

Council/Agency Meeting Held: _____	_____ City Clerk's Signature
Deferred/Continued to: _____	
<input type="checkbox"/> Approved <input type="checkbox"/> Conditionally Approved <input type="checkbox"/> Denied	
Council Meeting Date: 6/20/2005	Department ID Number: CS05-017

**CITY OF HUNTINGTON BEACH
REQUEST FOR CITY COUNCIL ACTION**

SUBMITTED TO: HONORABLE MAYOR AND CITY COUNCIL MEMBERS

SUBMITTED BY: *Penelope Culbreth-Graft*
PENELOPE CULBRETH-GRAFT, CITY ADMINISTRATOR

PREPARED BY: JIM B. ENGLE, DIRECTOR, COMMUNITY SERVICES
PAUL EMERY, ACTING DIRECTOR, PUBLIC WORKS
DAN VILLELLA, DIRECTOR, FINANCE

SUBJECT: **AWARD CONSTRUCTION CONTRACT FOR THE CENTRAL PARK
BATting CAGE COMPLETION PROJECT**

RECEIVED
 CITY CLERK
 CITY OF
 HUNTINGTON BEACH, CA
 2005 JUN 19 P 4:56

Statement of Issue, Funding Source, Recommended Action, Alternative Action(s), Analysis, Environmental Status, Attachment(s)

Statement of Issue: A bid has been received for the completion of the batting cage within the Central Park Sports Complex. Staff recommends award to Major League Construction Services, as the responsive and responsible bidder.

Funding Source: Construction funding is available in the Sports Complex Phase II Project escrow account in the amount of \$216,000; and \$40,000 in P.O. # 7885, which was originally opened for Community Parks Foundation.

Recommended Actions: Motions to:

1. Accept the bid submitted by Major League Construction Services in the amount of \$202,855 for completion of the Central Park Sports Complex batting cage; and, authorize payment from the Union Bank escrow account to Major League Construction Services;
2. Authorize the Mayor and City Clerk to execute a construction contract with Major League Construction Services in substantially the same format as the attached sample contract; and
3. Authorize transfer of Purchase Order #7885 in the amount of \$40,000 from Community Parks Foundation to pay any Public Works contingencies and construction management services.

Alternative Action: Do not authorize award of the contract, and direct staff on how to proceed.

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REQUEST FOR ACTION

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Analysis: Per Administrative Regulation No. 119, Administration of a Major Public Project, Community Services staff has worked with the Public Works and Administrative Services Departments to solicit bids to complete the partially constructed batting cage at the Central Park Sports Complex. Completion of the batting cage will enable its operation by city staff or by a concessionaire.

Proposals were sent to seven batting cage companies. It was also advertised on the city's website and through Sportsplex Operators and Developers Association. The only bidder to respond was Major League Construction Services. Administrative Services with Public Works and Community Services made a thorough review of the proposal and background check before approving this company. The construction company indicates the project will be completed by the end of September.

The construction cost for this project is estimated at \$202,855, not including contingency funds of up to a maximum of ten (10) percent of the project cost. Staff is recommending the award of the construction contract (Attachment No. 1-sample Public Works construction contract) to Major League Construction Services, which provided the responsive and responsible bid. The balance of funds that was originally approved for Phase II (\$216,000) is currently available in the Union Bank escrow account per the lease purchase agreement. The City Attorney has determined that these funds, which were originally appropriated for Community Parks Foundation, may be transferred to Major League Construction Services. Additionally, \$40,000, which was also approved to pay Community Parks Foundation for Phase II services, could be transferred to Major League Construction Services to cover any contingencies and construction management services that would be authorized by the Director of Public Works. A performance bond would be required from the company before construction begins.

Operating Budget Analysis: Total estimated annual expenses for operation of the batting cage are \$86,326 and estimated revenue is \$130,000 as indicated below:

Annual Operating Expenses:

- Rental of portable, pre-fabricated structure \$1,885
- Equipment costs \$6,441
- Recurrent staffing costs \$78,000

Annual Gross Revenue:

Revenue projections based on staff review of information from Batting Cage, Inc. and Tess Enterprises \$130,000*

*Revenue is estimated to be 20 % of maximum potential. Research of other batting cage indicates that revenue generated will be between 15% and 40% of maximum potential revenue.

