



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Katy Allen  
Jennifer A. Maguire

**SUBJECT:** SEE BELOW

**DATE:** 04-22-08

Approved

Date

4/24/08

**COUNCIL DISTRICT:** 9

**SUBJECT: ADOPTION OF APPROPRIATION ORDINANCE AMENDMENTS IN THE PARKS AND RECREATION BOND PROJECTS FUND AND THE SUBDIVISION PARK TRUST FUND, APPROVAL FOR ADDITIONAL COMPENSATION TO ARNTZ BUILDERS, AUTHORIZATION FOR THE CITY MANAGER TO NEGOTIATE AND EXECUTE A CHANGE ORDER, AND AUTHORIZATION FOR THE CITY MANAGER TO EXECUTE AND AMEND A CONSULTANT AGREEMENT FOR THE CAMDEN COMMUNITY CENTER MULTI-SERVICE PROJECT**

## RECOMMENDATION

- a. Approve paying Arntz Builders \$425,000 in additional compensation – for a total construction contract amount of \$7,747,711.28 - as part of a settlement resolving all construction claims on the Camden Multi-Service Community Center Project, as considered by the City Council during the closed session held on April 8, 2008.
- b. Adoption of a resolution authorizing the City Manager to negotiate and execute with Arntz Builders Contract Change Order No. 65 (CCO #65), which will contain all of the settlement terms, including the \$425,000 in additional compensation, necessary to finally resolve all construction claims related to the Camden Multi-Service Community Center Project.
- c. Authorize the City Manager to negotiate and execute an amendment to the consultant agreement with Steinberg Architects in the amount of \$70,000 for additional services in LEED certification of the new facilities.
- d. Adoption of the following Appropriation Ordinance amendments in the Parks and Recreation Bond Projects Fund (Fund 471):
  1. Increase the appropriation to the Parks, Recreation and Neighborhood Services Department for the Camden Community Center Multi-Service project by \$688,000; and
  2. Decrease the Ending Fund Balance by \$688,000.

- e. Adoption of the following Appropriation Ordinance amendments in the Subdivision Park Trust Fund (Fund 375):
  1. Establish an appropriation to the Parks, Recreation and Neighborhood Services Department in the amount of \$121,000 for the Camden Community Center Multi-Service project; and
  2. Decrease the Reserve: Future PDO/PIO Projects by \$121,000.

### **OUTCOME**

Approval of Contract Change Order #65 and appropriation of funds completes the dispute resolution process on the Camden Multi-Service Community Center Project and allows the contract to be closed.

### **EXECUTIVE SUMMARY**

The Camden Multi-Service Community Center project was completed approximately ten (10) months after the completion date required by the construction contract. At the completion of the project, the contractor, Arntz Builders, submitted a claim requesting approximately \$1.4 million in additional compensation for additional work and schedule delays allegedly attributable to the City. The City countered with liquidated damages of \$873,000, based on completion of the project 291 days behind contractual schedule requirements (after adjustment of time due to rain days and non-working holiday furlough days). Unable to settle its dispute, the Department of Public Works (PW) and the contractor agreed to participate in alternative dispute resolution per City policy. By mutual agreement between the two parties, an independent third party was retained to provide a neutral evaluation and render an opinion as to responsibility for the delay. This process resulted in PW agreeing to request the City Council to approve paying Arntz Builders \$425,000 additional compensation to finally settle all claims.

### **BACKGROUND**

Camden Multi-Service Community Center improvements were included as part of the Parks Bond Measure approved by San José voters in November 2000. The project consisted of construction of three new buildings, including a multi-purpose building, administrative office building and teen room/classroom building, along with other miscellaneous site improvements. Approximately 21,700 square feet of new space was added to the facility.

On February 24, 2003, the City Council awarded a \$6,111,331 contract to Arntz Builders for construction of the improvements. Arntz Builders began construction on May 12, 2003. The contract required Arntz Builders to complete construction of the project within 480 calendar days, on or before September 2, 2004. However, due to several issues that arose during the construction period, the City extended the contractual completion date by 54 days to October 26, 2004. Arntz Builders did not substantially complete the project until September 9, 2005, 318 days beyond the revised contractual completion date.

Subsequent to achieving substantial completion, Arntz Builders submitted a request for additional compensation (claim) to the City for approximately \$1.4 million, consisting of \$300,000 for changes in the work and \$1.1 million for extended general conditions, labor disruption and inefficiencies, cost escalation, and other miscellaneous costs, for itself and several of its subcontractors. For its part, the City made a claim against Arntz Builders consisting of \$873,000 in liquidated damages (291 days at \$3,000 per day, after adjusting for rain days and non-working holiday furlough days). The City's liquidated damage claim was based significantly on the assertion that Arntz Builders poorly managed the project, especially at the beginning when the City believes there was insufficient supervision and crew sizes were too small.

