



Staff Summary Report

Council Meeting Date: January 10, 2008

Agenda Item Number: _____

SUBJECT: Request approval of a contract with artist Carl Cheng for restoration of the Tilted Landscape art project located in front of the Tempe Public Library

DOCUMENT NAME: 20080110cstc01 **LIBRARY ADM (0704-01)**

SUPPORTING DOCS: Yes

COMMENTS: Total cost for restoring the artwork is \$59,600.

PREPARED BY: Liz Lagman, Cultural Services-Public Art Program 480/350-5163

REVIEWED BY: Tom Canasi, Community Services Manager, 480/350-5305

LEGAL REVIEW BY: David Park, Assistant City Attorney, 480/350-8907

FISCAL NOTE: Total cost for restoring the artwork is \$59,600. Staff negotiated the amount and believes it is reasonable for the scope of the work to be performed. There are sufficient funds in the Municipal Arts Fund for this project.

RECOMMENDATION: Staff and the Tempe Municipal Arts Commission recommend that the City Council approve this contract with the artist.

ADDITIONAL INFO: The Tempe Municipal Arts Commission recommends commissioning artist Carl Cheng to restore the Tilted Landscape artwork. The piece will be restored without the use of water. This artwork is located on a 40 foot by 40 foot area of land encircled by the passenger drop-off driveway in front of the library. The new design will be a complete topographic map of the city of Tempe.



ARTWORK WALL LOCATION



CARL CHENG, J
JOHN DOE CO
1212 17TH ST
SANTA MONICA, CA
TEL: 310-312-1234
EMAIL: CARL@JD.COM

ARTWORK RESTORATION AGREEMENT

CITY OF TEMPE CAPITAL IMPROVEMENT PROJECT NUMBER: _____

IN CONSIDERATION OF THE MUTUAL PROMISES AND AGREEMENTS HEREINAFTER CONTAINED, THE PARTIES AGREE AS FOLLOWS:

1. PARTIES. The City of Tempe (CITY) intends to contract with artist **Carl Cheng**, as an Independent Contractor (IC) for the performance of certain tasks as specified in this Agreement. The IC agrees to perform all work under this Agreement as an independent contractor and not as an agent or employee of the CITY. The IC'S principal place of business is located at the following address: **1518 17th St, Santa Monica, CA 90404**. The IC will be providing the following individual artist pursuant to this contract: **Carl Cheng**.
2. INDEPENDENT BUSINESS. The IC declares that IC is engaged in an independent business and holds services out to the public as a separate business entity from the CITY and is not in business for the purpose of providing services solely to the CITY.
3. COMPLIANCE WITH LAWS. The IC declares that IC shall comply with all applicable federal, state and local laws, rules and regulations, and executive orders governing equal employment opportunities, non-discrimination and immigration including compliance with Immigration Reform and Control Act of 1986 as well as with all other regulations, restrictions and requirements, including business permits and licenses of any kind that may be required to perform the work required under this Agreement, now or hereafter in effect, which are applicable to IC's work and shall obtain and keep in effect, at IC's own cost and expense, all necessary licenses, permissions and permits.

The IC further agrees to insert the foregoing provisions in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials. Any violation of such provisions shall constitute a material breach of contract.

4. PROJECT DESCRIPTION AND SCOPE OF WORK. The project shall be known as the **Tilted Landscape Artwork Restoration Project** (PROJECT). The Scope of Work for the PROJECT shall be as follows:

The Tilted Landscape Artwork (Artwork) located at the Tempe Public Library was completed in 1994.

The CITY'S goal with this PROJECT is to restore the Artwork without the use of water and electrical features and the equipment vault that was used in the original construction. The CITY desires to

contract with the original artist, **Carl Cheng**, to work with the Cultural Services Division staff of the CITY to coordinate restoration of the Artwork.

5. SERVICES TO BE PERFORMED. The CITY engages IC to perform the following tasks and services:

The IC is under contract to restore the artwork. IC shall interact with Cultural Services staff as well as other city staff to coordinate the restoration.

Task One/Payment One: Final design approval and schedule of restoration

The IC shall:

- Provide information regarding any changes to the proposal reviewed and accepted by the CITY. Final PROJECT design must be approved in writing by the CITY before the IC may begin restoration.
- Provide written restoration plan for the PROJECT, including intended access to the site and need for any traffic mediation. Restoration plan must be approved by the CITY. If work is being performed in the City of Tempe Right of Way, a permit may be required. The permit fee is \$150.00.