Annual NET Revenue (after expenses): \$43,674

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The above revenues and expenses will be included in the Community Services budget request for FY 05/06.

Attachment(s):

City Clerk's Page Number	No.	Description
4	1.	Sample Construction Contract

Approved:
Date:
Signature:

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ATTACHMENT #1

AGREEMENT BETWEEN THE CITY OF HUNTINGTON BEACH AND
FOR BATTING CAGE INSTALLATION SERVICES

THIS AGREEMENT is made and entered into by and between the City of Huntington Beach, a municipal corporation of the State of California, hereinafter referred to as "CITY," and _____, a California corporation, hereinafter referred to as "CONTRACTOR."

WHEREAS, CITY has solicited bids for services, hereinafter referred to as "PROJECT," generally described as the installation of a batting cage facility at the Huntington Beach Central Park Sports Complex in the City of Huntington Beach and more specifically described in the attached **Exhibit A**; and

CONTRACTOR has been selected to perform said services,

NOW, THEREFORE, in consideration of the promises and agreements hereinafter made and exchanged, the parties covenant and agree as follows:

1. STATEMENT OF WORK; ACCEPTANCE OF RISK

CONTRACTOR shall furnish, at its own expense, all labor, plans, tools, equipment, supplies, transportation, utilities and all other items, services, applicable permits, and facilities necessary to complete and construct the PROJECT in a good and workmanlike manner.

CONTRACTOR agrees to assume the risk of all loss or damage arising out of the nature of the PROJECT, during its progress or prior to acceptance, from the action of the elements, from any unforeseen difficulties which may arise or be encountered in the prosecution of work, and for all other risks of any description connection with the work, including, but not limited to, all expenses incurred by or in consequence of the suspension or discontinuance of work, except such as are herein expressly stipulated to be borne by CITY, and for well and faithfully completing the work within the stipulated time and in the manner shown and described in this Agreement, and in accordance with the requirements of CITY under them for the compensation set forth in the accepted bid proposal.

If a service was not included in the Bid Schedule of **Exhibit A**, CONTRACTOR may provide the service at CITY's request on a time and materials basis.

2. ACCEPTANCE OF CONDITIONS OF WORK; PLANS AND SPECIFICATIONS

CONTRACTOR acknowledges that it is fully familiar with all the terms, conditions and obligations of this Agreement and the Contract Documents (as hereinafter defined), the location of the job site, and the conditions under which the work is to be performed, and that it enters into this Agreement based upon its investigation of all such matters and is relying in no way upon any opinions or representations of CITY.

It is agreed that the Contract Documents are incorporated into this Agreement by this reference, with the same force and effect as if the same were set forth at length herein, and that CONTRACTOR and its subcontractors, if any, shall be bound by said Contract Documents insofar as

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they relate in part or in any way, directly or indirectly, to the work covered by this Agreement. The Scope of Services which CONTRACTOR agrees to perform is set forth in the attached **Exhibit "A"**.

"Contract Documents" as defined herein mean and include:

- A. This Agreement;
- B. Bonds covering the work herein agreed upon;
- C. Bid documents including the Notice Inviting Bids, the Special Instructions to Bidders and the CONTRACTOR's proposal, the plans and specifications (attached hereto as **Exhibit "A"**);
- D. Any insurance that may be required.

Should there be any conflict between the terms of this Agreement and the bid or proposal of CONTRACTOR, then this Agreement shall control and nothing herein shall be considered as an acceptance of the terms of said bid or proposal which is in conflict herewith.

3. COMPENSATION

CITY agrees to pay and CONTRACTOR agrees to accept as full compensation for the faithful performance of this Agreement, subject to any additions or deductions made under the provisions of this Agreement or the Contract Documents, a sum not to exceed _____ Dollars (\$ _____), as set forth in the Contract Documents, to be paid as provided in this Agreement.

4. PAYMENT

CITY shall pay CONTRACTOR for services rendered pursuant to this Agreement at the times and in the manner set forth in **Exhibit A**. The payments specified in Exhibit A shall be the only payments to be made to CONTRACTOR for services rendered pursuant to this Agreement unless, pursuant to Paragraph 1 above, CITY approves additional compensation for additional services. CONTRACTOR shall submit all billings for said services to CITY in the manner specified in Exhibit A.