PW and Arntz resolved approximately \$200,000 in change order work, reducing the claim to approximately \$1.2 million. Unable to resolve the Arntz's claim for about \$100,000 in outstanding change order work, or the delay claim (\$1.1 million), PW and Arntz Builders agreed to participate in alternative dispute resolution in accordance with the City's Dispute Avoidance and Dispute Resolution Policy (San José Municipal Code, Chapter 14.06). The parties agreed to retain the services of Arbitration Works, Inc. (AWI), a Sacramento based professional firm specializing in alternative dispute resolution of construction claims. AWI proposed to act as a neutral investigator to review and evaluate the data available from both parties for purposes of determining who was responsible for the delay and unresolved change order costs.

## ANALYSIS

### **1. Neutral Party Findings**

AWI's task was to determine the actual schedule delay on the project. It did this by reviewing the project records and comparing the baseline schedule representing the contractor's original plan for constructing the project with the as-built schedule reflecting the actual dates at which time work was completed.

AWI concluded that the project was completed 318 days beyond the contractual completion date, with the delay segregated into five (5) major areas of work. After completion of its evaluation, AWI concluded that the City was responsible for 109 days of delay. It also concluded that it could not determine responsibility for the remaining 209 days of delay without further investigation at considerable additional expense to the parties. AWI emphasized that there was a significant risk to each party that it could be responsible for the remaining 209 days of delay.

AWI attributed a significant portion of the delay - 62 days - to a number of structural steel issues in the plans and specifications. AWI concluded that the plans and specifications contained a number of design conflicts and no dimensions for the structural steel. The structural steel subcontractor had to request more than 100 dimensions. AWI referred to this as a "major design omission."

AWI also attributed 12 days of compensable delay to the City for some unanticipated underground obstructions, 7 days to the City due mainly to lack of coordination between drawings and lowered kitchen ceiling height in one of the buildings, and 30 days of delay to the City because of a large number of change orders relating to finishing work.

Because AWI's conclusions did not include a finding that Arntz was responsible for delay, AWI did not recommend an award of liquidated damages to the City.

PW staff and Arntz Builders, taking the conclusions of AWI into consideration, agreed to confer and negotiate a settlement. With AWI present as a mediator, negotiations between the City and Arntz Builders proceeded until an agreement in principle was reached to compensate Arntz Builders \$425,000 as final settlement for all claims. The \$425,000 is based on the City accepting responsibility for 109 days of delay as well as sharing responsibility for some of the 209 remaining days of delay not assigned to either party by AWI.

Given the various issues with the project – including the design issues - PW staff believes that AWI's conclusions with regard to the City's responsibility for delay and the payment of additional compensation in the amount of \$425,000 for such delay are not unreasonable. Of course, Arntz Builders believes it is entitled to more. On the other hand, PW staff had hoped to recover at least some liquidated damages. However, given all of the circumstances, PW staff believes that, at this point, the settlement is reasonable given the various issues with the project, the fact intensive, difficult and costly nature of trying to pursue a liquidated damage claim, and the risk that the recovery of liquidated damages might be limited. Accordingly, PW staff recommends the settlement.

**2. Settlement Terms**

CCO No. 65 would contain the following terms and conditions finally settling all construction issues on the project:

- It would provide for the payment of \$425,000 in additional compensation to Arntz Builders.
- It would provide for the payment of \$540,093.50 to Arntz Builders as payment for outstanding Change Orders Nos. 49 through 64. Payment for these outstanding change orders is within the existing contract contingency and within the authority of the Director of Public Works to execute. These change orders had not been paid prior to this settlement because the City was withholding 150% of the full amount in dispute.
- It would provide for the release of \$671,144.47 in retention that has been held in escrow based upon its liquidated damage claim.

- It would provide for the City to continue to withhold moneys for outstanding stop notices until the City receives the appropriate stop notice release or a stop notice release bond.
- It would provide for the appropriate releases of liability from both parties.

**3. Soft Costs**

Additional project delivery costs have been incurred in the amount of approximately \$375,000. These additional costs fall into three categories: 1) staff costs, 2) mediation expenses, and 3) Green Building Certification.

By virtue of the extension of the project duration, a considerable amount of additional staff costs have been incurred in completing the project, preparing documentation in support of the City's position in the defense against the Arntz Builders' claim, and negotiating and processing a settlement. Additional staff costs have also been expended in the pursuit of LEED certification for the project, which has run more than one year past original expectations because of the amount of detail required for submittal to the United States Green Building Council. Staff estimates that it has expended approximately 1,700 additional man-hours for project management and claim defense, translating to approximately \$225,000 in additional staff costs.

Additional costs come from the City's share of the mediator's expenses. The City and Arntz Builders agreed to share the cost of the neutral, third-party mediator equally. The City's share of this expense was \$75,498.

The final element of the additional costs are a reimbursement to Steinberg Architects for services related to the green building certification that were not included in the original agreement. The cost of this element is \$70,000. [Steinberg has agreed not to pursue costs associated with the delay of the project.]

**4. Historical Perspective of Bond Programs**

The Parks Bond Measure approved in 2000 included 95 original projects valued at \$228 million. To date, over 80 of those projects have been completed at an approximate value of \$140 million. The Public Safety Bond program has completed approximately two-thirds of its 30 original projects, having expended approximately one-half of the original \$159 million in funding. Finally, the Library Bond program has completed half of its proposed libraries, and expended approximately \$105 million of the original \$212 million program funding. Only two projects out of the three programs have had disputes that were not able to be resolved within the project funding.

