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

DEPARTMENT: **Engineering**

AGENDA DATE: **October 20, 2009**

CONTACT PERSON/PHONE: R. Alan Shubert, City Engineer

DISTRICT AFFECTED: 6

SUBJECT:

Item is to request approval of a resolution authorizing the City Manager to execute, on behalf of the City of El Paso, a contract of sale for the purchase of a portion (6,340 s.f., more or less) of an industrial property, M-1 Zoning, to be used as right-of-way for the *Roseway Street & Drainage Improvement Project.*

BACKGROUND / DISCUSSION:

This project consists of street and drainage improvements on the eastern portion of Roseway between Zaragoza and Carnes Road. Improvements will include curb & gutter, sidewalks, underground drainage, street widening, re-paving and the construction of a stormwater retention pond. The 6,340 s.f. taking was appraised by *Mars Appraisal Associates(appraiser Ramona Marslender)* for $25,500.00. The owning entity submitted a counter-offer to the City of $30,000.00 citing a .70 cent per square ft. higher value opinion. The counter offer was reviewed by Engineering's Administrative Settlement Committee and determined to be reasonable.

PRIOR COUNCIL ACTION:

Mayor and Council have not taken any prior action related to this parcel. Previous to the storms of August 2006, Council had approved multiple parcels within this project's right-of-way requirements scope.

AMOUNT AND SOURCE OF FUNDING:

This expenditure is funded through general obligation bonds approved by the voters as part of the February 2004 Bond Election. No budgetary adjustments are required. Funding source is as follows:

Project	Fund	Department	Account
PBE04ST127	29142	14200403	508000

BOARD / COMMISSION ACTION:

(N/A)

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

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

DEPARTMENT HEAD: for Rene Rey

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 Contract of Sale between the **CITY OF EL PASO** and **RIO GRANDE STUCCO COMPANY** for the purchase of the following parcel for the Roseway Street and Drainage Improvement Project for THIRTY THOUSAND AND NO/100THS DOLLARS ($30,000.00):

> **Parcel 15:** 6,340 square feet, more or less, being a portion of Ysleta Railroad Station, Ysleta Grant, City of El Paso, El Paso County, Texas.

ADOPTED this _____ day of _____, 2009.

THE CITY OF EL PASO

_____
John F. Cook, Mayor

ATTEST:

_____
Richarda D. Momsen, City Clerk

APPROVED AS TO FORM:

Theresa Cullen
Deputy City Attorney

APPROVED AS TO CONTENT:

for R. Alan Shubert, P.E.
City Engineer

#48431v1 - ENG/Roseway Drainage Project-Parcel 15/Reso

STATE OF TEXAS §
§ **CONTRACT OF SALE**
COUNTY OF EL PASO §

This Agreement is entered into this ____ day of _____, 2009, by and between the **CITY OF EL PASO**, hereinafter referred to as the "City," and **RIO GRANDE STUCCO COMPANY, a Texas Corporation,** hereinafter referred to as "Seller."

NOW, THEREFORE, for and in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Description of Property. The Seller hereby agrees to sell and convey and the City hereby agrees to acquire free and clear of any liens or encumbrances, the following described real property located in El Paso County, Texas:

> **Parcel 15:** 6,340 square feet, more or less, being a portion of Ysleta Railroad Station, being more particularly described by metes and bounds in Exhibit "A" attached hereto and made a part hereof for all purposes;

together with any interest of the Seller in (i) all improvements, if any, and (ii) all right, title and interest of the Seller in and to any easements, appurtenances, and rights-of-way, and all interests in, on or to, any land, highway or street, in, on, across, in front of, abutting, or adjoining any such real property, all of such property, hereinafter collectively referred to as the "Property".

