

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Katy Allen  
Albert Balagso

**SUBJECT:** HAPPY HOLLOW PARK & ZOO - ZOO AND ATTRACTIONS  
(PHASE IIA) PROJECT      **DATE:** 11-01-07

Approved

Date

11/5/07

**COUNCIL DISTRICT:** Citywide

## RECOMMENDATION

- a. Report on bids and award of contract to the low bidder, West Bay Builders, Inc. for the Happy Hollow Park & Zoo-Zoo and Attractions (Phase IIA) package base bid in the amount of \$37,830,000, plus bid alternates 3, 4, 5, 6, 7, 8 and 10 for a total contract award of \$39,255,000, and approval of a 7% contingency in the amount of \$2,748,000.
- b. Adoption of a resolution incorporating environmental mitigation measures as set forth in the Mitigation Monitoring and Reporting Program for the project.

## OUTCOME

Award of a contract to West Bay Builders, Inc. allows construction of the Parks & Recreation Bond Projects funded project (Measure P), Happy Hollow Park & Zoo Renovation & Improvements to proceed with scheduled completion in summer of 2009. Approval of a seven percent contingency will provide funding for any unanticipated work necessary for the completion of the project.

## EXECUTIVE SUMMARY

The project to renovate and expand Happy Hollow Park & Zoo is the largest of the projects funded by the Measure P Safe Neighborhood Parks and Recreation Bond approved by voters in 2000. The project is the only one specifically mentioned in the bond measure, and the completion of this project will implement the visions of the 1991 Kelley Park and 1996 Happy Hollow Park & Zoo master plans.

The proposed project is organized in two construction phases. Phase I will construct the new entrance and parking lot off Story Road on the Roberts landfill east of Coyote Creek. Phase II will construct improvements to the Zoo and Attractions facility west of Coyote Creek and the pedestrian bridge that connects the improved facility and parking lot.

While funding for the overall project is comprised largely of the general obligation bond funds, additional funds have been appropriated to the project from various other sources by Council over the last two years to offset construction cost and other cost escalations.

Phase II of the Happy Hollow Park & Zoo project is divided into two distinct construction packages: Phase IIA-Zoo and Attractions and Phase IIB-Pedestrian Bridge. The pedestrian bridge was broken out as a separate contract due to the specialty work and a different construction schedule.

By awarding Phase IIA as recommended, the Park & Zoo project will be borrowing \$3.9 Million from the remaining funds for the bridge and parking lot. In order to make up this funding gap, staff will be presenting a plan to Council in the coming months to take approximately \$2.7 Million from the Park Bond reserves and \$1.2 Million from the Citywide Construction and Conveyance Tax funds. Revised project costs for Phases I and IIB and any necessary related appropriation actions will be brought forward at a later date for City Council consideration.

*In light of a poor response to the pre-qualification of contractors for bidding the Phase IIA-Zoo and Attractions package, the project was publicly advertised without pre-qualification in order to maximize open competition. In addition to public advertisement 15 firms received direct notification. The Zoo and Attractions package advertised on June 6, 2007, and the bids opened on August 9, 2007 with the City receiving just two bid proposals. The low bid was received from West Bay Builders of Novato with a bid of \$37, 830,000, or 5.1 percent above the \$36 million bid target. Staff considers bid alternates 3, 4, 5, 6, 7, 8, and 10 essential to achieve the revenue projections calculated for the planned attendance increases in response to the facility enhancements.*

The City subsequently received a bid protest from the second low bidder. After careful analysis, staff recommends rejecting the protest and awarding the Zoo and Attractions contract to the low bidder, West Bay Builders, Inc.

## **BACKGROUND**

In November 2000, San José voters approved a \$228 million General Obligation Bond, specifically known as the San José Safe Neighborhood Parks and Recreation Bond (Measure P), for the purpose of acquiring property for and constructing improvements to parks and recreation facilities throughout the City. Of the total bond funding, \$52.3 million was directed to the implementation of the 1996 Happy Hollow Park & Zoo and 1991 Kelley Park master plans.