This phase may entail presentations to CITY staff necessary to gain any required permits and/or approvals.

Task Two/Payment Two: MIDPOINT completion

The IC shall:

- Remove all of the netting and all of the hardware on the walls and the plumbing fixtures on deck surfaces of the Artwork. Grind pipes flush, fill cracks and holes in the Artwork. Sandblast calcium deposits on all surfaces of the Artwork.
- Flagstone and Map surfaces of Artwork. Recover and sort vandalized sculpture pieces that can be reused. Replace rock pieces as needed. Provide additional flagstone to repair broken or missing pieces of sculpture map and to complete map surface below waterline area. Remove and fill light wells on deck surface. Subcontract labor to cement pieces in place as directed by the IC.
- Remove and replace broken copper "road" moldings. Remove broken copper fiber optic light tubes on all surfaces of the Artwork. Cap holes and adhere copper to flagstone.

Task Three/Payment Three: Coordination of PROJECT restoration and final acceptance by CITY

The IC shall:

- Demonstrate evidence of midpoint fabrication through images. Submit photos of concrete mold prior to delivery to site.
- Re-surface vertical wall of original pond with tile, mosaic or small rocks according to the IC's plan with city approval. Spray penetrating sealer on all rock surfaces after twenty-one (21) day cement cure.

Task Four/Payment four: PROJECT completion

The IC shall:

- Complete restoration of Artwork as indicated on approved design and plans
- Provide new maintenance instructions to CITY.

The IC shall report to Liz Lagman, Public Art Program, CITY.

6. TERMS OF PAYMENT. The CITY shall pay the IC according to the following terms and conditions:

For services described in Section 5 of this Agreement, the IC shall receive a total payment of **\$59,600.00** which shall be payment in full for the labor, materials, travel and any other expenses needed to perform these services and complete the PROJECT. Payments shall be paid in four installments. The IC shall submit invoices to the **City of Tempe, 3340 South Rural Road, Tempe, AZ 85282, Attn: Liz Lagman** for labor and services at intervals stipulated in this section of this Agreement. Upon completion of services and CITY approval of work and billings, the CITY will make payment within thirty (30) days.

- **IC shall receive \$14,900.00 upon completion of Task One, based upon CITY approval of work and billings and submission of an invoice.**
- **IC shall receive \$14,900.00 upon completion of Task Two, based upon CITY approval of work and billings and submission of an invoice.**
- **IC shall receive \$14,900.00 upon completion of Task Three, based upon CITY approval of work and billings and submission of an invoice.**
- **IC shall receive \$14,900.00 upon completion of Task Four, based upon CITY approval of work and billings and submission of an invoice.**

7. PERIOD OF SERVICE. The IC shall complete all tasks as necessary in a timely manner so as to keep the project on schedule.

PROJECT Timeline:

Prior to commencing work under this Agreement, IC shall:

- Submit a certificate of insurance to the CITY.
- Request valid City of Tempe Privilege Tax License Number or a letter from Tempe's tax department exempting the IC from the privilege tax.
- Request valid State of Arizona Privilege Tax License Number or a letter from Arizona's tax department exempting the IC from the privilege tax.

On or before six weeks after the contract is signed by the CITY, IC shall:

Task 1:

- Submit final design and installation plan for the PROJECT
- Submit all necessary tax and insurance documents

On or before two calendar months after the contract is signed by the CITY, IC shall:

Task 2:

- Submit installation plan
- Coordinate schedule of the PROJECT with CITY staff
- Obtain any necessary city of Tempe permits

On or before twelve calendar months after the contract is signed by the CITY, IC shall:

Task 3:

- Submit photos of concrete mold prior to delivery to site

On or before twelve calendar months after the contract is signed by the CITY, IC shall:

Task 4:

- Complete the PROJECT as stated in Section 5, SERVICES TO BE PERFORMED, above
- Submit written maintenance instructions pertinent to the PROJECT

The IC and the CITY agree that the CITY will suffer damages as a result of late or delayed performance by IC, however, those damages are difficult to estimate. As such, IC and the CITY agree that liquidated damages in the amount of twenty-five dollars (\$25.00) a day for the first week, one hundred dollars (\$100.00) each day thereafter that IC fails to complete performance after the contracted completion date, is a reasonable estimation of the CITY's damages. Nothing in this provision precludes the parties from agreeing, in writing, to schedule changes which modify the contracted completion date.