2. Amount of Payment of Purchase Price. The purchase price for the Property shall be **THIRTY THOUSAND AND NO/100THS DOLLARS ($30,000.00).**

2.1 Payment of Purchase Price. The full amount of the purchase price will be payable in cash at the closing.

2.2 Escrow Deposit. The City shall deposit with Stewart Title of El Paso, 415 North Mesa, El Paso, Texas 79901, (the "Agent" or the "Title Company"), in escrow, the sum of One Hundred and 00/100 Dollars ($100.00) (the "Escrow Deposit"), within three (3) business days after the City's actual receipt from the Agent, of a written notification that Agent has received a fully executed original of this Contract, signed by the Seller and the City. The Agent shall invest the Escrow Deposit in an interest-bearing account insured by the Federal Deposit Insurance Corporation, and the Escrow Deposit will be held and disbursed by the Agent strictly in accordance with the terms and provisions of this Contract. In the event the City fails to deposit the Escrow Deposit with the Agent within said three (3) day period, the Seller, at its option, may terminate this Contract. Any interest which shall accrue on the Escrow Deposit from and after the date hereof through the date on which the Escrow Deposit is or should have been disbursed by the Agent shall constitute part of the Escrow Deposit. At such time as the Closing shall have been consummated, the Escrow Deposit, together with all interest accrued thereon, shall be returned to the City or, at the option of the City, disbursed to the Seller and applied to the payment of the Purchase Price.

3. Conditions to City's Obligations. The obligations of the City hereunder to consummate the transaction contemplated herein are subject to the satisfaction of each of the following conditions, any of which may be waived, in whole or in part, in writing by the City, at or prior to Closing.

3.1 Inspection. Subject to the provisions of Paragraph 6.1 hereinafter, the City shall complete its inspection of the Property on or before fifteen (15) City working days after the execution of this Agreement by the City (the "Inspection Period"). For the purposes hereof, the City may complete or cause to be completed inspections of the Property by inspectors of the City's choice. Inspections may include, but shall not be limited to: (i) physical property inspections; (ii) environmental assessment or engineering study including the performance of tests such as soils tests, water tests or air sampling. The Seller shall permit the City and the City's inspectors access to the Property at all reasonable times. In the case of any invasive testing (taking samples, etc.), the City shall provide to the Seller evidence that the consultant making such inspection carries liability insurance and is properly licensed. During the Inspection Period, the City may determine in its sole and absolute discretion whether the Property is suitable for the City's needs. In the event that the City in its sole and absolute discretion determines that the Property is not suitable for its needs, the City may terminate this Contract by delivering a written termination notice to the Seller within the Inspection Period in which case the Escrow Deposit (less $50 which is independent contract consideration for this right to cancel), along with all interest accrued or earned thereon, will be refunded to the City. During the Inspection Period, the Seller covenants and agrees to make available to the City the Property. Such inspection shall be conducted by the City, and permitted by the Seller, on business days during normal business hours. All information provided by the Seller to the City or obtained by the City relating to the Property in the course of its review shall be treated as confidential information by the City, to the extent allowed by federal and state law, and in the event the City terminates this Contract, the City shall provide the Seller with all reports, studies, documents and other information obtained by the City relating to the Property. To the extent allowed by Texas State law, the City shall be liable for all damage or injury to any person or Property resulting from any such inspection occasioned by the acts of the City, its employees, agents or representatives.

3.2 Title Insurance. Within ten (10) working days after the date of execution of this contract, the City at its expense will order a title commitment ("Commitment"), accompanied by copies of all recorded documents affecting the property for the issuance of an Owner's Policy of Title Insurance with respect to the Property, in an amount to be decided by the City ("Owner's Policy").

3.3 Title Objections. The City will give the Seller written notice on or before the expiration of ten (10) working days after it receives the Commitment that the condition of the title set forth in the Commitment is or is not satisfactory. In the event the City states that the condition is not satisfactory, the City will specifically set forth in such notice the defect or exception to title that is deemed objectionable. The Seller may at its option promptly undertake to eliminate or modify all unacceptable matters to the reasonable satisfaction of the City. Otherwise, this condition will be deemed acceptable and any objection by the City will be deemed waived.

