

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

AGENDA DATE: September 28, 2021
PUBLIC HEARING DATE: Not Applicable

CONTACT PERSON(S) NAME AND PHONE NUMBER:

Ben Fyffe, Managing Director, Cultural Affairs & Recreation, (915) 212-1766
Bruce D. Collins, Director of Purchasing & Strategic Sourcing, (915) 212-1181

DISTRICT(S) AFFECTED: All

STRATEGIC GOAL: No. 3 – Promote the Visual Image of El Paso

SUBGOAL: 3.1 – Improve the visual impression of the community (community, gateways, corridors, intersections and parkland).

SUBJECT:

Request that that the City Manager be authorized to sign a Service Agreement between the City of El Paso and Christopher Weed Sculpture, Inc., for an estimated amount of \$211,000.00 for the Flores del Desierto Repairs. The award of this contract will allow Museums & Cultural Affairs to engage the original fabricator of the Flores del Desierto public art piece located on the Airway Median for repair and replacement of damaged Sculptures #1, 4, and 7.

BACKGROUND / DISCUSSION:

Public art piece, "Flores del Desierto" located on Airway has been damaged by motor vehicle accidents in February 2021 and April 2021. The original artist has agreed to refabricate and re-install damaged components.

SELECTION SUMMARY:

This is a non-competitive service agreement pursuant Exemption 252.022 (a) (3) procurement necessary because of unforeseen damage to public machinery, equipment, or other property of the Texas Local Government Code.

CONTRACT VARIANCE:

No contract variance

PROTEST

No protest received for this requirement.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

Amount: \$211,000.00

Funding Source: Outside contracts

Account: 454-4005-54320-522150-PBARTSTRET85

HAVE ALL AFFECTED DEPARTMENTS BEEN NOTIFIED? YES NO

PRIMARY DEPARTMENT: Museums and Cultural Affairs

SECONDARY DEPARTMENT: Purchasing & Strategic Sourcing

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

DEPARTMENT HEAD:



Ben Fyffe, Managing Director

**COUNCIL PROJECT FORM
(Exemption)**

*******POSTING LANGUAGE BELOW*******

Please place the following item on the **CONSENT** agenda for the Council Meeting of **September 28, 2021**.

Strategic Goal 3: Promote the Visual Image of El Paso

The linkage to the Strategic Plan is subsection 3.1 – Improve the visual impression of the community (community, gateways, corridors, intersections and parkland).

Request that the City Manager be authorized to sign a Service Agreement between the City of El Paso and Christopher Weed Sculpture, Inc., for an estimated amount of \$211,000.00 for the Flores del Desierto Repairs. The award of this contract will allow the Museums & Cultural Affairs Department to engage the original fabricator of the Flores del Desierto public art piece located on the Airway Median for repair and replacement of damaged Sculptures #1, 4, and 7.

Contract Variance:

No contract variance.

Department:	Museums & Cultural Affairs
Award to:	Christopher Weed Sculpture, Inc. Colorado Springs, CO
Estimated Amount:	\$211,000.00
Funding Source:	Outside Contracts
Account No.:	454-4005-54320-522150-PBARTSTRET85
District(s):	3
Reference No.:	2022-0026

This is a non-competitive service agreement pursuant Exemption 252.022 (a) (3) procurement necessary because of unforeseen damage to public machinery, equipment, or other property of the Texas Local Government Code.

Additionally, it is requested that the City Attorney's Office review and that the City Manager or designee be authorized to execute any related contract documents and agreements necessary to effectuate this award.

*******ADDITIONAL INFO BELOW*******

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

SERVICES AGREEMENT
FLORES DEL DESIERTO REPAIR

This Services Agreement (“**Agreement**”) is made this ____ day of September, 2021 (“**Effective Date**”) between the City of El Paso, a municipal corporation organized and existing under the laws of the State of Texas, (“**City**”), and Christophe Weed Sculpture Inc., a Colorado Corporation (“**Contractor**”). For the convenience of the parties, all defined terms appear in **bold face print** when first defined.

WHEREAS, the City previously engaged the Contractor to design, fabricate, transport and install the original artwork known as Flores Del Desierto (“**Artwork**”); and

WHEREAS, a portion of the artwork has recently become damaged; and

WHEREAS, the City desires to engage the Contractor to repair the damaged portion of the Artwork.

The parties agree as follows:

SECTION 1. SCOPE OF WORK.

- A. The Contractor will perform the Scope of Work as described and in accordance to the timelines described in **Attachment “A”** (the “**Work**”). The Contractor will provide all materials, employees, permits, licenses, travel expenses, and all other items needed to complete the Work.

SECTION 2. CONSIDERATION.