5. COMMENCEMENT OF PROJECT

CONTRACTOR agrees to commence the PROJECT within twenty (20) working days after notice to proceed is issued and shall diligently prosecute PROJECT to completion, excluding delays provided for in this Agreement.

6. TERM OF AGREEMENT

The term of this Agreement shall be one year, unless CITY exercises its option to renew as set forth herein.

7. TIME OF THE ESSENCE

The parties hereto recognize and agree that time is of the essence in the performance of this Agreement and each and every provision of the Contract Documents.

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8. DEFAULT AND TERMINATION

If CONTRACTOR fails or refuses to prosecute the work hereunder with diligence, or fails to complete the work within the time specified, or is adjudged bankrupt or makes an assignment for the benefit of creditors or becomes insolvent, or violates any provision of this Agreement or the Contract Documents, CITY may give CONTRACTOR notice in writing of its intention to terminate this Agreement. Unless the violation is cured within ten (10) days after such Notice of Intention has been served on CONTRACTOR, CITY may, without prejudice to any other remedy it may have, terminate this Agreement upon the expiration of that time. Upon such default by CONTRACTOR, CITY may elect not to terminate this Agreement; in such event CITY may make good the deficiency in which the default consists and deduct the resulting costs from the progress payments then or to become due to CONTRACTOR.

If it is subsequently determined by a court of competent jurisdiction that CITY's termination of this Agreement under this Section was wrongful, such termination shall be converted to a termination for convenience under Section 9 and any damages shall be assessed as set forth in Section 9.

9. TERMINATION FOR CONVENIENCE

CITY may terminate this Agreement for convenience at any time with or without cause, and whether or not PROJECT is fully complete upon seven (7) calendar days written notice to CONTRACTOR. In the event of termination, under this Section CITY shall pay CONTRACTOR for value of work in place on the PROJECT through the termination period less all such payments already made. Such payment by CITY shall be CONTRACTOR's sole and exclusive remedy for termination by CITY for its convenience and CITY shall have no further obligation to CONTRACTOR.

10. RESERVED

11. REMEDY ON BREACH

In the event that CONTRACTOR shall breach, or fail to execute in good faith, any of the terms or conditions of this Agreement, and should CONTRACTOR fail to cure such breach or failure within ten (10) calendar days after CITY gives written notice thereof, the CITY may terminate this Agreement and complete the work to be accomplished hereunder for the account and at the expense of CONTRACTOR. CONTRACTOR shall be liable for any excess cost to CITY over the original contract price. In the event CITY completes the work, or causes the work to be completed, no sum shall be paid to CONTRACTOR until the work is complete. All costs of completion shall be deducted before any payment to CONTRACTOR is made. If the unexpended portion of the contract price is less than CITY's cost to complete, CONTRACTOR shall pay CITY a sum equal to said difference on demand. The remedies contained in this section are cumulative and are in addition to all other rights of CITY pursuant to this Agreement and at law or in equity.

12. CHANGES

CONTRACTOR shall adhere strictly to the Scope of Services set forth in **Exhibit A** unless a change therefrom is authorized in writing by the Department of Public Works (the Department). CONTRACTOR agrees to make any and all changes, furnish materials and perform all work necessary within the scope of the PROJECT as the Department may require in writing. Under no condition shall CONTRACTOR make any changes without the written order of the Department, and CITY shall not pay any extra charges made by CONTRACTOR that have not been agreed upon in writing by the Department.

13. DIFFERING SITE CONDITIONS

A. Notice: The CONTRACTOR shall promptly, and before any conditions are disturbed, notify the DPW in writing of:

(1) Subsurface or latent physical conditions at the job site differing materially from those indicated in this Agreement or the Contract Documents; or

(2) Unknown physical conditions at the job site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent to work of the character to be performed under this Agreement. The DPW shall promptly investigate the conditions and if it finds that such conditions do materially so differ and cause an increase or decrease in the time required for performance of any part of the work under this Agreement, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the Agreement modified in writing accordingly;

