

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

DEPARTMENT: Engineering and Construction Management

AGENDA DATE: September 28, 2010

CONTACT PERSON NAME AND PHONE NUMBER: R. Alan Shubert, P.E., City Engineer X4423

DISTRICT(S) AFFECTED: 8

SUBJECT:

That the Mayor be authorized to sign an Interlocal Agreement by and between the City of El Paso and the El Paso County Community College District (EPCC) wherein EPCC will pay the City for installation of conduit and fiber optics serving the EPCC facility at 918 North Oregon Street, El Paso, Texas. Installation will be by City's Contractor, who is presently constructing the city project known as the Oregon Street Reconstruction. Payment by EPCC will be for all charges by the contractor for the construction work required by EPCC, which shall be at no cost to the City.

BACKGROUND / DISCUSSION:

The El Paso Community College has requested that a line be relocated through the City's contract. The agreement provides the mechanism for the transfer of funds to be use on the project.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

\$45,315.04 El Paso County Community College District funds

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD:



(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

RESOLUTION

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

That the Mayor be authorized to sign an Interlocal Agreement by and between the City of El Paso and the El Paso County Community College District (EPCC) wherein EPCC will pay the City for installation of conduit and fiber optics serving the EPCC facility at 918 North Oregon Street, El Paso, Texas. Installation will be by City's Contractor, who is presently constructing the city project known as the Oregon Street Reconstruction. Payment by EPCC will be for all charges by the contractor for the construction work required by EPCC, which shall be at no cost to the City.

ADOPTED THIS _____ DAY OF _____, 2010.

THE CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Mark Shoesmith
Assistant City Attorney

APPROVED AS TO CONTENT:



R. Alan Shubert, P.E.
City Engineer

STATE OF TEXAS §
 § **INTERLOCAL AGREEMENT**
COUNTY OF EL PASO §

This Interlocal Agreement (hereinafter "Agreement") is entered into this _____ day of _____, 2010, by and between the City of El Paso, a home rule municipal corporation (hereinafter "the City") and El Paso County Community College District (hereinafter "EPCC").

WHEREAS, the EPCC have facilities at 918 Oregon, El Paso, Texas (the facility) served by underground fiber optic cables that EPCC wishes to have replaced, and

WHEREAS, the City presently has the Oregon Street Reconstruction project presently being constructed adjacent to the EPCC facility.

WHEREAS, both the City and EPCC have determined that the terms and considerations provided for herein are of mutual benefit and are fair, reasonable and the product of arms length negotiations; and

WHEREAS, it is necessary for the City and EPCC to enter into this Agreement concerning the installation of a fiber optic cable to the EPCC facility in order for the City's contractor for the Oregon Street Reconstruction project to install the fiber optic cable and related items; and

WHEREAS, the City and EPCC are authorized to enter into this Agreement under the provisions of Chapter 791, Texas Government Code.

NOW, THEREFORE, THE CITY AND EPCC HEREBY ENTER INTO THIS INTERLOCAL AGREEMENT UNDER THE FOLLOWING TERMS AND CONDITIONS:

1.0 EXHIBITS AND DEFINITIONS

1.1 The exhibits listed herein and attached to this Agreement are incorporated herein by reference for all purposes as if set forth verbatim:

Exhibit "A" an aerial photograph showing the existing fiber optics cable and the proposed location of the fiber optics cable to be installed by City' contractor.

Exhibit "B" The cost estimate for installation of the fiber optic cable and related items provided by the City's Contractor.

The following definitions shall apply throughout this Agreement:

"City's contractor" means Tri-State Electric, Ltd.

"Completion" means the execution, satisfaction and fulfillment of all terms and conditions of this agreement, including (1) inspection of the Project and approval of the

Project by EPCC after construction and (2) the full and complete reimbursement by EPCC to City of all expenses and costs of construction incurred by City's Contractor in regard to the Project.

"Project" means the installation of fiber optic cable and related items as shown on Exhibit "B provided for herein to be constructed by the City's contractor and paid for by EPCC.

2.0 CONTRACTUAL RELATIONSHIP

2.1 The parties to this Agreement are governmental entities that are entering into this contract pursuant to Chapter 791, Texas Government Code, which establishes the legal relationship between the parties. No other legal relationship is intended to be created by this Agreement, to include but not be limited to landlord-tenant, employer-employee, or principal-agent. The parties to this Agreement are independent contractors. No provision of this Agreement that imposes an obligation or restriction on either party not permitted by applicable law shall be enforceable.

2.2 EPCC acknowledges and agrees that it 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. The CITY also acknowledges and agrees that it does not have, and will not attempt to assert, the authority to make commitments for or to bind EPCC to any obligation other than the obligations set forth in this Agreement.

2.3 As an independent contractor, each party understands and agrees that it will be responsible for its respective acts or omissions, and neither party shall be responsible as an employer to the other party's officers, employees, agents or representatives who perform any service in connection with this Agreement.

