ITEM NO. 16

STAFF REPORT

CITY OF OCEANSIDE

DATE: November 7, 2007

TO: Honorable Mayor and City Councilmembers

FROM: Public Works Department

SUBJECT: **TERMINATION OF A CONTRACT IN THE AMOUNT OF $263,753 FOR THE SKYLARK SLOPE STABILIZATION AND REPAIR PROJECT**

SYNOPSIS

Staff recommends that the City Council terminate a contract in the amount of $263,753 with Valley Coast Construction, Inc., of San Diego, for the Skylark Slope Stabilization and Repair project located south of Skylark Drive and east of Downs Street.

BACKGROUND

This project was created to stabilize a privately-owned slope that was constructed as part of a street realignment project for Downs Street and Skylark Drive in 1975. The current slope stabilization project was prompted by the Public Works Maintenance Division. This was due to an ongoing street maintenance effort, which results from minor slope erosion depositing sediment onto the Skylark Drive public right-of-way.

On March 14, 2007, the City Council awarded a contract in the amount of $263,753 to Valley Coast Construction, Inc., of San Diego, for the Skylark Slope Stabilization and Repair project located south of Skylark Drive and east of Downs Street.

ANALYSIS

The project award cost of $263,753 is high for the benefit gained. After execution of the contract, staff learned that the site supports three distinct plant communities. A follow-up biological study indicates that the project construction would have significant impacts to two of the plant habitats. To issue a notice to proceed, the City would have to process a Negative Declaration under CEQA, provide the recommended mitigation, and obtain approval from State and Federal resource agencies. The direct cost of construction, mitigation, and permit processing would increase the overall cost of the project to approximately $350,000.

In analyzing whether to proceed with construction, staff considered three key questions:

1) What is the City's liability if the project is not completed?
2) What is the maintenance cost if the project is not completed?
3) Is the overall project cost of approximately $350,000 the best use of City funds?

Based upon field examination and review, staff believes the risk of slope failure will remain unchanged from current status if the project is not completed. The slope stabilization project was conceived as a result of maintenance issues, not liability issues.

Sediment will continue to erode off the slope during significant rainfall events and will be addressed by City maintenance crews. The resultant street maintenance and debris-clearing activities cost roughly $5,000 annually. Therefore, the $350,000 capital cost equates to 70 years of annual maintenance effort. Based upon this overall assessment, City staff believes the most economical action is to abandon the project and continue to incur the relatively small expense regarding street maintenance.

FISCAL IMPACT

Funds in the amount of $289,455 were carried forward from FY 2006-07 CIP project account (213.755342.5392). The plans and specification preparation costs were $25,190 and the recommended cost reimbursement to the contractor is $2,973 (Exhibit A). Thus the total project cost is $28,163. The funds remaining in the project account will be returned to the unallocated balance of the gas tax fund (213.3300).

INSURANCE REQUIREMENTS

Does not apply.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY'S ANALYSIS

Pursuant to Section 7.26 of the Contract, "The Board may terminate the Contract at its own discretion or when conditions encountered during the work make it impossible or impracticable to proceed...In the event of such a termination, the Contractor shall be entitled to compensation only for the reasonable value of the work done." Therefore, Council may terminate the contract, for any reason whatsoever, provided the Contractor is compensated for the reasonable value of work done in preparing the Project for bidding.

RECOMMENDATION

Staff recommends that the City Council terminate a contract in the amount of $263,753 with Valley Coast Construction, Inc., of San Diego, for the Skylark Slope Stabilization and Repair project located south of Skylark Drive and east of Downs Street.

PREPARED BY:

Peter Biniaz
Project Manager

SUBMITTED BY:

Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Joseph Arranaga, Acting Deputy Public Works Director

Scott O. Smith, City Engineer

Paul Bussey, Interim Financial Services Director

Exhibit A

Exhibit A

COST REIMBURSEMENT AGREEMENT

This Cost Reimbursement Agreement ("Agreement") is entered into between the CITY OF OCEANSIDE ("City") and VALLEY COAST CONSTRUCTION, INCORPORATED ("Valley Coast"). The City and Valley Coast are sometimes referred to collectively hereinafter as the "Parties".