B. Time Extension: No claim of the CONTRACTOR under this Section shall be allowed unless the CONTRACTOR has given the notice required hereunder, provided, however, the time prescribed therefor may be extended by CITY

14. SAFETY PRACTICES

CONTRACTOR shall comply fully with all laws, orders, citations, rules, regulations, standards and statutes, with respect to occupational health and safety, the handling and storage of hazardous materials, accident prevention, safety equipment and construction practices. CONTRACTOR shall conduct inspections to determine that safe working conditions and equipment exist and accepts sole responsibility for providing a safe place to work for its employees and for employees of its subcontractors and suppliers of material and equipment, if any, for adequacy of and required use of all safety equipment and for full compliance with the aforesaid laws, orders, citations, rules, regulations, standards and statutes.

15. WARRANTIES

The CONTRACTOR unconditionally guarantees all work done under this Agreement including, but not limited to, any workmanship, installation, fabrication, material or structural facilities maintained. CONTRACTOR, within ten (10) days after notice by CITY of any defect in the work, shall have the option to make appropriate repairs or replace the defective work. Upon expiration of such ten (10) day period, CITY may then make appropriate repair, replacement or rework at CONTRACTOR's risk and expense.

16. INDEPENDENT CONTRACTOR

It is understood and agreed that the CONTRACTOR is, and shall be, acting at all times hereunder as an independent contractor and not an employee of CITY. CONTRACTOR shall secure at its expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for CONTRACTOR and its officers, agents and employees and all business licenses, if any, in connection with the PROJECT.

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17. INDEMNIFICATION, DEFENSE, HOLD HARMLESS

CONTRACTOR hereby agrees to protect, defend, indemnify and hold harmless CITY, its officers, elected or appointed officials, employees, agents, and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands defense costs, and consequential damage or liability of any kind or nature, however caused, including those resulting from death or injury to CONTRACTOR's employees and damage to CONTRACTOR's property, arising directly or indirectly out of the obligations or operations herein undertaken by CONTRACTOR, caused in whole or in part by any negligent act or omission of the CONTRACTOR, any subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including but not limited to concurrent active or passive negligence, except where caused by the active negligence, sole negligence, or willful misconduct of the CITY. CONTRACTOR will conduct all defense at its sole cost and expense and CITY shall approve selection of CONTRACTOR's counsel. CITY shall be reimbursed for all costs and attorney's fees incurred by CITY in enforcing this obligation. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by CONTRACTOR.

18. WORKERS' COMPENSATION INSURANCE

Pursuant to *California Labor Code* section 1861, CONTRACTOR acknowledges awareness of section 3700 *et seq.* of said Code, which requires every employer to be insured against liability for workers' compensation; CONTRACTOR covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

CONTRACTOR shall maintain workers' compensation insurance in an amount of not less than One Hundred Thousand Dollars (\$100,000) bodily injury by accident, each occurrence, One Hundred Thousand Dollars (\$100,000) bodily injury by disease, each employee, Two Hundred Fifty Thousand Dollars (\$250,000) bodily injury by disease, policy limit.

CONTRACTOR shall require all subcontractors to provide such workers' compensation insurance for all of the subcontractors' employees. CONTRACTOR shall furnish to CITY a certificate of waiver of subrogation under the terms of the workers' compensation insurance and CONTRACTOR shall similarly require all subcontractors to waive subrogation.

19. INSURANCE

In addition to the workers' compensation insurance and CONTRACTOR's covenant to indemnify CITY, CONTRACTOR shall obtain and furnish to CITY, a policy of general public liability insurance, including motor vehicle coverage covering the PROJECT. Said policy shall indemnify CONTRACTOR, its officers, agents and employees, while acting within the scope of their duties, against any and all claims of arising out of or in connection with the PROJECT, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of \$1,000,000 per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than \$1,000,000. Said policy shall name CITY, its officers, and employees as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the PROJECT shall be deemed excess coverage and that CONTRACTOR's insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

20. CERTIFICATES OF INSURANCE; ADDITIONAL INSURED ENDORSEMENTS

Prior to commencing performance of the work hereunder, CONTRACTOR shall furnish to CITY certificates of insurance subject to approval of the City Attorney evidencing the foregoing insurance coverages as required by this Agreement; said certificates shall:

1. provide the name and policy number of each carrier and policy;
2. shall state that the policy is currently in force;
3. shall promise to provide that such policies will not be canceled or modified without thirty (30) days' prior written notice of CITY; and
4. shall state as follows: *"The above-detailed coverage is not subject to any deductible or self-insured retention, or any other form of similar-type limitation."*

CONTRACTOR shall maintain the foregoing insurance coverages in force while working under this Agreement.