2.4 EPCC acknowledges and agrees that it 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. The City also acknowledges and agrees that it does not have, and will not attempt to assert, the authority to make commitments for or to bind EPCC to any obligation other than the obligations set forth in this Agreement.

3.0 GOVERNMENTAL FUNCTION AND IMMUNITY.

3.1 Governmental Function. The CITY and EPCC expressly agree that, in all things relating to this Agreement, the parties enter into this Agreement for the purpose of performing governmental functions and are performing governmental functions, as defined by the Texas Tort Claims Act. The parties further expressly agree that every act or omission of each party, which in any way pertains to or arises out of this Agreement, falls within the definition of governmental function.

3.2 Sovereign Immunity. The CITY and EPCC reserve, and do not waive, their respective rights of sovereign immunity and similar rights and do not waive their rights

under the Texas Tort Claims Act. The parties expressly agree that neither party waives, nor shall be deemed hereby to waive, any immunity or defense that would otherwise be available to it against claims arising in the exercise of its powers or functions or pursuant to the Texas Tort Claims Act or other applicable statutes, laws, rules, or regulations.

4.0 RISK ALLOCATION – LIMITATION OF LIABILITY

4.1 Liability. This Agreement is not intended to alter or reallocate any defense or immunity authorized or available to either party by law.

4.1.1 Exclusion of Incidental and Consequential Damages. Independent of, severable from, and to be enforced independently of any other enforceable or unenforceable provision of this Agreement, neither party shall be liable to the other party (nor to any person claiming rights derived from such party's rights) for incidental, consequential, special, punitive, or exemplary damages of any kind - including lost profits, loss of business, and further including, mental anguish, emotional distress and attorneys fees- as a result of breach of any term of this Agreement, regardless of whether the party was advised, had other reason to know, or in fact knew of the possibility thereof, except as expressly provided herein. Neither party hereto shall be liable to the other party or any third party by reason of any inaccuracy, incompleteness, or obsolescence of any information provided or maintained by the other party regardless of whether the party receiving said information from the other party was advised, had other reason to know, or in fact knew thereof.

4.1.2 Intentional Risk Allocation. The CITY and EPCC each acknowledge that the provisions of this Agreement were negotiated to reflect an informed, voluntary allocation between them of all risks (both known and unknown) associated with the transactions associated with this Agreement. The disclaimers and limitations in this Agreement are intended to limit the circumstances of liability. The remedy limitations, and the limitations of liability, are separately intended to limit the forms of relief available to the parties.

4.1.3 No Indemnification. The Parties expressly agree that, except as provided herein, neither Party shall have the right to seek indemnification or contribution from the other Party for any losses, costs, expenses, or damages directly or indirectly arising, in whole or part, from this Agreement.

4.1.4. Fines and Penalties. Each party shall be solely responsible for fiscal penalties, fines or any other sanctions occasioned as a result of a finding that violations of any applicable local, state or federal regulations, codes or laws occurred as a result of that parties actions, except as may be specifically provided by law.

5.0 SCOPE, TERM, RIGHT OF ENTRY AND MAINTENANCE

5.1 Scope: Installation of fiber optic cable and related items shown in Exhibit B, including connecting new cable to the EPCC facility and disconnecting the existing fiber optic cable to the EPCC facility.

5.2 Technical information: EPCC shall provide all technical information necessary for the installation of the fiber optic cable to the EPCC facility to the City's project manager. EPCC shall not communicate with the City's contractor unless in the presence of the City's project manager.

5.3 Construction coordination. It is anticipated that the project will be completed by November 1, 2010. However, the City and EPCC acknowledge that delays may result. The City's project manager will coordinate the schedule of the work for the project, specifically coordinating the disconnection of service from the existing fiber optic cable and the connection of the new fiber optic cable.

5.4 Entry Granted. EPCC herein grants a right of entry to the City, to include its agents, employees, and contractors, onto any and all EPCC property necessary to access and work within the Project area and the EPCC facility.

5.5 Maintenance. EPCC shall be responsible for the maintenance and repair of the fiber optic cable and related items upon completion of the project.

6.0 **COSTS**. EPCC and City Agree that the cost for the project shown in Exhibit "B" is an estimate from the City's contractor and that actual costs may vary. Upon completion of the project, City shall submit to EPCC the final costs of the project as documented by City's Contractor. EPCC shall pay to City all reasonable and necessary costs related to the project within 60 days of its receipt of the final costs. City shall not be responsible for any costs related to the project.

7.0 **TERMINATION**. This Agreement may be terminated as provided herein.

7.1 Termination by Either Party. It is further understood and agreed by the City and EPCC that either party may terminate this Agreement in whole or in part. Such termination may be made for failure of one party to substantially fulfill its contractual obligations, pursuant to this Agreement, and through no fault of the other party. No such termination shall be made, unless the other party being terminated is granted (a) written notice of intent to terminate enumerating the failures for which the termination is being sought; (b) a minimum of **thirty (30) consecutive calendar days** to cure such failures; and (c) an opportunity for consultation with the terminating party prior to such termination.

