public art to be known as the Paso Del Norte International Bridge Public Art Project in the amount of THREE HUNDRED THOUSAND AND NO/100 DOLLARS (\$300,000.00).

ADOPTED this ___ day of _____, 2009.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

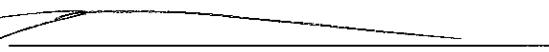
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Kristen L. Choi
Assistant City Attorney

APPROVED AS TO CONTENT:



Sean P. McGlynn, Director
Museums and Cultural Affairs Department

1.4 Artist does not have, and will not attempt to assert, the authority to make commitments for or to bind the City to any obligation other than the obligations set forth in this Agreement or in any subsequent written agreement that is signed by both parties.

ARTICLE TWO

Scope of Services

2.1 Artist's Obligations

- 2.1.1 Artist shall abide by all U.S. Federal, State and Local laws during the design, fabrication and transportation of the Artwork as it relates to the performance of this Contract including, but not limited to, all laws regarding taxation and immigration.
- 2.1.2 Artist shall perform all services ("Services") and furnish all supplies, materials and/or equipment as necessary for the off-site design and fabrication of the Artwork in accordance with the specified schedule and as further described here in below and in EXHIBIT "B" including collaboration with the City Engineering Department, City Museums and Cultural Affairs Department, and the City International Bridges department. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- 2.1.3 Artist shall determine the expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the City, by and through its Museums and Cultural Affairs Department ("MCAD"), the City International Bridges department and the City Engineering Department as set forth in this Agreement. All aspects of Artist's Services shall be coordinated with MCAD's Public Arts Coordinator.
- 2.1.4 Artist shall prepare three proposed designs from which City shall choose. Artist will then develop the design for the design chosen by City and the corresponding budget described in Sections 2.3 and 2.4 of this Agreement. The design concept shall include a description of all materials and products utilized in the Artwork and the required routine care and upkeep involved.
- 2.1.5 At the discretion of the City, Artist shall provide necessary information as reasonably requested by MCAD for public information meetings with the general public, design and construction coordination meetings with MCAD, the City Engineering Department, general contractor, landscape architect and other parties, as appropriate, to communicate about the Artwork and to ensure appropriate integration and/or installation of the Artwork.
- 2.1.6 Artist shall provide written, detailed instructions on the installation of the Artwork, shall provide instruction, guidance and consultation during the installation of the Artwork and shall provide insurance during the transportation for the value of the Artwork. Artist shall be liable for loss or damage to the Artwork during

C.O.

transportation of the Artwork until it is received at the site, installed according to Artist's detailed instructions and inspected by City and accepted.

- 2.1.7 Artist shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations.

2.2 City's Obligations

- 2.2.1 The City shall be responsible for providing Artist, at no expense to the Artist, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data, if any, which is needed by Artist in order to perform.
- 2.2.2 The City shall inform Artist of any limitations to the Artwork, during any stage of its design, fabrication or transportation to the Site, imposed by zoning or environmental laws and/or regulations, or any other laws or regulations.
- 2.2.3 The City shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 2.3.2 of this Agreement

2.3 Design

2.3.1 Concept/Schematic

- 2.3.1.1 Within 45 days of the execution of this Agreement, Artist shall submit to MCAD three design proposals, all of which shall meet the criteria in the Pre-Design Concept, that include detailed color drawings, models, and/or other documents as are required to present a meaningful representation of the Artwork. The Pre-Design Concept is attached hereto as Exhibit "C".
- 2.3.1.2 Within **30 days** of receipt of the three proposed designs, City will choose the design that Artist will fabricate and will notify Artist of City's chosen design in writing ("Design").
- 2.3.1.3 Within **45 days**, after City's notification of the chosen Design, Artist will finalize and submit the finalized Design and shall also consult with the City Engineering Department, the City Museums and Cultural Affairs Department and the City International Bridges department.
- 2.3.1.4 The finalized Design(s) will include: the project name, a description of the method by which the Artwork is to be fabricated and installed; a description of any operational, maintenance and conservation requirements for the Artwork; a description of the placement of the Artwork at the Site and any site preparations that may be required by the City including, but not limited to, any changes or modifications to any utility system or structure of the Site as necessary.