- A. The maximum payment amount for the Contractor’s Work is \$211,000.00. The Contractor will invoice the City through written invoices. The City will pay invoices for all Work performed as soon as it is reasonably possible, but no later than 30 calendar days from receipt in accordance with Chapter 2251 of the Texas Government Code. The City may withhold payment if the Work performed by the Contractor does not comply with this Agreement.

SECTION 3. TERM.

- A. The Agreement commences on the Effective Date and ends on August 31, 2022 (“**Term**”). Prior to the expiration of the Term, the City Manager, or designee, may extend the Term for an additional .

SECTION 4. OWNERSHIP OF WORK PRODUCT.

- A. The City owns all hard copies of finished and unfinished Work under this Agreement for which the City has paid for. The Contractor grants a license to the City to reproduce for non-commercial purposes the copies owned by the City under this Agreement.

SECTION 5. WARRANTY FOR WORK.

- A. The Contractor will provide a warranty for the Work provided by the Contractor for a period of commencing upon the acceptance by the City of the completion of the Work (the “Warranty Period”). The Contractor, at its sole expense, will correct any defects from the Contractor’s Work that arise during the Warranty Period. The correction of any defects during the Warranty Period will extend the Warranty Period, as to the corrected defect only, for an additional following the completion of the correction.

SECTION 6. DAMAGES TO CITY PROPERTY.

- A. The Licensee is responsible for all damages caused to City property by the Licensee and/or the Licensee’s employees, agents, or contractors. If the Licensee or any of the Licensee’s employees, agents, or contractors damages any City property, then the City may repair such damage to the City’s standards and the City may send an invoice to the Licensee for the full costs of the repairs. The Licensee will pay in full any invoice sent by the City under this section within 30 calendar days of receipt.

SECTION 7. RELEASE.

- A. The Contractor releases the City from all claims of property damage, property loss, personal injury, illness, and death sustained by the Contractor while performing the Work under this Agreement regardless of whether such property damage, property loss, personal injury, illness, or death was caused by the negligence of the City or the City’s officers, employees, and/or agents.

SECTION 8. INDEMNIFICATION.

- A. **Contractor or its insurer will INDEMNIFY, DEFEND AND HOLD the City, its officers, agents and employees, HARMLESS FOR AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, (INCLUDING BUT NOT LIMITED TO ATTORNEY FEES AND COSTS) 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 ARISING OUT OF OR RELATED TO THIS AGREEMENT, even where such damage, injury, loss, illness, physical or mental impairment, loss of service, or death results from or involves NEGLIGENCE, or allegations of negligence on the part OF THE CITY, its officers, agents, or employees. Without modifying the conditions of preserving, asserting or enforcing any legal liability against the City as required by the City Charter or any law, the City will promptly forward to the Contractor every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. Contractor will 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 the Contractor 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. Contractor will pay all judgments finally establishing liability of the City in actions defended by Contractor pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by Contractor, and premiums on any appeal bonds. The City, at its election, will have the right to participate in any such negotiations or legal proceedings to the extent of its interest. The City will not be responsible for any loss of or damage to the Contractor's property from any cause.

SECTION 9. INSURANCE.

A. The Contractor will provide the City the following insurance policies:

LIABILITY INSURANCE. Liability Insurance from a solvent company authorized to do business in the State of Texas. The liability insurance must provide coverage for the Contractor and its employees in the minimum amounts of \$1,000,000.00 per occurrence for bodily injury or wrongful death and One Million Dollars \$1,000,000 per occurrence for property damage. The Contractor will ensure that the liability insurance provides coverage for premises liability, operations liability, products and completed operations liability, personal and advertising injury, contractual liability, broad form property damage liability, and independent contractor liability. If the Contractor is performing Work near any railroad or streetcar track, then the Contractor will provide liability insurance that provides railroad protective liability insurance in the amount of \$1,000,000 Bodily Injury/\$1,000,000 Property Damage Liability per occurrence

1. **WORKERS COMPENSATION.** If required by law, the Contractor will obtain a third-party policy of Workers' Compensation insurance coverage providing Statutory Benefits according to the Workers Compensation Act of the State of Texas and/or any other state or federal law as may be applicable to the work and will cover all of the persons engaged in the work.