### **Consultant Selection and Phasing**

On January 22, 2002, after a formal consultant selection process, Council approved a master agreement with Portico, Inc. of Seattle, Washington, for design services for the Happy Hollow Park & Zoo renovation and expansion project. In consultation with the Portico design team and various stakeholders, staff settled on two phases of construction as the most efficient and effective

project delivery model which would support future operations and maintenance strategies for the facility.

Phase I will construct a new 550-space parking lot on the Roberts landfill east of Coyote Creek. Phase II will renovate and expand the existing Happy Hollow Park & Zoo facility west of Coyote Creek. Improvements include a new entry plaza, zoo exhibits and new attractions, buildings to house retail space, park administration, concessions, and an education program. Additionally, there are improvements in the existing lower zoo for accessibility compliance, LEED certification and a new pedestrian bridge across Coyote Creek connecting the parking lot with the new facility.

### **Design and Funding**

In August 2004 the Happy Hollow Park & Zoo renovation and expansion project moved from the feasibility stage to design. Project design development continued through December 2005 and construction documents through May 2007.

Although value engineering sessions were conducted with the project team throughout the design process, the consultant cost estimates at the 65% design development stage indicated significant spikes in construction material and labor costs that exceeded the project escalation built into the 2000 bond project budget. Project workshops held from November 2005 to February 2006 attempted to align the project scope without jeopardizing the park's revenue generation capability and mission statement. While these efforts mitigated the impact of cost escalation, there were still funding shortfalls to meet the overall project objectives.

City staff analyzed these shortfalls, developed a plan to recover the lost project scope on which continued Happy Hollow Park & Zoo viability depended, and proposed a financing plan using City-wide Construction and Conveyance (C&C) Tax and Park Trust funds. Council approved the plan in May 2006, and on June 27, 2006, authorized it with final budget approval in the amount of \$1,436,000 for Phase 1 and \$6,078,000 for Phase 2. In addition, the Parks, Recreation and Neighborhood Services Department (PRNS) allocated a \$248,000 Chaffee Grant for zoo improvements and a \$600,000 First 5 Santa Clara County Grant for child education to supplement additional City funding. Council authorized \$2.0 million in Parks City-wide C&C Tax Fund and the \$600,000 First 5 Funds for the project as part of the 2007-2008 Adopted Capital Budget approved on June 19, 2007.

### **Construction Packages and Bidding**

Due to the specialty work required for the pedestrian bridge construction and a shorter construction schedule, the bridge was broken out into a separate contract package from the zoo and attractions work. The Phase IIA-Zoo and Attractions package advertised on June 6, 2007, with a bid opening on August 9, 2007, while the Phase IIB-Pedestrian Bridge package advertised on June 13, 2007, with a bid opening on August 6, 2007.

The Zoo and Attractions construction package consists of site and utility infrastructure improvements, ten new buildings (seven of which have green roofs), zoo exhibits, interim entry, paving, new tree-house themed play structure, entry carousel, new Danny the Dragon electric

train, new and renovated attractions, party areas, signage, planting, irrigation, lighting, fencing, site furnishings and mitigation planting. LEED certification by the U.S. Green Building Council (USGBC) at the highest level attainable is also part of the base bid. Currently, the project is projected to attain LEED silver rating.

There are 11 add-alternates included in the bid for the Phase IIA-Zoo and Attractions package.

- Alternate 1: 18-month Schedule with Full site access
- Alternate 2: 22-month Schedule with Full site access
- Alternate 3: Puppet Theater Shade Structure
- Alternate 4: Mini Putt Ride Work
- Alternate 5: Granny Bug Ride Work
- Alternate 6: Treehouse Shotcrete
- Alternate 7: Kiddie Swing work
- Alternate 8: Hand Pump Cars
- Alternate 9: Miner's Maze
- Alternate 10: Wallaby Exhibit
- Alternate 11: Family Coaster

### **Construction Schedule**

The base bid for the Phase IIA-Zoo and Attractions package includes a 550-calendar day schedule that allows the existing zoo and attractions areas to remain open to the public into summer 2008, while the zoo improvement work is under construction. At that time, the entire facility closes for the balance of the construction term, with beneficial use scheduled for summer 2009. This schedule maximizes park revenue through the construction period and minimizes operational disruption to the City but at a potential higher cost of construction due to difficult general conditions created by limiting the contractor's site access through summer 2008.