2.3.1.5 The Design must provide sufficient detail to permit the City to assure compliance with applicable local, state or federal laws, ordinances and/or regulations. The Artist shall attach to the Design a detailed budget for the Design and fabrication phases of the Artwork, as described in EXHIBIT "D" of this Agreement.

2.3.1.6 The Artist shall prepare drawings detailing every physical feature of the construction of the Artwork and its integration with the Site. These drawings shall indicate any risks involved in the integration and maintenance of the Artwork, as well as any third party subcontractor needed to work on the project. Artist, in collaboration with the City Engineering Department, shall define site preparations required for installation of the Artwork by submitting all necessary documentation and corresponding with City.

2.3.2 Approval

2.3.2.1 Within 30 days after the Artist submits the finalized Design, MCAD shall notify Artist whether it approves or disapproves of the Design. MCAD shall have discretion in approving outright or with conditions, or rejecting the Design. The City shall notify Artist of any revisions to the Design as are necessary for the Artwork to comply with any applicable laws, ordinances and/or regulations and other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the accepted Design.

2.3.2.2 If the City disapproves of the Design, MCAD will submit to Artist in writing the reasons for such disapproval. In such event, Artist will submit a revised design ("Revised Design") within 30 days after the MCAD has notified Artist of the City's disapproval. Artist will not be paid an additional fee for the Revised Design.

2.3.2.3 The Revised Design will reflect changes made to address the City's stated reasons for disapproval, as well as any adjustments in the budget or schedule that may be necessary. The City shall notify Artist in writing whether it approves or disapproves of the Revised Design within ten (10) days after Artist submits the Revised Design.

2.3.2.4 If Artist refuses to revise the Design pursuant to Section 2.3.2.2, or if Artist fails to adequately revise the Design in the judgment of the City, this Agreement shall terminate and the parties shall be under no further obligation to each other as of the date of such termination. The effective date of termination shall be the date the City submits its written disapproval of the Revised Design to Artist. The MCAD shall submit to Artist a written termination notice with the disapproval. The termination notice shall advise Artist that this Agreement has been terminated pursuant to this Article. The termination notice shall notify Artist that Artist is entitled to retain the

compensation paid prior to the termination date, and that the Parties are under no further obligation to each other. The termination notice shall confirm that the Artist shall retain ownership of all Designs, revised Designs and renderings thereof submitted hereunder.

2.3.3 Final/Construction Documents

2.3.3.1 Within 30 days of the City's acceptance of the Design or the Revised Design, Artist shall prepare detailed design drawings detailing every physical feature of the construction of the Artwork and its integration with the Site. These drawings and supplementary documents shall indicate any issues involved in the construction, integration and maintenance of the Artwork, as well as any third party subcontractor needed to work on the project.

2.3.3.2 Where appropriate, Artist, through MCAD, shall present such drawings to the City's Engineering Department for review by an engineer and for certification that the Artwork will be of adequate structural integrity.

2.3.3.3 If the City deems it appropriate, the City may present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork and Artist shall provide a written copy of the conservator's recommendations to MCAD.

2.4 Budget, Construction Schedule and Progress Reports

2.4.1 Budget

2.4.1.1 Artist shall prepare a budget, which shall include all goods, services and materials, with such costs itemized ("the Budget"). The Budget shall be submitted to and approved by the City as part of the Design, and shall be consistent with the budget outline attached to this Agreement as EXHIBIT "D".

2.4.1.2 Calculation of the Budget will take into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.

2.4.1.3 Artist shall keep a log of Artist's project hours and shall retain all original receipts pertaining directly to the design and oversight of fabrication and installation of the Artwork.

2.4.1.4 If Artist incurs costs in excess of the amount listed in the budget, Artist shall pay such excess from Artist's own funds unless Artist previously obtained approval for such costs from the City. Without said prior approval for such costs from the City, should Artist incur costs in excess of the amount listed in the budget, Artist shall not seek additional funds from the City.

2.4.1.5 Artist's books and other records related to the improvements shall be available for inspection by the City upon written request.