8. CONTROL. Tasks and services described in Section 5 shall be performed by the IC. Any work done by assistants, other persons or other means must be under the direct control and supervision of the IC. Quality of all work is subject to approval by CITY.
9. INSTRUMENTALITIES. The IC shall supply all equipment, tools, materials and supplies to accomplish the designated tasks and services.
10. TITLE TO WORK. Title to all work created for this PROJECT under this Agreement will remain property of the CITY. CITY retains the option to return any part of the work to the IC after PROJECT completion.
11. COPYRIGHT AND USE. The IC warrants that the design being commissioned and produced under this Agreement is the original product of his own creative efforts, the work is unique, it is an edition of one, it has not been accepted for sale elsewhere, and that the design shall not be offered for sale elsewhere without the express approval of the CITY.

The IC shall ensure that the design contains no material from other artworks or other copyrighted material without the prior written permission of the owner of such material where such other work is copyrighted or where such permission is otherwise required. Such permissions shall be obtained by the IC in form and content acceptable to the CITY.

The IC retains the copyright for all of the restored Artwork including designs, sketches, models and any other completed artwork created and submitted by the IC to the CITY under the terms of this Agreement as described in Sections 4 and 5 of this Agreement.

The IC grants the CITY an exclusive license to produce designs of the restored Artwork produced under this Agreement, and a non-exclusive license to publish photographs, videos, digital images and drawings of the work solely in conjunction with advertisements, publicity and promotions for the CITY without additional payment to the IC. Upon publication, the CITY will use its best efforts to assure that the IC is given customary and appropriate identification as the creator of the restored Artwork and the CITY will not utilize any such publication for the direct production of revenue, i.e., for the sale of photographs, drawings, reproductions or facsimiles of the restored Artwork without permission of the IC.

12. WARRANTY. The IC warrants to the CITY that the fabrication and installation of the restored Artwork will be performed in a workmanlike manner and that the work will be free of defects in workmanship or materials, including inherent vice, and that the IC will, at the IC's own expense, remedy any defects found in the restored Artwork fabricated by the IC or under the IC's supervision due to faulty workmanship or materials for a period of three (3) years after the restored Artwork is finally accepted by the CITY. The IC additionally warrants that the IC will, at IC's own expense, remedy any defects found in the restored Artwork due to inherent vice for a period of three (3) years after the work is finally accepted by the CITY. "Inherent vice" refers to a quality within the material or materials which comprise the restored Artwork which, either alone or in combination, results in the tendency of the restored Artwork to destroy or cause damage to itself, or makes the restored Artwork incapable of performing its intended function.

The IC warrants to the CITY that the restored Artwork will not require maintenance substantially in excess of that described in the maintenance recommendations to be provided by the IC to the CITY hereunder.

The IC agrees to deliver and construct the restored Artwork free and clear of any liens and claims arising from any source.

With the exception of damage due to vandalism or accident by any person other than the IC or persons under his employ, direction or supervision, the IC warrants that the restored Artwork will not contain any defect in design or construction including any defect which may be a hazard or a danger to the health and safety of the public and further agrees to cooperate in making or permitting adjustments to the restored Artwork, if necessary, to eliminate hazards or potential hazards which become apparent after the restored Artwork is accepted by the CITY.

13. USEFUL LIFE OF PROJECT. All artistic work incorporated into the IC's PROJECT plans shall result in a renovated Artwork that will have a useful life equal to the life of the infrastructure of the Tempe Public Library building.

14. MAINTENANCE AND REPAIRS. As a condition of and prior to final acceptance of the restored Artwork on the part of the CITY, the IC will supply the CITY with maintenance instructions. The CITY agrees to ensure that the restored Artwork is maintained and protected to the extent practical. During the lifetime of the restored Artwork the IC will supply, at no charge, advice as to problems arising in relation to maintenance of the restored Artwork. The IC shall incur no cost to himself as a result of giving this advice.

The CITY shall make every reasonable effort to consult with the IC concerning repairs to the restored Artwork. To the extent practical, the IC shall be given the opportunity to accomplish repairs at a reasonable fee. The CITY reserves the right to obtain competitive bids and to choose the highest quality and least expensive vendor for all repairs to and/or restoration of the restored Artwork required after completion of this Agreement.

To the extent the PROJECT is covered by the Visual Artists Rights Act of 1990 (VARA), any modification made to the restored Artwork by the CITY, including removal or relocation of the restored Artwork, will be made in accordance with VARA.

15. LICENSES AND TAXES. No payroll or employment taxes of any kind shall be withheld or paid with respect to payments to IC. The payroll or employment taxes that are the subject of this paragraph include, but are not limited to FICA, FUTA, federal personal income tax, state personal income tax, state disability insurance tax and state unemployment insurance tax.