The bid documents for the Zoo and Attractions package contain a number of bid alternates, the first two of which are specifically aimed at enabling the City to determine the most cost effective schedule of constructing the project. Bid Alternate No. 1 provides a 550-calendar day construction duration with the facility closed to the public from the time construction starts through beneficial use in summer 2009. It was anticipated that allowing the contractor to have complete access to the facility from the time construction commences would result in lower construction cost than the limited phased access scenario provided under the base bid. This bid alternate enables the City to determine if the anticipated reduction in construction costs outweighs the anticipated additional revenue from keeping the existing Zoo and Attractions area open through summer 2008.

Bid Alternate No. 2 provides a 665-calendar day construction duration with the facility closed from the time construction starts through beneficial use in summer 2009. The 550-day construction schedule under the base bid and bid Alternate No. 1 is considered an accelerated schedule while a 665-calendar day schedule is considered to be an average schedule for this type

of project. Generally, staff anticipated that an accelerated construction schedule would result in higher construction costs than an average schedule.

## **ANALYSIS**

### **Contractor Pre-Qualification**

The City's pre-qualification policy requires contractor pre-qualification for construction projects estimated at greater than \$10 million unless the Director determines, based upon an analysis of a number of factors, that pre-qualification is not justified. Under the policy, the factors to be analyzed by the Director include project complexity, the number and quality of the pool of potential contractors bidding on the project, time constraints on construction and economic conditions. For this project, staff initially pre-qualified contractors.

Staff conducted a contractor sourcing exercise that identified 15 contractors to receive direct notices and advertised the pre-qualification invitation on the City's Internet Bid Line and the *Post Record* beginning March 26, 2007, with an April 20, 2007 submittal date.

The project team presented the project at a non-mandatory pre-qualification meeting at Leininger Center on April 11, 2007, which was poorly attended by contractors. On that basis, staff extended the pre-qualification deadline to April 27, 2007, taking advantage of an American General Contractors meeting in San José on April 19, 2007 to feature the Happy Hollow Park & Zoo project along with other City projects.

The City received three pre-qualification statements. Staff contacted all identified contractors in an attempt to understand the low participation. No single reason for the general lack of interest emerged from those inquiries. Subsequently, staff determined it was in the City's best interest to advertise the project without requiring pre-qualification in an attempt to maximize competition. Accordingly, pre-qualification for the Happy Hollow Park & Zoo-Zoo and Attractions project was not required. Staff informed participating contractors in writing and also contacted them with encouragement to bid the project.

The project was advertised in the *Post Record*, *San José Mercury News*, City's Internet Bid Line and more than 10 builder exchanges that included two national builder exchanges on June 6, 2007. The noticed bid opening date was July 19, 2007. The bid period was extended to allow adequate time for contractors and subcontractors to review the plans and specifications, submit written questions and refine their bid proposals. During the bidding period, City staff collected written questions from contractors and responded to them by addenda. The final bid opening date was August 9, 2007 and two contractors submitted bids.

### **Bid Results**

Bids for the Phase IIA-Zoo and Attractions package were opened on August 9, 2007 with the following results:

<u>Contractor</u>	<u>Base Bid</u>	Add Alt. <u>Total</u>	<u>Total Bid</u>	Variance <u>Amount</u>	Over/ (Under) <u>Percent</u>
Robert A. Bothman Constr. (San José)	\$38,952,000	\$1,080,500	\$40,032,500	\$2,629,679	7.0
West Bay Builders (Novato)	37,830,000	1,425,000	39,255,000	1,852,179	5.0
<b>Bid Target</b>	<b>36,000,000</b>	<b>1,402,821</b>	<b>37,402,821</b>	---	---

Based on the formula contained in the project bid documents for determining the low bidder, the low bid was determined solely upon the base bid amounts. The low base bid was submitted by West Bay Builders and is 5.1% above the Bid Target. The low base bid is within an acceptable range of the bid target based on the project complexity.