2. **AUTO LIABILITY.** Automobile Liability Insurance covering all owned, hired, and non-owned motor vehicles used by Contractor, its employees, contractors or agents, in connection with the work being performed under this Agreement with limits of liability not less than \$1,000,000.00 for each occurrence Combined Single Limit for Bodily Injury and Property Damage.
 3. **PROFESSIONAL LIABILITY INSURANCE.** Professional Liability Insurance for the benefit of the City to cover the errors and omissions of the Contractor, its principals or officers, agents or employees in the performance of this Agreement with a limit of \$1,000,000.00 on a claims made basis.
- B. Contractor will maintain the insurance policies described above throughout the Term of this Agreement. The Contractor will ensure that all policies comply with the following:**
1. The Contractor may provide the insurances required in this section in one or more policies of insurance, the form of which must be approved by the City's Risk Manager.
 2. Prior to performing any Work, the Contractor will provide the City copies of all insurance policies along with all endorsements and certificates of insurance.
 3. The Contractor will provide the City all certificates evidencing renewal or replacement of said policies of insurance at least 15 calendar days prior to the expiration or cancellation of any such policies
 4. The issuer of any policy must have a certificate of authority to transact insurance business in the State of Texas. Each issuer must be responsible, reputable, and have financial capability consistent with the risks covered. The City may reject an issuer of an insurance policy in the City's sole discretion.
 5. Each policy, except those for Workers' Compensation, must name the City of El Paso (and their elected and appointed officials, officers, agents and employees) as Additional Insured parties on the original policy and all renewals or replacements during the term of this Agreement.
 6. Contractor will obtain the prior written approval of the City's Risk Manager for any deductibles, aggregate caps, and endorsements on any insurance policy required under this Agreement.

7. The Contractor will require the insurance policy issuer to provide the City 30 calendar days advance notice of any reduction in coverage under an insurance policy.
8. Each policy must expressly state that it may not be canceled or non-renewed unless there are 30 calendar days advance notice of cancellation or intent not to renew is given in writing to the City's Purchasing Manager by the insurance company.
9. Each policy must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the City, their elected and appointed officials, officers, agents or employees.
10. Each policy must contain an endorsement that such policy is primary insurance to any other insurance available to the Additional Insured with respect to claims arising hereunder and that the insurance applies separately to each insured.

SECTION 10. TERMINATION.

A. This Agreement may be terminated as provided in this Section.

1. **TERMINATION FOR CONVENIENCE.** Either party may terminate this Agreement for any reason by sending a written notice to the non-terminating party at least 15 calendar days before termination. The Contractor will halt all Work upon receiving a termination notice under this provision from the City. Upon such termination, the Contractor will provide one final invoice for all Work completed and reimbursable expenses incurred prior to the notice of termination. Reimbursable expenses means any expenses that the Contractor can provide a receipt for and that were necessary for providing Work to the City. The City may withhold payment to the Contractor if there is any dispute in the amount until the City determines the exact amount that is owed to the Contractor by the City. The City is not required to pay for any Work that does not comply with the provisions of this Agreement. If the Contractor terminates this Agreement under this provision, then the Contractor will return all payments made by the City prior to the notice of termination.
2. **TERMINATION BY EITHER PARTY FOR CAUSE.** Either party may terminate this Agreement if one party fails to fulfill the obligations set out in this Agreement. Before terminating this Agreement pursuant to this provision the terminating party will provide written notice of intent to terminate enumerating the failures for which the termination is being sought and provide at least 30 calendar days to the non-

terminating party to cure such failure. If the City terminated this Agreement pursuant to this provision, then the City may withhold any payments to the Contractor until the exact amount owed to the Contractor by the City is determined.

3. **TERMINATION FOR FAILURE TO COMPLY WITH THE GOVERNMENT CODE.** The requirements of Subchapter J, Chapter 552, Government Code, may apply to this Agreement and the Contractor agrees that the Agreement may be terminated if the Contractor knowingly or intentionally fails to comply with a requirement of that subchapter.

B. **TERMINATION NOT A RELEASE.** Termination by either party is not a release of any claims that the terminating party may be lawfully entitled to assert against the terminated party. Further, the terminated party is not relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.

SECTION 11. GENERAL PROVISIONS

A. **NO WAIVER.** Either party may waive any default without waiving any prior or subsequent defaults. Either party's failure to exercise or delay in exercising any right under this Agreement, will not operate as a waiver of such right.

B. **INDEPENDENT CONTRACTOR RELATIONSHIP.** This Agreement does not create an employee-employer relationship between the Contractor and the City. As such, the City is not subject to the liabilities or obligations the Contractor obtains under the performance of this Agreement.

C. **TIME IS OF THE ESSENCE.** The times and dates specified in this contract are material to this Agreement. For the purpose of this Agreement "**business days**" means Monday through Friday excluding City of El Paso holidays and "**calendar days**" means Monday through Sunday excluding City of El Paso holidays.