Prior to commencing work under this Agreement, the IC will contact the City of Tempe Audit and License Division and the Arizona Department of Revenue and either obtain any and all applicable tax license(s) or obtain letters from the tax departments confirming that no tax license(s) is required and that no privilege, sales, use or excise tax will be owed by the IC in relation to his or her work performed under this Agreement. IC will be responsible for reporting and paying any applicable sales, privilege, use or excise tax which may be payable in relation to this Agreement.

16. CLAIMS AGAINST THE CITY. To the fullest extent permissible by law, the IC shall defend, indemnify, save, and hold harmless the CITY, its departments, agencies, officers and employees from any and all claims or damages that arise from the negligent or wrongful performance of professional services performed under this Agreement. These services are to be performed in accordance with the standards of IC's profession in his appropriate capacity. In addition, the IC shall indemnify and hold harmless the CITY for any error, omission or negligent act of any person employed by IC or others for whose acts IC may be held liable.

17. INSURANCE. Without limiting any of his obligations or liabilities, the IC, at his own expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona Department of Insurance and acceptable to the CITY, and with forms satisfactory to the CITY of Tempe:

Automobile Liability Insurance with limits of not less than \$1,000,000 including coverages for owned, hired and non-owned vehicles, as applicable.

Prior to start of installation, Commercial General Liability Insurance with a limit of not less than \$1,000,000 for each occurrence with a \$2,000,000 General Aggregate Limit. The policy shall include coverage for bodily injury, property damage, personal injury, products and blanket contractual covering, but not limited to the liability assumed under the indemnification provisions of this Agreement.

The IC shall include all subcontractors as insured under his policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein for the IC.

The Commercial General Liability Insurance coverage required by Agreement shall name the City of Tempe, its agents, representatives, directors, officials, employees and officers as Additional Insureds, and shall specify that insurance afforded by the IC shall be primary insurance and that any insurance coverage carried by the CITY or its employees shall be excess coverage and not contributory coverage to that provided by the IC.

Prior to commencing activities and services under this Agreement, except as noted above, the IC shall furnish the CITY with Certificates of Insurance, or formal endorsements as required by the Agreement issued by IC's insurer(s), as evidence that policies providing the required coverages, conditions and limits required by this Agreement are in full force and effect. Such certificates shall identify this PROJECT and shall provide for not less than thirty (30) days advance Notice of Cancellation, Termination, or Material Alteration. Such certificates shall be sent directly to:

City of Tempe
Cultural Services/Public Art
3340 South Rural Road
Tempe, Arizona 85282
Phone (480) 350-5287
Fax (480) 350-5161

18. WORKERS' COMPENSATION. No workers' compensation insurance has been or will be obtained by the CITY for the IC.
19. SAFETY. The IC shall be solely and completely responsible for conditions on any job site over which he has oversight responsibility, including the safety of all persons (including employees) and property during performance of this PROJECT. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county and local laws, ordinances, codes and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The IC's failure to thoroughly familiarize himself with the aforementioned safety provisions shall not relieve him from compliance with the obligations set forth therein.
20. COMMUNICATIONS. Any communications and/or deliverables required under this Agreement shall be deemed sufficiently given when personally delivered or mailed via US Certified Mail, return receipt requested, and addressed as follows (or to any other address agreed upon in writing by both parties):

To CITY: City of Tempe

Cultural Services/Public Art
3340 South Rural Road
Tempe, Arizona 85282

To IC: Carl Cheng
1518 17th St
Santa Monica, CA 90404

21. DISPUTE RESOLUTION. In the event of a dispute concerning this Agreement, the parties will meet in good faith to attempt to resolve the dispute.
22. RIGHT OF TERMINATION. The CITY and the IC hereby agree to the full performance of the covenants contained herein, except the CITY reserves the right, at its discretion, to terminate or abandon all or any part of the PROJECT at any time.

In the event the CITY shall terminate or abandon the service or any part of the services as herein provided, the CITY shall notify the IC in writing, and immediately after receiving such notice, the IC shall discontinue advancing work under this Agreement and proceed to close said operations under the Agreement.

The IC shall appraise the services completed prior to notification of termination and submit an appraisal to the CITY for evaluation. The CITY shall have the right to inspect the IC's work to appraise the services completed. The CITY will not pay more than the corresponding progress payment set forth above for the percentage of work completed to that point in time.