1. INTRODUCTION

On May 16, 2007, the City Council voted to award a contract for $ 263,753 to Valley Coast for the Skylark Slope Stabilization Project ("Project") and authorized the City Manager to execute a Contract ("Project Contract") for the Project on receipt of supporting documents. Subsequent to the execution of the contract, based on a Biological Study of the Project site, the City learned that the site had significant biological constraints, increasing the Project cost significantly. The City seeks termination of the Contract. Valley Coast submitted an estimate of their costs and damages due to the cancellation of the Project in the amount of $ 2,973.00.

After negotiations in good faith, it is the desire of the Parties to settle this matter by reimbursement rather than through trial, including all claims and liabilities in connection with the claims asserted by Valley Coast, or which could have been raised by Valley Coast, or which arise from or relate to the termination of the Project Contract, and to avoid the incurring of additional costs and expenses arising out of the litigating the matter of costs incurred for termination of the Project Contract, subject to the terms and conditions set forth herein. In addition, except as to the obligations which may be created by this Agreement, it is the desire of the Parties to settle any and all claims, disputes and/or liabilities whether known or unknown which the Parties have or may have against each other whether or not said claims, demands and/or liabilities relate to, or in any way are connected with, the subject matter of the termination of the Project Contract.

The Parties enter into this Agreement to fully settle and discharge all disputed civil claims and actions upon the terms and conditions set forth herein. Valley Coast represents that the representations set forth above shall endure forever and shall survive the execution of this Agreement.

2. NO ADMISSION OF LIABILITY

It is expressly understood, acknowledged and agreed to by the Parties, that by reason of entering into this Agreement, the Parties do not admit, expressly or impliedly, any fact or liability of any type or nature with respect to the termination of the Project Contract, whether or not referred to herein, or the sufficiency of any claims made or that could have

been raised by any party, allegations, assertions, or the positions of any party. Further, the Parties have not made any such admission and this Agreement is entered into solely by way of compromise and reimbursement.

3. PAYMENT

The City will pay to Valley Coast, and Valley Coast will accept as payment, the sum of $ 2973.00 as final and complete cost reimbursement for costs and damages incurred as a result of the termination of the Project Contract as well as full, final and complete settlement of any or all civil claims Valley Coast may have against the City, related to the termination of the Project Contract, whether known or unknown, present or future. The payment by the City shall be in the form of a check made payable to Valley Coast Construction, Incorporated. Payment shall be made upon execution of this Agreement by all Parties.

RELEASE AGREEMENT

In consideration of the payments referred to herein, Claimant does hereby fully and forever completely release, acquit and discharge the City, together with any and all past and present employees, agents (whether ostensible or actual), officers, directors, successors-in-interest, departments, or representatives, (collectively "Releasees") from any and all civil claims, demands, damages, wages, personal injuries, loss of future employment capacity, costs, attorneys' fees, rights or causes of action, whether known or unknown, present or future which claimant may have against the Releasees, or any of them, that arise from, or are directly or indirectly related to, or are connected with, any of the facts or circumstances alleged, or in any way connected, or caused by the termination of the Project Contract.

1. WAIVER OF SECTION 1542

There is a risk that, after the execution of this Agreement, Valley Coast will manifest new damage, the scope, location and character of which is unknown and/or not discovered at the time this Agreement is signed. There is a risk that the damage of which Valley Coast is aware may become more serious or otherwise increase in magnitude (qualitatively or quantitatively). Valley Coast shall, and hereby does, assume the above-mentioned risks. This release is expressly intended to cover and include all future damages, defects and discoveries, including all rights and causes of action arising against the City.

As to the matters released by this Agreement, the Parties expressly waive all rights under section 1542 of the California Civil Code and of any comparable principle of law, whether by statute or decision. Section 1542 provides as follows:

"A general release does not extend to the claims which the creditor does not know or suspect to exist in his favor at the time of the execution of the release, which if known by him must have materially affected his settlement with the debtor."

This Release expressly includes a discharge of all unknown and unsuspected claims. Valley Coast understands and acknowledges the consequences of such a specific waiver.

2. ASSUMPTION OF RISK

Valley Coast fully understands and declares that if the facts with respect to which this Agreement is executed are found to be different from the facts now believed to be true, Valley Coast assumed the risk of such possible difference in facts and hereby agrees this Agreement shall be in effect and shall remain in effect notwithstanding such difference in facts. Valley Coast represents and covenants that it is fully informed regarding all known facts related to this Agreement and will not seek to void, rescind, set aside or alter this Agreement on an assertion of mistake of fact or law.