4. Representations and Warranties of Seller. The Seller hereby represents, to the best of its knowledge, covenants, and warrants to the City, as follows:

4.1 Parties in Possession. There are no parties in possession of any portion of the Property as lessees, tenants at sufferance, or otherwise.

4.2 Legal and Authorized Transactions. The Seller warrants that no person or persons own an interest in the fee title in the Property other than the Seller and that the joinder of no other third party shall be required to consummate this transaction.

4.3 Mechanic's Lien. To the Seller's best knowledge and belief: (i) no action has been taken, suffered or permitted by or on behalf of the Seller, the effect of which would be to establish or cause the inception or priority of any mechanic's or materialmen's lien, statutory, constitutional or otherwise, or other lien, charge or encumbrance upon the Property or any part thereof or interest therein; or (ii) no liens or lien claims, choate or inchoate, arising from the Seller's actions or otherwise, exist or can exist for the benefit of mechanics or materialmen in regard to the Property. Except as expressly disclosed in the documents relating to this transaction, the Seller has not entered into any contracts or agreements relating to the use of ownership of the Property or by which any person or entity agreed to provide labor, services or materials in regard to the Property or the business of the Seller.

4.4 Litigation. To the best knowledge of the Seller, there is no pending or contemplated litigation before or by any court of law pertaining to the Property or which involve incidents occurring on the Property including, but not limited to, claims of damage to persons or property.

4.5 Bills Paid. At closing, there will be no unpaid bills or claims in connection with any repair or operation of the Property.

4.6 Compliance With Law. To the Seller's knowledge, the Property is in compliance with all applicable laws, ordinances, rules and regulations of any Government or any agency, body or subdivision, including any environmental issues related to the Seller's activities thereof.

4.7 Taxes. To the best of the Seller's knowledge, no state or municipal taxes are due with respect to the Property and no liens for such taxes are in effect against the Property, except as set forth on the Title Commitment. The Seller agrees to pay the prorated taxes, if any, due on the Property for the year 2009 through the date of Closing.

4.8 Pre-Closing Claims.

A. The Seller agrees that the City's acceptance of title to the Property under the conveyance documents should not create any liability on the City's part to third parties that have claims of any kind against the Seller in connection with the Property. The City hereby expressly disclaims any and all liability to third parties that have any claims against the Seller. The City will not assume or agree to discharge any liabilities pertaining to the Property that occurred or accrued prior to the date of Closing. The Seller agrees to indemnify and hold the City harmless from and against any claims, injuries, liabilities, losses, damages, or

expenses, including attorneys' fees and court costs, pertaining to claims arising out of the Property, and accruing prior to and arising from events that occurred prior to the date of Closing.

B. The Seller agrees to indemnify and hold the City harmless from and against any and all claims, injuries, liabilities, losses, damages, or expenses, including attorneys fees and court costs, pertaining to claims arising out of the Property, accruing prior to and arising from events that occurred prior to the date of Closing, and arising from any of the following: (i) testing or inspection obligations required by federal or state environmental agencies, including without limitation any required after the date of Closing; (ii) pending environmental investigations or cases by the Texas Commission on Environmental Quality known to the Seller; or (iii) the acts or omissions of the Seller on the Property. The Seller and the City each agree to promptly inform other party of any correspondence, directive, inquiry, demand, request, or similar communication from any federal or state environmental agency relating to the Property, to reasonably cooperate with the other party on the response to and handling of such communication and any related proceeding, and allow the reasonable participation of the other party in connection with the same.

4.9 Authority. The Seller has full right, power and authority to convey the property to the City and to consummate this transaction as provided in this Contract without the joinder of any other person or entity.

4.10 Title. The Seller has good and indefeasible title to a fee simple estate in the Property, subject to no liens, charges, encumbrances or exceptions other than those shown on the Title Commitment.