2.4.2 Schedule of Completion

2.4.2.1 Artist shall notify MCAD of the tentative schedule for the Design, fabrication and delivery of the Artwork to the Site, including a schedule for the submission of progress reports and inspections if any (the "Schedule"). MCAD shall have the right to require any submitted schedule to be coordinated with the City in conjunction with any other agreements for the Paso Del Norte International Bridge Public Art Project. MCAD shall approve the tentative schedule before it shall take effect. The Schedule may be amended by written agreement of both parties.

2.5 Fabrication Stage

2.5.1 Artist shall fabricate the artwork in substantial conformity with the Design or the Revised Design. Artist may not deviate from the approved Design without written approval of the City.

2.5.2 Artist shall take reasonable measures to protect or preserve the integrity of the Artwork such as the application of protective or anti-graffiti coatings, unless waived by the City. If the Artwork is being constructed on-site, Artist shall avoid creating nuisance conditions arising out of Artist's operations. Prior to requesting authorization to transport and install the Artwork, Artist is required to provide MCAD with a list of all workers or subcontractors and equipment to be used along with the hours of operation and the scope of work to be performed on site. All additional workers or subcontractors must provide proof of insurance prior to entering the site.

2.5.3 The City shall have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice to Artist.

2.5.4 If the City, upon review of the Artwork, determines that the Artwork does not conform to the Design or Revised Design, the City reserves the right to notify Artist in writing of the deficiencies and that the City intends to withhold the next payment installment ("Deficiency Notice").

2.5.5 Within ten (10) days of the written Deficiency Notice described hereinabove, or during such timeframe as agreed upon by the parties, Artist will promptly cure the City's objections and shall notify MCAD in writing of completion of the cure. The City shall promptly review the Artwork, and upon approval shall release the next payment installment pursuant to Section 4.2 herein if Artist has completed all work required in order to receive that payment installment. If Artist disputes the City's determination that the Artwork does not conform, Artist shall promptly submit reasons in writing to MCAD within ten (10) days of the City's prior notification to

the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether Artist has complied with the terms of this Agreement shall remain with the City.

- 2.5.6 Artist shall notify MCAD in writing immediately once fabrication of the Artwork has been completed.
- 2.5.7 The City shall inspect the Artwork within thirty (30) days after receiving notification pursuant to Section 2.5.6, prior to transportation and delivery, to determine that the Artwork conforms with the Design and give final approval of the Artwork. The City shall not unreasonably withhold final approval of the fabricated Artwork. In the event that the City does withhold final approval, MCAD shall submit the reasons for such disapproval in writing within ten (10) days of examining the fabricated Artwork. Artist shall then have thirty (30) days from the date of MCAD's notice of the disapproval to continue consultations with the City as the necessary adjustments are made to the fabricated Artwork in accordance with such writing.
- 2.5.8 MCAD shall promptly notify Artist of any delays at the Site impacting installation of the Artwork. Artist shall be required to inspect documents outlining and describing the Site Plan prior to the transportation and delivery of the Artwork and shall notify the MCAD of any adverse Site conditions that shall impact the installation of the Artwork that are in need of correction. Artist shall be entitled to additional time to perform this Agreement due to delays caused by the City but shall not be entitled to additional compensation for such delays.

2.6 Changes to Design

- 2.6.1 Prior to the execution of any change in the approved Design, Artist shall present proposed changes in writing to the City for further review and approval. Artist must provide a detailed description of any significant changes in the artistic expression, design, dimensions and materials of the Artwork that are not in substantial conformity with the already approved design. Such notice will also include a detailed description of any additional costs that may be incurred or changes in the Budget. A significant change is any change that materially affects installation, scheduling, site preparation or maintenance.
- 2.6.2 If the City approves the changes, the City shall promptly notify Artist in writing. If the City disapproves of the changes, MCAD shall promptly notify Artist in writing and Artist shall continue to consult with the City regarding the fabrication of the Artwork in substantial conformity with the approved Design.
- 2.6.3 Artist's fee shall be equitably adjusted for any increase or decrease in Artist's cost of, or time required for, performance of any services under this Agreement as a result of revisions made to the Design under Section 2.6.1. Any claim of Artist for adjustment under this paragraph must be asserted in writing within fifteen (15) days after the date of the revision by Artist.