3. INDEMNIFICATION

Valley Coast hereby agrees to release, acquit and discharge any and all claims and demands, rights and causes of action of any kind that may now have arisen or hereafter may arise as a result of the termination of the Project Contract, and further agrees to hold the City harmless, and to indemnify City for and against any claims, cost, demands, damages, attorneys' fees, liens of any kind and the claims of lien holders thereof or the successors and assigns of any such lien holders or debt which has or may arise from the termination of the Project Contract as described herein.

4. MISCELLANEOUS PROVISIONS

A. Entire Agreement:

This Agreement constitutes the full and entire Agreement of the claims between the Parties hereto and such Parties acknowledge that there is no other Agreement, oral and/or written, between the Parties hereto relating to the termination of the Project Contract.

B. Authority to Enter Agreement:

This Agreement is the result of arms-length negotiations. Each Party to this Agreement represents and warrants to the others that the persons executing this Agreement on behalf

of such Party are duly and fully authorized to do so, and that each such Party is acting pursuant to the power and authority granted by their respective principals, and that no further approvals are required to be obtained from any persons or entities.

C. Final Agreement:

The Parties to this Agreement, and each of them, acknowledge that (1) this Agreement and its reduction to final form is the result of extensive good faith negotiations between the Parties; (2) said parties have carefully reviewed and examined this Agreement for execution; and (3) any statute or rule of construction that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Agreement.

D. Binding Agreement:

This Agreement is and shall be binding upon and shall inure to the benefit of the predecessors, affiliates, subsidiaries, successors, assigns, parties, agents, officers, employees, shareholders, associates, legal representatives, heirs, executives and/or administrators of each of the Parties hereto.

E. Interpretative Law:

This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced and governed by and under the laws of the State of California. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable for whatever reason, the remaining provisions not so declared shall nonetheless continue in full force and effect without being impaired in any manner whatsoever.

F. Modifications:

This Agreement may be amended or modified only by a writing signed by all Parties to this Agreement. Modifications affecting the rights or obligations of the City of Oceanside shall first be approved by the City Council.

G. Paragraph Headings:

Paragraph headings are for reference only and shall not affect the interpretation of any paragraph hereto.

H. No Inducement:

Each of the Parties to this Agreement acknowledges for itself that it has read this Agreement and fully understands its contents and consequences and has voluntarily executed it. Each of the parties also warrants that no promise or inducement has been made or offered by any of the Parties, except as set forth herein, and that this Agreement is not executed in reliance upon any statement of representation of any of the Parties or their representatives, concerning the nature and extent of the injuries, damages or legal liability thereof.

I. Counterparts

This Agreement may be executed in counter-parts with the same effect as if all original signatures were placed on one document and all of which together shall be one and the same Agreement.

J. Additional Documents:

All Parties agree to cooperate fully to take any and all steps, perform any acts, and execute any documents consistent with the terms and conditions of this Agreement, which may be needed or required to effectuate the terms, intent, conditions, covenants, and provisions hereof.

K. Effective Date:

This Agreement is effective as of the date all signatures are obtained.

L. Venue:

Venue for enforcement of this agreement shall be in the Superior Court of the State of California, County of San Diego, North County Branch.

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WE HEREBY CERTIFY THAT WE HAVE READ ALL OF THIS SETTLEMENT, RELEASE AND WAIVER AGREEMENT AND FULLY UNDERSTAND THE SAME, AND IN WITNESS WHEREOF WE HAVE EXECUTED THIS AGREEMENT IN CALIFORNIA, SIGNED, SEALED AND DELIVERED.

CITY OF OCEANSIDE

SCOTT O. SMITH
City Engineer

DATED: 10·10·07

APPROVED AS TO FORM

HEIDI A. WIERMAN
Deputy City Attorney

DATED: 10-12-07

VALLEY COAST CONSTRUCTION, INCORPORATED

INSERT NAME HERE STAN LATTIMORE
City Engineer

DATED: 10/8/07

APPROVED AS TO FORM

INSERT NAME HERE Robert J. MARKS
Attorneys for Valley Coast Construction, Incorporated

DATED: 10/5/07

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