### **Bid Protest.**

The second low bidder, Robert A. Bothman, Inc., filed a bid protest claiming that the bid submitted by West Bay Builders is not responsive and inviting the City to find that West Bay Builders is not a responsible bidder. Staff recommends rejecting the bid protest for the following reasons.

#### 1. Responsiveness

A bid is responsive if it conforms to the material terms of the bid package. A bid fails to comply materially with a bid package if it gives the bidder a substantial economic advantage or benefit over the other bidders. Typically, the material terms of a bid are those affecting price, quantity or quality. The City has the discretion to waive minor irregularities in a bid – that is, those irregularities that are not material. Applying these standards, none of Bothman’s numerous arguments that the bid of West Bay Builders is not responsive require the City to reject the bid.

Bothman’s primary contention is that West Bay Builders did not properly complete the List of Subcontractors form. The form provided by the City listed likely portions of work for the project. Bidders were instructed to identify those subcontractors that would be performing any portion of work in excess of ½ of 1% of the bid amount and to add additional subcontractors as needed. They were also instructed to indicate “By General” for any of the portions of work the bidder would self-perform.

Bothman complains that West Bay Builders crossed out a number of the listed portions of work without indicating “By General” or listing a subcontractor. The List of Subcontractors form is technically non-responsive because West Bay Builders failed to indicate “By General” for those portions of work in excess of ½ of 1% that it would be self-performing. However, this irregularity is minor. The City’s Standard Specifications provide that if the bidder fails to specify a subcontractor for any portion of work in excess of ½ of 1%, the bidder agrees that it will self-perform the work. Thus, whether or not West Bay Builders wrote in “By General,” it is

required to self-perform all portions of work in excess of ½ of 1% of its bid for which it did not list a subcontractor.

West Bay Builders was not required to list any subcontractors for work involving less than ½ of 1% of its bid amount. In its response to the bid protest, West Bay Builders confirmed that, to the extent that work will be performed by a subcontractor that is not listed, the work involves less than ½ of 1% of the bid price. Bothman is incredulous that some of the work could be less than ½ of 1% of the bid price and urges the City to investigate this matter further by requesting supporting documents from West Bay Builders. However, responsiveness is determined from the face of the bid without outside investigation or information. On the face of the bid, there is no apparent irregularity in this regard.

In short, on its face, the List of Subcontractors form submitted by West Bay Builders complies with the subcontractor listing requirements by listing those subcontractors that will perform portions of work in excess of ½ of 1% of the bid amount. Any irregularity resulting from failing to write "By General" for certain portions of work that West Bay Builders would self-perform is minor. It did not affect price, quantity or quality, or otherwise provide any competitive advantage to West Bay Builders. Staff recommends waiving this minor irregularity.

Bothman also complains that West Bay Builders listed three subcontractors that are not licensed by the California State Contractors License Board. However, the City's Standard Specifications do not require that subcontractors be licensed at the time of bid. Bothman's contention that Section 2-1.15B(f) of the Standard Specifications requires subcontractors to be licensed at the time of bid is misplaced. This Section addresses the various reasons that the City "may" allow the substitution of a subcontractor. It does not require listed subcontractors to be licensed at the time of bid.

Finally, Bothman suggests that West Bay Builders will use subcontractors that are not properly qualified to perform the work. However, there is nothing on the face of the bid that demonstrates that the work – when performed – will be performed by unqualified subcontractors. In its response to the bid protest, West Bay Builders reaffirmed that the various portions of work on the project would be performed by properly qualified persons. Moreover, before the work is performed, staff will ensure that it is performed by properly qualified subcontractors that meet all of the contract requirements.