2.7 Transportation and Delivery

- 2.7.1 Upon the City's final approval of the fabricated Artwork, as being in conformity with the Design, City shall arrange for transportation and delivery of the completed Artwork to the Site in accordance with the schedule provided for in Section 2.4.
- 2.7.2 Artist will coordinate closely with the City to ascertain that the Site is prepared to receive the Artwork. Artist must notify MCAD of any adverse conditions at the Site that would effect or impede the installation of the Artwork. Artist shall confer with City to ensure timely coordination with City's Construction team. Artist shall provide detailed instructions for the installation of the Artwork and consultation and advise to the City regarding the installation of the Artwork once authorized to do so by MCAD.
- 2.7.3 Within fifteen (15) days after installation of the Artwork, Artist shall furnish MCAD with a full written narrative description of the Artwork and an Artist Statement to explain, justify and contextualize the Artwork to help the viewer understand the most important aspects of the Artwork, the techniques used to make it and the primary sources of inspiration.

Within fifteen (15) days completion of the installation of the Artwork, Artist shall provide MCAD with written instructions for the appropriate maintenance and preservation of the Artwork along with product data sheets for any material or finish used. The Artwork must be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist must ensure that all maintenance requirements will be reasonable in terms of time and expense. The City is responsible for the proper care and maintenance of the Artwork.

2.8 Approval and Acceptance

- 2.8.1 The Artist shall notify MCAD in writing when the Services have been completed in substantial conformity with the Design to include Design, Fabrication and instructions, consultation and advise on Installation.
- 2.8.2 MCAD shall promptly notify Artist of its final acceptance of the Artwork within thirty (30) days after Artist submitted written notice pursuant to Section 2.8.1 above. The effective date of final acceptance shall be the date MCAD submits written notice to Artist of its final acceptance of the Artwork. The final acceptance shall be understood to mean that the City acknowledges completion of the Artwork in substantial conformity with the approved design, and that the City confirms that all Services as required of both Parties by this Agreement have been completed. Title to the Artwork passes to the City upon final acceptance by the City and final payment by the City to Artist.

- 2.8.3 If the City disputes that all the Services have been performed, the City shall notify Artist in writing of those services that Artist has failed to perform within thirty (30) days after Artist submitted written notice pursuant to Section 2.8.1 above. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether all Services have been performed shall remain with the City.
- 2.8.4 If Artist disputes the MCAD's determination that not all Services have been performed, the Artist shall submit reasons in writing to MCAD within ten (10) days of the City's prior notification to the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether all Services have been performed shall remain with the City.
- 2.8.5 Upon the resolution of any disputes that arise under paragraphs (3) and (4) of this section, MCAD shall notify Artist of its final acceptance of the Artwork pursuant to paragraph (2).

ARTICLE THREE
Term and Termination

3.1 Term. This Agreement will be in effect for a three- (3) year period from the Effective Date, or until terminated earlier as provided for herein.

3.2 Unilateral Termination. The City may unilaterally terminate the Agreement with or without cause at any time, such termination effective immediately upon written notice to Artist as provided herein. In the event the City terminates this Agreement, Artist shall be entitled to compensation for Services in accordance with the Payment Schedule as described hereinbelow in Article 4, with the understanding that the final 25% of the contract price may be withheld unless 100% completion of the Artwork is provided by Artist and is accepted by the City.

3.3 Termination by Mutual Consent. The Parties may terminate the Agreement by mutual consent upon such terms as they may agree in writing.

3.4 Time of Performance- Force Majeure. The Services shall be undertaken and completed as appropriate to carry out the purposes of this Agreement. Except as otherwise provided, neither Artist nor the City shall be liable to the other for any delay in, or failure of performance of any requirement contained in this Agreement caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. "Force majeure" includes those causes generally recognized under Texas law as constituting impossible conditions.

ARTICLE FOUR
Fees and Expenses

4.1 Fee. Artist agrees to perform the Services contemplated hereunder for a total fee of THREE HUNDRED THOUSAND AND NO/100 DOLLARS (\$300,000.00). Artist in accordance with the Payment Schedule described as follows.