4.11 Condition of Property Prior to Closing. Prior to Closing, the Seller shall not create or permit to be created any easement or other condition affecting the Property without the prior written consent of the City.

4.12 Misrepresentation. The Seller shall indemnify and hold the City harmless from and against any losses, damages, costs or expenses (including attorneys' fees) incurred by the City as a direct or indirect result of (i) breach of any representation or warranty of the Seller contained in this document, or (ii) any breach or default by the Seller under any of the covenants or agreements contained in this document, or (iii) any breach or default by the Seller under any of the covenants or agreements contained in this document to be performed by the Seller, all of which shall survive the Closing hereof.

4.13 Survival. All representations, warranties, covenants and agreements of the Seller made in this document, including without limitation any indemnity obligations, shall survive the execution and delivery hereof and of the Deed as well as the Closing hereunder, until such time as all of the obligations of the signatories hereto shall have lapsed in accordance with their respective terms [if and as applicable] or shall have been discharged in full.

5. Closing. The closing of this transaction ("Closing") shall take place at the offices of the Title Company on or before thirty (30) days after the execution of this Agreement by the City.

5.1 Possession. Possession of the Property will be transferred to the City upon Closing.

5.2 Real Property Taxes. The Seller agrees to pay the taxes due on the Property for the year 2009 prorated through the day of closing, if any.

5.3 Closing Costs.

(a) All recording fees arising from the recordation of documents necessary to show good title to the Property shall be paid by the City.

(b) Premiums and other charges for the issuance of the Owner's Policy of Title Insurance for the Property shall be paid by the City.

(c) Escrow fees, if any, shall be paid by the City.

5.4 Seller's Obligations. At Closing, the Seller shall deliver to the City a duly executed and acknowledged Warranty Deed to the Property, free and clear of any and all liens, encumbrances, conditions, easements, assessments, and restrictions, except for (i) ad valorem taxes for the year of Closing which shall be prorated to the date of Closing, (ii) the standard printed exceptions contained in the usual form of the Owner's Policy, and (iii) any other exceptions set forth in the Title Policy which the City has approved pursuant to Paragraph 3.2 above.

5.5 Other Obligations. Each party shall do all other acts, or deliver any other instruments or documents required or helpful to be done or delivered, in order to consummate this transaction.

6. Default.

6.1 Breach by Seller. In the event that the Seller shall fail to fully and timely perform any of its obligations under this Agreement, or shall fail to consummate the sale of the Property for any reason, except the City's default, or the termination of this Agreement in accordance with its terms, the City may enforce specific performance of this Agreement.

6.2 Breach by City. In the event that City shall fail to fully and timely perform any of its obligations under this Agreement, or shall fail to consummate the sale of the Property for any reason, except the Seller's default, or the termination of this Agreement in accordance with its terms, due to the difficulty of assessing the Seller's actual damages as a result of such breach by City, the Seller shall have a right to receive the Escrow Deposit as independent consideration as well as the reasonable and necessary out-of-pocket expenses of the Seller directly relating to this Agreement, such sum being agreed upon as liquidated damages for the failure of the City to perform the duties, liabilities and obligations imposed upon it by the terms and provisions of this Agreement, and the Seller agrees to accept and take such cash payment as its total, reasonable damages and relief and as the Seller's sole, exclusive remedy hereunder in such event.

7. Miscellaneous.

7.1 Notice. Any notice, demand, direction, request, or other instrument authorized or required by this Agreement to be given to or filed with either party, shall be deemed to have been sufficiently given or filed for all purposes, if and when personally delivered or sent by certified mail, postage prepaid, return receipt requested, to the address specified below or at such other address as may be designated in writing by the parties:

Seller: Rio Grande Stucco Company
Lewis Winchell, President
1550 Parkway Blvd.
West Sacramento, CA 95691

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

8. Entire Agreement/Governing Law. **This Agreement constitutes the entire agreement between the parties, and supersedes all prior agreements and understandings, written or oral, regarding the subject matter of this Agreement, and may be amended or supplemented only by an instrument in writing, executed by the party against whom enforcement is sought. This Agreement shall be governed in all respects, including validity, interpretation and effect, by and shall be enforceable in accordance with the laws of the State of Texas.**

8.1 Time. Time is of the essence of this Agreement and each and every provision hereof.

8.2 Severability. If any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portion shall not in any way be affected or impaired.