D. **NOTICES.** The parties will send all notices required by this Agreement in writing, postmarked, and delivered by certified mail. All notices are considered received 3 business days after the postmark date. Parties may change their address by sending a written notice to the other party. A new address is not official until the change of address notice is received by the other party as provided in this section. Upon receipt of proper notification of change of address the notified party will send all further notifications to the new address. Parties will address notices as follows:

To the City: The City of El Paso
 Attn: City Manager
 P. O. Box 1890
 El Paso, Texas 79950-1890

With a Copy to: The City of El Paso
 Attn: Director, Aviation
 P. O. Box 1890
 El Paso, Texas 79950-1890

To the Contractor: Christopher Weed Sculpture Inc,
 Attn: Christopher Weed
 Address: 220 E. Monument St.,
 Colorado Springs, CO 80903

- E. **CONFIDENTIALITY.** The Contractor acknowledges that this Agreement is subject to Chapter 552 of the Texas Government Code (Texas Public Information Act). The release of the Agreement as a whole or in part must comply with Chapter 552 of the Texas Government Code (Texas Public Information Act).
- F. **GOVERNING LAW.** This Agreement is governed by Texas law.
- G. **VENUE.** The venue for disputes regarding this Agreement between the parties will be El Paso County, Texas.
- H. **SEVERABILITY.** A future finding of invalidity of any provision of this Agreement does not affect the validity of any remaining provisions of this Agreement.
- I. **HEADINGS.** The headings and subheadings of this Agreement are for information purposes only and are not substantive terms.
- J. **GOVERNMENTAL FUNCTIONS.** The parties agree that the City is entering this Agreement in the exercise of its governmental functions under the Texas Tort Claims Act. The parties also agree that the City is entering into this Agreement as a governmental entity performing a governmental function.
- K. **COMPLIANCE WITH THE LAWS.** The parties will comply with all applicable laws, administrative orders, and any rules or regulations relating to the obligations under this Agreement. If applicable, then the Contractor will procure all licenses and pay all fees or other charges as required to complete the Work under this agreement.

- L. **AUDITING RECORDS FOR THE SPECIFIC PROJECT.** The Contractor will allow the City to inspect and copy all records pertaining to the Work provided in this Agreement.
- M. **CONTRACTING INFORMATION.** The Contractor must preserve all contracting information related to this Agreement as provided by the records retention schedule requirements applicable to the City for the duration of this Agreement. The Contractor will promptly provide the City any contracting information related to this Agreement that is in the custody or possession of the Contractor on request of the City. On completion of this Agreement, the Contractor will either provide at no cost to the City all contracting information related to this Agreement that is in the custody or possession of the Contractor or preserve the contracting information related to this Agreement as provided by the records retention requirements applicable to the City.
- N. **FORCE MAJEURE.** There is no breach of contract should either party's obligations within this Agreement be delayed due to an act of God, outbreak of hostilities, riot, civil disturbance, acts of terrorism, the act of any government or authority, fire, explosion, flood, theft, malicious damage, strike, lockout, or any cause or circumstances whatsoever beyond either party's reasonable control. The delayed party must resume performing its obligations in this Agreement after the reason for the delay is resolved.
- O. **SUCCESSORS AND ASSIGNS.** This Agreement is binding on the City and the Contractor, and the Contractor's successors and assigns. Neither party may assign, sublet, or transfer its interest or obligations in this Agreement without the written consent of the other.
- P. **THIRD-PARTY BENEFICIARIES.** There are no third party beneficiaries for this Agreement.
- Q. **PROVISIONS SURVIVING THIS AGREEMENT.** Representations, releases, warranties, covenants, indemnities, and confidentiality survive past the execution, performance, and termination of this Agreement.
- R. **REPRESENTATIONS AND WARRANTIES.** The Contractor warrants to the City that the Contractor has all required licenses, permits, and expertise to perform the Work of this Agreement. The person executing this Agreement on behalf of both parties have the authority to sign on behalf of their respective parties.

S. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties.

WITNESS THE FOLLOWING SIGNATURES AND/OR SEALS:

CITY OF EL PASO:

Bruce D. Collins
City Purchasing Director

APPROVED AS TO FORM:

Russell Abeln

Russell T. Abeln
Assistant City Attorney

APPROVED AS TO CONTENT:

Ben Fyffe for

Ben Fyffe, Managing Director
Department of Cultural Affairs &
Recreation

(ACKNOWLEDGEMENTS BEGIN ON THE FOLLOWING PAGE)

ATTACHMENT "A"
SCOPE OF WORK

PAYMENT SCHEDULE

- 1.1** Within thirty calendar days of the Effective Date, the City will pay the Artist an amount equal to 25% of the total Budget Amount.
- 1.2** Within thirty calendar days of the receipt by the City of an itemized statement from the Artist for the completion of 50% of the fabrication of the Artwork, the City will pay the Artist an amount equal to 25% of the total Budget Amount.
- 1.3** Within thirty calendar days of receipt by the City of an itemized statement from the Artist for the completion of 100% of the fabrication of the Artwork, the City will pay the Artist an amount equal to 25% of the total Budget Amount
- 1.4** Final Payment. Within thirty calendar says of the City's Final Acceptance of the Artwork in accordance to Article VII of this Agreement, the City will pay the Artist the remaining 25% of the total Budget Amount ("Final Payment").