4.2 Payment Schedule.

4.2.1 Within thirty (30) days of the Effective Date, the City will pay to Artist SEVEN THOUSAND AND NO/100 DOLLARS (\$7,000.00), for the purchase of materials and supplies, for the three design proposals required in paragraph 2.3.1.1.

4.2.2 The City agrees to pay Artist an additional ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$150,000.00), which represents 50% of the total cost, within thirty (30) days of receipt by the City of an itemized statement from the Artist of materials and supplies to begin fabrication, after City has chosen the Design..

4.2.3 The City agrees to pay Artist an additional SIXTY EIGHT THOUSAND AND NO/100 DOLLARS (\$68,000.00), within thirty (30) days of the agreement of the Parties that 100% of the fabrication of the Artwork is complete.

4.2.4 The City agrees to pay Artist an additional SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$75,000.00), which represents 25% of the total cost, within thirty (30) days of receipt by the City of an itemized statement from Artist for the completion of 100% of the Services rendered under this Agreement, including, but not limited to, Artist's providing detailed instruction, advice and consulting for the installation of the Artwork, , subject to a positive inspection and acceptance by MCAD of the Artwork and said Services. MCAD's acceptance at this stage shall not be granted unless the Artist provides to MCAD the written instructions for the maintenance and preservation of the Artwork as stated hereinabove in Section 2.7.4 and 2.7.5.

ARTICLE FIVE

INSURANCE AND INDEMNIFICATION PROVISIONS. Artist agrees to provide the following as a condition of the Agreement:

5.1 LIABILITY INSURANCE. Once the Artwork enters the United States and until the Artwork is officially accepted and title transferred to City, Artist shall provide public liability insurance for personal injuries and death growing out of any one accident or other cause in a minimum amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in

a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one accident or other cause.

5.1.1 Artist is required to purchase liability insurance on behalf of the City or, alternatively, may name the City as an additional insured on the policy of general liability insurance referenced above. Such insurance shall provide coverage for any alleged acts or omissions of the City, its agents, employees or independent contractors, alleged or asserted by any individual, in connection with the performance of this Agreement. Certificate of Insurance should be on behalf of the City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901.

5.1.2 Artist shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and contractors, its officers, agents, servants or employees.

5.1.3 No Services shall be provided by the City until Artist files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, the City Attorney's Office, and the Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the Term of this Agreement shall be grounds for cancellation of this Agreement.

5.2 INDEMNITY. As a condition of this Agreement, Artist or its insurer shall INDEMNIFY, DEFEND AND HOLD the City, its officers, agents and employees, HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE,) INCLUDING BUT NOT LIMITED TO ALL JUDGMENTS, SETTLEMENT AMOUNTS, ATTORNEYS' FEES, COURT COSTS AND EXPENSES INCURRED IN THE INVESTIGATION, HANDLING, DEFENSE AND LITIGATION OF ANY CLAIM OR SUIT, INCLUDING BUT NOT LIMITED TO ANY CLAIM OR SUIT FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON REGARDLESS OF THE MERITS OF OR OUTCOME OF SUCH CLAIM OR SUIT

ARISING OUT OF OR RELATED TO THIS AGREEMENT. THIS INDEMNIFICATION PARAGRAPH SHALL APPLY EVEN WHERE SUCH BODILY OR PERSONAL INJURY, ILLNESS, LOSS OF SERVICES, PHYSICAL OR MENTAL IMPAIRMENT TO OR DEATH OF ANY PERSON, OR FOR DAMAGE OR DESTRUCTION TO ANY PROPERTY RESULTS FROM OR INVOLVES NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS OR EMPLOYEES. Without modifying the conditions precedent for preserving defenses, asserting claims or enforcing any legal liability, against the City as required by the City Charter or any law, the City shall promptly forward to Artist every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. Artist shall 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as Artist may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. Artist shall pay all judgments in actions defended by Artist pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by Artist, and premiums on any appeal bonds. The City, at its election shall have the right to participate in any such negotiations or legal proceedings to the extent of its interest. The City shall not be responsible for any loss of or damage to Artist's property from any cause.