The requirement for carrying the foregoing insurance coverages shall not derogate from the provisions for indemnification of CITY by CONTRACTOR under the Agreement. CITY or its representative shall at all times have the right to demand the original or a copy of all said policies of insurance. CONTRACTOR shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

A separate copy of the additional insured endorsement to each of CONTRACTOR's insurance policies, naming the CITY, its officers and employees as Additional Insureds shall be provided to the City Attorney for approval prior to any payment hereunder.

21. NON-ASSIGNABILITY

CONTRACTOR shall not sell, assign, transfer, convey or encumber this Agreement, or any part hereof, or any right or duty created herein, without the prior written consent of CITY and the surety.

22. CITY EMPLOYEES AND OFFICIALS

CONTRACTOR shall employ no CITY official nor any regular CITY employee in the work performed pursuant to this Agreement. No officer or employee of CITY shall have any financial interest in this Agreement in violation of *California Government Code* sections 1090 *et seq.*

23. NOTICES

All notices required or permitted hereunder shall be delivered in person or by registered or certified mail to the following authorized representative of the party to whom delivery is to be made, at the place of business of such party, or to any other place designated in writing by such party.

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FOR CITY

FOR CONTRACTOR

Director of Public Works
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

24. AFFIDAVITS OF SATISFACTION OF CLAIMS

After the completion of the work contemplated by this Agreement, CONTRACTOR shall file with the DPW its affidavit stating that all workers and persons employed, all firms supplying materials and all subcontractors upon PROJECT have been paid in full and that there are no claims outstanding against PROJECT for either labor or material, except certain items, if any, to be set forth in an affidavit covering disputed claims, or items in connection with Notices to Withhold which have been filed under the provisions of the statutes of the State of California.

25. WAIVER OF CLAIMS

The acceptance by CONTRACTOR of the payment of the final certificate shall constitute a waiver of all claims against CITY under or arising out of this Agreement.

26. BONDS

CONTRACTOR shall, prior to entering upon the performance of this Agreement, furnish the following three bonds approved by the City Attorney. One in the amount of one hundred percent of the contract price to guarantee the CONTRACTOR's faithful performance of the work; one in the amount of one hundred percent of the contract price to secure CONTRACTOR'S warranty of the completed Project as set forth in Section 15 hereof for a period of one (1) year after CITY's acceptance thereof; and one in the amount of one hundred percent of the contract price to guarantee payment of all claims for labor and materials furnished.

27. CAPTIONS

Captions of the section of this Agreement are for convenience and reference only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

28. IMMIGRATION

CONTRACTOR shall be responsible for full compliance with the immigration and naturalization laws of the United States and shall, in particular, comply with the provisions of U.S.C. Section 1324a regarding employment verification.

29. LEGAL SERVICES SUBCONTRACTING PROHIBITED

CONTRACTOR and CITY agree that CITY is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. CONTRACTOR understands that pursuant to Huntington Beach

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City Charter Section 309, the City Attorney is the exclusive legal counsel for CITY; and CITY shall not be liable for payment of any legal services expenses incurred by CONTRACTOR.

30. ATTORNEY'S FEES

In the event suit is brought by either party to enforce the terms and provisions of this agreement or to secure the performance hereof, each party shall bear its own attorney's fees.

31. ENTIRETY

The foregoing, and Exhibit "A" attached hereto, set forth the entire Agreement between the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their authorized officers on _____ 200_____

CONTRACTOR

CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California

By: _____

print name

Mayor

ITS: (circle one) Chairman/President/Vice President

AND

City Clerk

By: _____

APPROVED AS TO FORM:

print name

ITS: (circle one) Secretary/Chief Financial Officer/Asst. Secretary - Treasurer

City Attorney

INITIATED AND APPROVED:

REVIEWED AND APPROVED:

Director of Community Services

City Administrator

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