7.3 Termination Shall Not Be Construed as Release. Termination by either party shall not be construed as a release of any claims that the terminating party may be lawfully entitled to assert against the other party. Further, the terminated party shall not be relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.

7.3. Costs to date of termination. In the event EPCC terminates this agreement, it shall pay all of the costs incurred by City's contractor project through the date of termination and such obligation shall survive the termination of this agreement.

7.4 Except as otherwise provided herein all duties and obligations of the City and EPCC shall cease upon termination or expiration of this Agreement.

8.0 GENERAL PROVISIONS

8.1 Compliance with Laws. In the performance of their obligations under this Agreement, the parties shall comply with all applicable federal, state or local laws, ordinances and regulations.

8.2 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas, along with any applicable provisions of the federal law, the City Charter and/or any ordinance of the CITY.

8.3 Venue. The parties hereto agree that this Agreement shall be enforceable in El Paso, Texas, and if legal action is necessary to enforce it, exclusive venue shall lie in El Paso County, Texas. Should the need for dispute resolution arise, venue is in the El Paso County, Texas.

8.4 Current Revenues. Pursuant to Section 791.001(d)(3), Texas Government Code, each party paying for the performance of governmental functions or services will make those payments from current revenues available to the paying party.

8.5 No Waiver. The failure of either party at any time to require performance by the other party of any provision of this agreement shall in no way affect the right of such party to require performance of that provision. Any waiver by either party of any breach of any provision of this Agreement shall not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself, or a waiver of any right under this Agreement.

8.6 Amendment; Assignability. This Agreement and the obligations hereunder shall not be amended, assigned, transferred or encumbered, in any manner without the written consent of the other party.

8.7 Severability. All agreements and covenants contained in this Agreement are severable. Should any term or provision of this Agreement be declared illegal, invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement will not be affected; and in lieu of each provision which is declared to be illegal, invalid or unenforceable, there will be added as part of this Agreement, a provision which preserves the intention of the unenforceable provision, but which complies with the law.

8.8 Section Headings. The paragraph or section headings contained in this Agreement are for reference purposes only and shall not in any way control the meaning or interpretation of this Agreement.

8.9 Representation of Counsel; Mutual Negotiation. Each party has had the opportunity to be represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated and prepared at the joint request, direction, and construction of the parties, at arms' length, with the advice

and participation of counsel, and will be interpreted in accordance with its terms without favor to any party. This Agreement shall not be construed against or unfavorably to any party because of such party's involvement in the preparation or drafting of this Agreement.

8.10 Notices. Any notice, demand, request, consent or approval that either party may or is required to provide to the other, shall be in writing and either personally delivered or sent via United States Postal Service certified mail return receipt requested, addressed to the other party at the following addresses provided below:

CITY: City of El Paso
 Attention: Office of the City Manager
 Two Civic Center Plaza, 10th Floor
 El Paso, Texas 79901-1196

EPCC: El Paso Community College
 Attention: Vice President
 P.O. Box 20500
 El Paso, Texas 79998-0500

Changes may be made to the above addresses and addressees through timely written notice provided to the other party.

8.11 Execution and Counterparts. This Agreement may be executed in any number of counterparts; each of which when so executed and delivered shall be deemed an original, and such counterparts together shall constitute only one instrument. Any one of such counterparts shall be sufficient for the purpose of proving the existence and terms of this Agreement, and no party shall be required to produce an original or all of such counterparts when making such proof.

8.12 Complete Agreement. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof, and this Agreement, together with any Exhibits attached hereto, constitutes the entire agreement between the parties relating to the terms and conditions of the Agreement. The parties expressly acknowledge and warrant that there exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein. Unless expressly stated, this Agreement confers no rights on any person(s) or business entity(s) that is not a party hereto.

8.13 Warranty of Capacity to Execute Contract. The person signing this Agreement on behalf of each party warrants that he/she has the authority to do so and to bind each party to this Agreement and all the terms and conditions contained herein.

Each person signing below represents that he or she has read this Agreement in its entirety (including any and all Attachments/Exhibits); understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

THE CITY OF EL PASO

By: _____
John F. Cook, Mayor

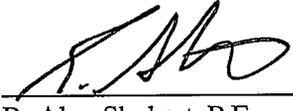
**EL PASO COUNTY COMMUNITY
COLLEGE DISTRICT**

By: 
Richard M. Rhodes, President of the College

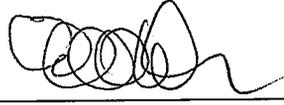
APPROVED AS TO FORM:


Mark Shoesmith
Assistant City Attorney

APPROVED AS TO CONTENT:


R. Alan Shubert, P.E.
City Engineer

APPROVED AS TO FORM:


Edward W. Dunbar
Attorney for EPCC