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ARTICLE SIX
Copyright

6.1 The issue of copyright shall be treated in accordance with applicable law and City ordinances.

6.2 The City shall have absolute, unrestricted rights incidental to its full ownership of the final artistic work to alter, change, modify, destroy, remove, move, replace, transport, or transfer in whole or in part, the final artistic work when the City deems necessary within its discretion in order to exercise the City's powers and responsibilities in regard to public works and improvements, in furtherance of the City's operations or for any other good cause. The Artist may retain copyright and other intellectual property rights in and to the final design and the final artistic work itself. The Artist shall grant to the City a perpetual, irrevocable license to graphically depict or display the final artistic work for any non-commercial purpose whatsoever.

6.3 The City acknowledges that Artist is retaining the copyright of the Artwork. Artist will be responsible for registering with the United States Register of Copyrights, a copyright in the Artwork in the Artist's name, at Artist's expense. The City shall not be responsible for the payment of any royalties to the Artist who created the Artwork, through any activities of the City or any third party.

6.4 Artist agrees that it is selling, transferring and releasing to the City full and exclusive right to the project name: Paso Del Norte International Bridge Public Art Project. Artist further agrees to cease and desist from using the project name Paso Del Norte International Bridge Public Art Project for future commercial use. The City agrees that Artist may use the name Paso Del Norte International Bridge Public Art Project for historical reference and non-commercial purposes.

6.4.1 The non-commercial use of the Paso Del Norte International Bridge Public Art Project project, including the name and reproduction of the images of the Artwork by Artist, shall not require the prior written consent of the City. Non-commercial uses of the Artwork include, but are not limited to, publication of the Artwork in order to show Artist's body of work, or publication or reproduction of the name of the project or the Artwork in a pamphlet or brochure or other historical documentation for Artist's archival purposes. All other parties shall request the City's consent to use the Paso Del Norte International Bridge Public Art Project project name and/or reproduce the images of the Assets.

6.4.2 The parties agree that the current project name "Paso Del Norte International Bridge Public Art Project" may change during the term of this Agreement. Said name change must occur in writing and be approved in accordance with the provisions of Section 2.3.2.1. A formal amendment to this Agreement shall not be necessary, but the City Clerk's Office must have on file the agreed to name change. Should the name change from "Paso Del Norte International Bridge Public Art Project Project", all provisions of this Agreement related to the name "Paso Del Norte International Bridge Public Art Project" shall apply to the new project name, including, but not limited to, this Article Seven.

ARTICLE SEVEN
General Administrative Provisions

7.1 Governmental Function. Artist expressly agrees that, in all things relating to this Agreement, the City is performing a governmental function, as defined by the Texas Tort Claims Act. The Parties hereby agree that the City enters into this Agreement in its capacity as a governmental entity for the purpose of performing a governmental function.

7.2 City Not Obligated to Third Parties. The City shall not be obligated or liable hereunder to any person other than Artist.

7.3 Waiver/Modification of Agreement. No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be valid unless provided as a written amendment hereto signed and approved as provided herein. No evidence of any waiver or modification shall be offered or received in evidence of any proceeding arising between the Parties out of or affecting this Agreement, or the rights or obligations of the Parties under this Agreement, unless such waiver or modification is in writing as hereinabove described. The Parties further agree that the provisions of this Section 8.3 cannot be waived.

7.4 Complete Agreement. This Agreement constitutes and expresses the entire agreement between the parties hereto in reference to the Services described herein, and in reference to any of the matters or things herein provided for, or hereinbefore discussed or mentioned in reference to such Services, all promises, representations and understanding relative thereto herein being merged.

7.5 Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Agreement.

7.6 Choice of Law. It is the intention of the Parties that this Agreement be construed in accordance with and under the laws of the State of Texas.

7.7 Venue. Venue shall be in the County of El Paso, Texas.

7.8 Compliance with Law. Artist shall comply with all Federal, State and local laws and ordinances applicable to the Services described herein.

7.9 Taxation and Immigration. Artist represents that no service required under this contract will be performed within the United States, that he does not have a permanent establishment in the United States, and is not present in the United States more than 183 days each year for the purpose of his business. Artist will comply with all United States Tax laws and with all United States Immigration laws in connection with all services performed under this contract.