Historical data listed above indicates that the use of a third party for dispute resolution on bond projects is extremely rare. For this reason, staff recommends that this request for supplemental funding to close out the Camden project be approved.

5. **Summary**

As detailed in the Cost Summary/Implications section below, remaining project costs total \$1,038,210. This consists of Contract Change Order Nos. 49-53, 55-57, 60-64 (\$398,210) and No. 65 (\$425,000), and project delivery costs, including consultant services, to close-out the project (\$215,000).

The Parks and Recreation Bond Project Fund has \$230,000 appropriated in the current fiscal year for the project. Consequently, an additional \$809,000 is needed to close out the project. Included in this memorandum are recommendations to appropriate \$688,000 from the Ending Fund Balance of the Parks and Recreation Bond Projects Fund and \$121,000 from the Reserve: Future PDO/PIFO Projects in the Subdivision Park Trust Fund to provide the total amount necessary to close out the project. The project satisfies the nexus requirement in the Subdivision Park Trust Fund to expend funds to benefit the residents of developments that contributed the funds.

**EVALUATION AND FOLLOW UP**

1. **BASELINE SCHEDULE:** Beneficial occupancy was achieved ten months after the baseline schedule because of concurrent delays by both the contractor and the City.
2. **BASELINE BUDGET:** This project will not be completed within the baseline budget. However, approval of supplemental funds for resolution of the dispute with the contractor will allow the project to be closed.
3. **DELIVERY COSTS:** Delivery costs were approximately 34% of total construction costs.

**PUBLIC OUTREACH/INTEREST**

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This item does not meet any of the above criteria. This memorandum will be posted on the City's website for the May 6, 2008, Council agenda.

**COORDINATION**

This project was coordinated with the Departments of Parks, Recreation and Neighborhood Services, Planning, Building and Code Enforcement, and the City Attorney's Office.

**FISCAL/POLICY ALIGNMENT**

This project is consistent with the Council-approved Budget Strategy to continue with capital investments that spur construction spending in our local economy.

**COST SUMMARY/IMPLICATIONS**

1.	<b>COST OF RECOMMENDATION/COST OF PROJECT:</b>	<b>\$425,000</b>
	Project Delivery	\$3,742,381
	Construction	6,111,331
	CCOs 1-48, 54, 58, 59 (processed)	812,870
	CCOs 49-53, 55-57, 60-64 (pending funds)	398,210
	Proposed Change Order No. 65	425,000
	<b>Total</b>	<b>\$11,489,792</b>
	Prior Year Expenditures*	\$10,451,582
	<b>Remaining Project Costs</b>	<b>\$1,038,210</b>

\* A total of \$10,451,582 was expended or encumbered in prior fiscal years for the construction and delivery of this project.

2. COST ELEMENTS OF CONTRACT: Lump sum contract
3. SOURCE OF FUNDING: 471-Parks and Recreation Bond Projects Fund  
 375- Subdivision Park Trust Fund

**BUDGET REFERENCE**

The table below identifies the funds and appropriations proposed to fund the contract(s) recommended as part of this memo and remaining project costs, including project delivery, construction, and contingency costs.

Fund #	Appn #	Appn. Name	Total Appn	2007-08 Adopted Capital Budget (Page)	Last Budget Action (Date, Ord. No.)
<b>Remaining Project Costs</b>			<b>\$1,038,210</b>		
<b>Funding Available</b>					
471	6913	Camden Community Center-Multi-Service	\$230,000	V-807	
<b>Total Funding Available</b>			<b>\$230,000</b>		
<b>Recommended Additional Funding</b>					
471	8999	Ending Fund Balance	\$688,000	V-808	10/16/2007, Ord. No. 28143
375	8845	Reserve: Future PDO/PIO Projects	\$121,000	V-799	
<b>Total Project Funding</b>			<b>\$1,039,000</b>		

\* Included in this memorandum is a request to allocate \$688,000 from the Parks and Recreation Bond Projects Fund (total appropriation is \$4,939,447) and \$121,000 from the Subdivision Park Trust Fund (total appropriation is \$29,243,449) to ensure sufficient funding to close out this project.

HONORABLE MAYOR AND CITY COUNCIL

04-22-08

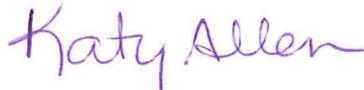
**Subject: Camden Multi-Service Community Center**

Page 8

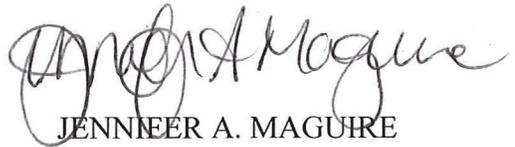
\* \$135,000 of the \$230,000 currently appropriated for the project is available.

**CEQA**

CEQA: Mitigated Negative Declaration, PP01-11-208.



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For questions please contact DAVID SYKES, ASSISTANT DIRECTOR, PUBLIC WORKS DEPARTMENT, 408-535-8300.