## 2. Responsibility

Bothman also argues that the manner in which West Bay Builders completed the List of Subcontractors form raises doubts as to whether West Bay Builders is a responsible bidder. "Responsibility" goes to whether a bidder has the fitness, quality and capacity to perform the proposed work satisfactorily. Nothing in the manner in which West Bay Builders completed the List of Subcontractors form suggests that West Bay Builders is not a responsible bidder on this project. Accordingly, staff recommends declining Bothman's invitation to determine that West Bay Builders is not a responsible bidder.

For all of the above reasons, staff recommends rejecting Bothman's bid protest and awarding the contract to West Bay Builders.

**Recommendation for Award**

Bids for the project were received on August 9, 2007. City of San Jose Standard Specification Section 3-1.01 dictates that the award of a contract "will be made within 90 days after the opening of the proposals", which would be by November 7<sup>th</sup> for the Phase IIA Zoo and Attractions bids. Having received bids for both Phase IIA and IIB in early August, staff has spent considerable time analyzing the bid results, the bid protests, and the cost and funding impacts for the overall Happy Hollow Park and Zoo renovation and expansion project, such that the determination of a recommendation has exceeded the 90-day duration of the contractor bid proposals. The low bidder, West Bay Builders, has provided the City with an extension of their bid beyond the 90-day period, to the date of November 21, 2007.

Staff recommends award of the contract to the West Bay Builders, Inc. for the base bid and Add Alternates 3, 4, 5, 6, 7, 8 and 10.

Alternates 1 and 2 represent schedule and park closure alternates that sought to assess the impact of full zoo closure and longer construction duration on the bid price. Neither significantly altered the bid price enough to make those options cost effective to Happy Hollow Park & Zoo operations and is not recommended for inclusion in the award.

Staff considers bid Alternates 3, 4, 5, 6, 7, 8, and 10 totaling \$1,425,000 essential to attaining revenue projections based on increased attendance due to planned improvements and therefore recommends inclusions of those alternates in the overall contract award.

While bid Alternates 9 and 11 are desirable items, neither is considered to be essential to meeting the facility revenue projections and therefore neither is recommended for award.

**EVALUATION AND FOLLOW UP**

The report on bids for the Happy Hollow Park & Zoo-Phase IIB Pedestrian Bridge project is a related item that will be considered by Council at the November 6, 2007 meeting.

The Happy Hollow Park & Zoo-Phase IIA Zoo and Attractions Project is nearly three months behind the scheduled award date due to extensive analysis of the budget implications of the bids for both the Zoo and Attractions package and the Pedestrian Bridge package. Assuming a November 20, 2007 award, project beneficial occupancy is scheduled for summer 2009.

## POLICY ALTERNATIVES

**Alternative #1:** The Happy Hollow Park & Zoo project could be repackaged with a reduced Zoo and Attractions scope that allowed the pedestrian bridge, in its current configuration, to be bid along with the east side parking on the Roberts landfill.

**Pros:** The reduced scope improvements and larger construction package combined with contractor pre-qualification, value engineering sessions, bridge design/build bridge option, and bidding at a more favorable time of year may result in a project bid that meets the available project funding.

**Cons:** There is uncertainty regarding the ability to receive a lower overall price by re-bidding the project as a comprehensive package and this option puts back on the table the possibility of de-scoping the Zoo and Attractions project. Through a number of value engineering and scoping meetings over the past year, this project has already been scoped down to the minimum possible to still deliver an effective facility to the residents, so further de-scoping of the Park & Zoo improvements to save additional funds is not recommended. This alternative is subject to six months of project escalation from the date of the original bid opening to the revised bid date. There is no assurance that bid conditions will improve significantly and may lead to higher bid prices and a reduced scope will also reduce revenue generation potential for the facility.

**Reason for not recommending:** Reducing the scope will reduce revenue generation and there is no guarantee the re-bid will be more favorable and a delay in the project will add escalation cost to the project.