7.10 Place of Performance. The Artist will design and fabricate the Artwork in the Country of Mexico, and the City will provide for the artwork to be transported through Mexico into El Paso, Texas, and it will be delivered in El Paso, Texas at the Site.

7.10 Notice. Any notices required under this Agreement shall be sufficient if sent by Certified Mail, Return Receipt Requested, postage prepaid, to the City or Artist at the following addresses:

CITY: City of El Paso
ATTN: City Manager
2 Civic Center Plaza
El Paso, Texas 79901-1196

CITY: City of El Paso
Director, Museums and Cultural Affairs Department
2 Civic Center Plaza
El Paso, Texas 79901-1196

ARTIST: Enrique Carbajal
Cda. Protasio Tagle 45
Mexico, D.F. 11850

Changes may be made to the names and addresses noted herein through timely written notice to the other party.

7.11 Successor and Assigns. This Agreement shall be binding on the City and Artist, their successors and assigns. Neither party may assign, sublet or transfer its interest in this Agreement without the written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any principal or agent of the City.

7.12 Captions. The captions of this Agreement are for informational purposes only and shall in no way affect the substantive terms or conditions of this Agreement.

7.13 Warranty of Capacity to Execute Agreement. The people signing this Agreement on behalf of the parties warrants that he/she has the authority to do so and to bind the party for which he/she has authority to sign this Agreement and all the terms and conditions contained herein.

7.14. Binding Effect. Each person signing below represents that he or she has read this Agreement in its entirety; understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

IN WITNESS WHEREOF the parties hereto have executed this Agreement at El Paso, Texas effective as of the first date appearing heretofore.

(SIGNATURES APPEAR ON FOLLOWING PAGE)

SIGNED this _____ day of _____, 2009.

CITY OF EL PASO

Joyce A. Wilson
City Manager

ARTIST:



Enrique Carbajal
By: _____
Title: _____

APPROVED AS TO FORM:



Kristen L. Choi
Assistant City Attorney

APPROVED AS TO CONTENT:



Sean P. McGlynn, Director
Museums and Cultural Affairs Department

EXHIBIT "A"

PASO DEL NORTE INTERNATIONAL BRIDGE PUBLIC ART PROJECT

LEGAL DESCRIPTION OF THE SITE

Formerly known as 8th Street, City of El Paso ROW, between Santa Fe Street and the Federal Property and between lot 11, Block 44 and Lot 20, Block 61 Campbell Addition.

EXHIBIT "B"

PASO DEL NORTE INTERNATIONAL BRIDGE PUBLIC ART PROJECT

Artist shall perform work according to the following schedule:

-Three Design Proposals - 45 days from Effective Date of Agreement. (*Artist shall not commence Artist's Services until this Agreement is fully executed and City issues a notice to proceed with work.*)

-Final Design - 30 days after receiving notification of the City's chosen Design and MCAD's notice to proceed to Final Design.

-Fabrication - 90 days after receiving MCAD's approval of the Final Design and MCAD's notice to proceed to Fabrication.

-Instructions, guidance and consultation for installation - 30 days after receiving the City's final approval of the fabricated Artwork, as being in conformity with the Design.

C.C.

EXHIBIT "C"

PASO DEL NORTE INTERNATIONAL BRIDGE PUBLIC ART PROJECT

PRE-DESIGN CONCEPT

Artist shall design, fabricate and deliver to the Site a 40' to 45' tall steel sculpture in geometric shapes and patterns uniquely designed for the City of El Paso.

E.P.O.

EXHIBIT “D”

PASO DEL NORTE INTERNATIONAL BRIDGE PUBLIC ART PROJECT

BUDGET OUTLINE

Artist’s Fee	_____
Drafting Fees	_____
Materials & Supplies	_____
Insurance	_____
Travel	_____
Administrative Expenses (telephone, etc)	_____
Photographic Documentation (a CD file of the completed work)	_____
Pricing Contingency	_____
Other Expenses	_____
TOTAL BUDGET	\$300,000.00