The IC shall deliver to the CITY all PROJECT-related work, including copies of photographs, drawings, concepts, plans, reports, calculations, writing and computer disks, created and prepared by the IC specifically for this PROJECT, together with all unused materials supplied to the IC by the CITY or from funds paid by the CITY.

In the event of such termination or abandonment, the IC shall be paid for services performed prior to receipt of said notice of termination.

If the remuneration scheduled hereunder is based upon a fixed fee or definitely ascertainable sum, the portion of such sum payable shall be proportionate to the percentage of services completed by the IC based upon the project description and scope of work set forth in Sections 4 and 5 of this Agreement, and shall be agreed upon mutually by the IC and the CITY. However, in no event shall the fee exceed that set forth in Section 6 of this Agreement.

The CITY shall make final payment within thirty (30) days after the IC has delivered the last of the completed and/or partially completed items, all project-related materials and a final invoice for the final fee that has been agreed upon by both parties.

In the event this Agreement is terminated or abandoned, the CITY may make use of the completed or partially completed work for this PROJECT for the uses for which it was intended. Any use of incomplete work for this PROJECT by the CITY following termination without specific written authorization by the IC will be without responsibility or liability to the IC.

In the event this Agreement is terminated, the CITY shall have the option of completing the PROJECT, or entering into an Agreement with another party for the completion of the work according to the provisions and agreements herein.

The IC shall have the right to cancel the Agreement within thirty (30) days after notice in writing to the CITY for non-payment.

This Agreement may be canceled pursuant to the provisions of ARS 38-511.

23. ENTIRE AGREEMENT. This Agreement shall constitute the entire agreement between the parties hereto. No oral representation has been made by any of the parties. This Agreement may not be amended, changed, modified or rescinded except in writing signed by all parties hereto and any attempt at oral modification of this Agreement shall be void and of no effect.
24. SUCCESSORS AND ASSIGNS. This Agreement shall not be assignable except at the written consent of the parties hereto.
25. FORCE MAJEURE. If either party shall be delayed or prevented from the performance of any act required under this Agreement by reason of acts of God or other cause, including delays in schedule not caused by, beyond the control of and without fault of the IC (financial inability excepted), performance of that act shall be excused, but only for the period of the delay. The time for performance of the act shall be extended for a period equivalent to the period of delay.
26. GOVERNING LAW. This Agreement shall be governed by and construed under the laws of the State of Arizona and any court actions related to this Agreement shall be filed in Maricopa County, Arizona.
27. HEADINGS, CONSTRUCTION OF LANGUAGE. The headings contained in this Agreement are inserted for convenience of reference only and shall not be a part of or control or affect the meaning hereof. The language of this Agreement shall be construed according to its fair meaning and shall not be construed against the party responsible for drafting this Agreement or any provision hereof. Words in this Agreement shall be deemed to refer to whatever number or gender that the context requires. It is the intention of the parties that if any provision of this Agreement is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.
28. NON-WAIVER PROVISION. No breach or event of default hereunder shall be deemed to have been waived by the City of Tempe except by a writing to that effect signed on behalf of the CITY and no waiver of any such breach or default shall operate as a waiver of any other breach or default on a future occasion, or as a waiver of that breach or default after written notice thereof and demand by the CITY for strict performance of this Agreement. Acceptance of partial or delinquent performance shall not constitute the waiver of any right of the CITY. Time is of the essence in this Agreement. All rights, remedies, and privileges of the CITY hereunder shall be cumulative and not alternative.

29. Adoption by Mayor and Council; Authority to execute minor amendments: This Agreement is subject to adoption by the City's Mayor and City Council. Upon execution of this Agreement, the Mayor and Council authorize the City's Deputy Community Services Manager-Cultural Services to sign other documents or amendments of this Agreement as may be necessary to effectuate this Agreement and further authorize said Manager to act upon any other matters not presently contemplated but which may arise and require the City's action in order to effectuate the purpose of this Agreement.

This Agreement shall be in full force and effect only when it has been executed by the duly authorized representatives of the IC and the CITY.

The parties have executed this Agreement as of the _____ day of _____ in the year of 20____.

CITY OF TEMPE, ARIZONA

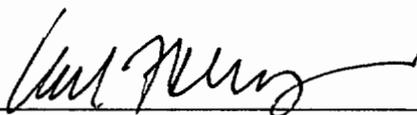
By _____
Mayor Hugh Hallman

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

IC
By 
Carl Cheng
1518 17th St, Santa Monica, CA 90404

557 52 2215

Federal I.D No./Social Security No.