8.3 Survival of Provisions. The terms contained in this Agreement, including without limitation, representations, warranties, covenants and agreements of the parties, shall survive the Closing and shall not be merged therein. In case any one or more of the provisions contained in this contract for any reason is held invalid, this invalidity will not affect any other provision of this Contract, which will be construed as if the invalid or unenforceable provision had never existed.

8.4 Binding Effect. This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

8.5 Compliance. In accordance with the requirements of Section 2B of the Texas Real Estate License Act, the City or its representatives is hereby advised that it should be furnished with or obtain a policy of title insurance or have an abstract covering the Property examined by an attorney of its own selection.

8.6 Reservation. The City reserves, and does not waive, its rights of sovereign immunity and similar rights and its rights under the Texas Tort Claims Act, except to the extent necessary to give legal effect to this Contract.

The above instrument, together with all conditions thereto is hereby EXECUTED by the Seller to be effective as of the _____ day of _____, 2009.

SELLER:

RIO GRANDE STUCCO COMPANY

By: Lewis Winchell
Lewis Winchell, President

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)
)
COUNTY OF YOLO)

See attached Acknowledgement

This instrument was acknowledged before me on the _____ day of _____, 2009 by **Lewis Winchell, President of Rio Grande Stucco Company.**

_____
Notary Public, State of California

My commission expires:

_____

EXECUTED by the City of El Paso this _____ day of _____, 2009.

CITY OF EL PASO

By: _____
Joyce Wilson
City Manager

APPROVED AS TO FORM:

Theresa Cullen
Theresa Cullen
Deputy City Attorney

APPROVED AS TO CONTENT:

R. Alan Shubert, P.E.
City Engineer

ACKNOWLEDGEMENT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the _____ day of _____, 2009 by Joyce Wilson, City Manager of the City of El Paso.

_____
Notary Public, State of Texas

My commission expires:

_____

CERTIFICATE OF ACKNOWLEDGMENT

State of California)
County of Sacramento)

On October 8th, 2009 before me, Dara Allen, Notary Public
Date (here insert name and title of the officer)
personally appeared Lewis Winchell
Name(s) of Signer(s)
who proved to me on the basis of satisfactory evidence to be the person (s) whose name (s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity (ies), and that by his/her/their signature (s) on the instrument the person (s), or the entity upon behalf of which the person (s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

BMP1 DARA ALLEN
COMM. #1746735
Notary Public-California
SACRAMENTO COUNTY
My Comm. Exp. May 24, 2011 BMP1

Signature
Signature of Notary Public

Place Notary Seal Above

File: 504051

PROPERTY DESCRIPTION 15
6,340 Square Feet

Being a portion of the Ysleta Railroad Station, Ysleta Grant, City of El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING FOR REFERENCE at the city monument at the intersection of Onate Way and Candelaria Street and the city monument at the intersection of said Candelaria Street and Benito Way bears, South 23°00'49" West, 285.62 feet;

THENCE, South 77°05'51" East, a distance of 430.39 feet to a set ½ inch rebar with cap marked (Tx2027) at the Southwest corner of a tract to Rio Grande Stucco Products (book 2031, page 976) in the East right-of-way line of Roseway Drive and **POINT OF BEGINNING** for the herein described tract;

THENCE, leaving said right-of-way line, South 46°03'18" East, a distance of 221.51 feet;

THENCE, South 45°10'55" East, a distance of 247.26 feet to the beginning of a curve to the left;