## 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)**

Staff conducted a contractor pre-qualification process consistent with City policy. In addition to directly contacting potential contactors and publicly advertising the pre-qualification, public works staff presented this project to the local American General Contractors Association meeting in San José on April 19, 2007 during the pre-qualification effort.

Poor contractor response led staff to eliminate contractor pre-qualification and openly advertise the project to maximize competition. DPW staff advertised the project on the City's Internet Bid Line, *San José Post Record*, *Mercury News*, and various California Builder Exchanges beginning

June 6, 2007, with bids due on August 9, 2007. DPW routinely provides construction bid packages to various contractor organizations and builder's exchanges. This memorandum will be posted on the City's website for the November 20, 2007, City Council agenda.

### **COORDINATION**

This project and memorandum were coordinated with the Departments of Finance, Planning, Building and Code Enforcement, City Attorney's Office and City Manager's Budget 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. AMOUNT OF RECOMMENDATION/COST OF PROJECT

Project Delivery	\$15,436,267
Construction	39,255,000
Contingency 7%	<u>2,747,850</u>
<b>TOTAL PROJECT COSTS</b>	<b>\$57,439,117</b>
Prior Year Expenditures	8,903,099
<b>Remaining Project Costs</b>	<b>\$48,536,018</b>

#### 2. COST ELEMENTS OF CONTRACT/AGREEMENT

3. SOURCE OF FUNDING: 471 – Parks and Recreation Bond Projects Fund  
391 – Construction Tax & Property Conveyance Tax Fund:  
City-wide Parks Purposes  
375 – Subdivision Park Trust Fund

4. OPERATING COSTS: Upon full operation, this development places an additional burden on the General Fund of approximately \$4.5M per year, with the majority of these additional costs offset through projected new revenues. The proposed net operating and maintenance costs of this facility have been reviewed and are anticipated to be approximately \$275,000 in the facility's first full year of operation (2010/2011), increasing to approximately \$300,000 in 2011/2012, with stable conditions thereafter. These costs will be included in the City Manager's upcoming preliminary 2009-2013 Five-Year General Fund Forecast and Revenue Projections. The appropriate budget addition requests will be submitted through standard City processes.

**BUDGET REFERENCE**

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

**Table 1 – Phase IIA: Happy Hollow Park & Zoo & Attractions**

Fund #	Appn. #	Appn. Name	Total Allocation for Phase IIA	Amt. for Contract: Phase IIA	Adopted Budget Page	Last Budget Action (Date, Ord. No.)
<b>Remaining Project Costs for Phase IIA: HHPZ Zoo &amp; Attractions*</b>			<b>\$48,536,018</b>	<b>\$42,002,850</b>		
<b>Current Funding Available</b>						
471	4787	Happy Hollow Park & Zoo Renovation and Improvements	\$40,106,018**	\$33,572,850	V-816	10/16/2007 Ord. No. 28143
391	5583	Happy Hollow East Side Improvements	\$1,430,000	\$1,430,000		
391	5037	Happy Hollow Park & Zoo Phase II Renovations	\$6,408,000***	\$6,408,000	V-561	6/19/2007 Ord. No. 28071
391	4567	Happy Hollow Zoo/Paul Chaffee State Grant	\$248,000	\$248,000	V-590	6/19/2007 Ord. No. 28071
375	5037	Happy Hollow Park & Zoo Phase II Renovation	\$344,000	\$344,000	V-680	6/19/2007 Ord. No. 28071
<b>Total Funding Available Phase IIA: HHPZ – Zoo and Attractions</b>			<b>\$48,536,018</b>	<b>\$42,002,850</b>		

\* By awarding Phase IIA as recommended, the Park & Zoo project will be reallocating \$3.9 Million from the remaining funds for the bridge and parking lot. In order to make up this funding gap, staff will be presenting a plan to Council in the coming months to take approximately \$2.7 Million from the Park Bond reserves and \$1.2 Million from the Citywide Construction and Conveyance Tax funds. Revised project costs for Phases I and IIB and any necessary related appropriation actions will be brought forward at a later date for City Council consideration.