THENCE, along the arc of said curve (Delta Angle = 38°02'57", Radius = 200.00 feet, Chord = South 65°29'20" East, 130.39 feet) a distance of 132.82 feet;

THENCE, South 82°52'12" East, a distance of 100.11 feet to a set ½ inch rebar with cap marked (Tx2027) in said East right-of-way line of Roseway Drive;

THENCE, along said East right-of-way line the following six (6) courses:

Along the arc of a curve to the left (Delta Angle = 05°18'28", Radius = 132.69 feet, Chord = South 76°37'55" West, 12.29 feet) a distance of 12.29 feet to the beginning of a curve to the left;

Along the arc of said curve (Delta Angle = 08°26'06", Radius = 137.52 feet, Chord = South 69°45'38" West, 20.23 feet) a distance of 20.25 feet;

South 65°32'35" West, a distance of 23.71 feet to the beginning of a curve to the right;

Along the arc of said curve (Delta Angle = 19°32'14", Radius = 85.33 feet, Chord = South 75°18'44" West, 28.96 feet) a distance of 29.10 feet to the beginning of a curve to the right;

Along the arc of said curve (Delta Angle = 44°52'45", Radius = 97.63 feet, Chord = North 72°28'50" West, 74.53 feet) a distance of 76.47 feet;

North 45°09'19" West, a distance of 565.92 feet to the **POINT OF BEGINNING** and containing **6,340 square feet** of land.

This description was prepared from a survey made on the ground on 7-13-04 with a plat dated 5-19-05.

PREPARED BY:
Cutts Land Surveying, Inc.
El Paso, Texas
May 26, 2005
Job No. 050413-yrrs

STATE OF TEXAS
REGISTERED
JERRY E. CUTTS
2027
PROFESSIONAL
LAND SURVEYOR

Exhibit "O"

GRAPHIC SCALE

60 0 30 60 120 240

(IN FEET)
1 inch = 60 ft.

Southern Pacific Railroad

David Feuerstein
book 1875, page 480

Ysleta Grant

book 2031, page 976

cinder block wall

rock wall

9151

6,340 Sq. Ft.

9224

P.O.B.

S46°03'18" E 221.51' S45°10'55" E 247.26'

565.92' N45°09'19" W

S82°52'12" E 100.11'

C1 C2 C3 C4 C5

proposed centerline

Roseway Drive

Lot 133 Lot 1

Building

Weather Station

Tract 10L

9132

Building

Lot 110

Lot 109 Lot 108 Lot 107 Lot 106 Lot 105 Lot 104

Tract 11

Ohate Way

P.O.C.
city monument

430.39'
S77°05'51" E

S23°00'48" W 285.52'

Candelaria Street

STATE OF TEXAS
REGISTERED
JERRY E. CUTTS
2027
PROFESSIONAL
LAND SURVEYOR

No.	Bearing	Distance
T1	S65°32'35"W	23.71'

No.	Delta	Radius	Length	Bearing	Chord
C1	38°02'57"	200.00'	132.82'	S65°29'20"E	130.39'
C2	05°18'28"	132.69'	12.29'	S76°37'55"W	12.29'
C3	08°26'06"	137.52'	20.25'	S69°45'38"W	20.23'
C4	19°32'14"	85.33'	29.10'	S75°18'44"W	28.96'
C5	44°52'45"	97.63'	76.47'	N72°28'50"W	74.53'

Exhibit "A"
Page 2 of 2

Date prepared: 05-19-05
Job No. 050413

ROW PLAT 15

PORTION OF YSLETA RAILROAD STATION, YSLETA GRANT, EL PASO, EL PASO COUNTY, TEXAS

Cutts Land Surveying, Inc.
Professional Land Surveyors
1100 Montana Avenue, Suite 206
El Paso, Texas 79902
Ph. (915) 534-9391
Fx. (915) 534-9394