\*\* Total funds available in 2007-08 are \$41,211,000, of which \$40,106,018 is allocated to Phase IIA: HHPZ- Zoo and Attractions/

\*\*\* Grant funding totaling \$600,000 is included in this appropriation from the First Five Grant.

**Table 2: Distribution of Available Funding by Project Phase**

Fund #	Appn. #	Appn. Name	Total Appn.	Amt. for Phase I (Parking Lot)	Amt. for Phase IIA (Zoo & Attracts)****	Amount for Phase IIB (Ped Bridge)*****
<b>Remaining Project Costs</b>				<b>TBD</b>	<b>\$48,536,018</b>	<b>TBD</b>
<b>Current Funding Available</b>						
471	4787	Happy Hollow Park & Zoo Renovation and Improvements	\$41,211,000	\$886,817	\$40,106,018	\$218,165
391	5583	Happy Hollow East Side Improvements	\$1,430,000		\$1,430,000	
391	5037	Happy Hollow Park & Zoo Phase II Renovations	\$6,408,000		\$6,408,000	
391	4567	Happy Hollow Zoo/Paul Chaffee State Grant	\$248,000		\$248,000	
375	5037	Happy Hollow Park & Zoo Phase II Renovation	\$344,000		\$344,000	
391	5584	Kelley Park East Picnic Grounds & Restroom	\$1,436,000	\$1,436,000		
391	4787	Happy Hollow Park & Zoo & Kelley Park Misc. Improvements	\$82,000	\$82,000		
<b>Total Funding Available</b>			<b>\$51,159,000</b>	<b>\$2,404,817</b>	<b>\$48,536,018</b>	<b>\$218,165</b>
<b>Future Funding Available</b>						
391	5037	Happy Hollow Park & Zoo Phase II Renovations	\$1,913,000			\$1,913,000
<b>Total Project Funding Available</b>			<b>\$53,072,000</b>	<b>\$2,404,817</b>	<b>\$48,536,018</b>	<b>\$2,131,165</b>

\*\*\*\* Including the essential add-alternates, the bid results for the Zoo and Attractions project exceeded the target budget for this portion of the project. In order to proceed with the award of the Zoo and Attractions project, this memorandum closes this gap by shifting funding from the Pedestrian Bridge/Parking Lot projects to the Zoo and Attractions project. As mentioned above, staff will be presenting a funding plan as well as any necessary related appropriation actions to Council in the coming months to make up for the funding gap on the remaining phases of the project.

\*\*\*\*\* The bid results for the Pedestrian Bridge project exceeded the target budget for this portion of the project by \$4.0 million. Staff has recommended rejecting the bids for the Bridge project through a separate council action. As mentioned above, staff is borrowing from the

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**Subject: Happy Hollow Park & Zoo-Zoo and Attractions (Phase IIA) Project**

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Bridge budget to award the Zoo and Attractions project at this time and will request to replenish the bridge budget at a later date.

**CEQA**

CEQA: Mitigated Negative Declaration, File No. PP05-142, dated April 2007.

Planning has issued a mitigated negative declaration for the Happy Hollow Park & Zoo. The mitigated negative declaration identifies a number of mitigations that need to be implemented in order to address environmental impacts. These mitigation measures and their manner of implementation are identified in the Mitigation Monitoring and Reporting Program (MMRP). The mitigations that are required for this project have been incorporated into the project design and the construction documents. As part of today's action, staff is requesting Council to approve these mitigations and their manner of implementation, as set forth in the MMRP, and direct the implementation of these mitigations as part of the project. A copy of the draft Mitigated Negative Declaration is attached to this memorandum.



KATY ALLEN

Director, Public Works Department



ALBERT BALAGSO

Director, Parks, Recreation and  
Neighborhood Services Department

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

August 16, 2007

Mr. Paul Thompson, President  
West Bay Builders, Inc.  
250 Bel Marin Keys Boulevard, Bldg. A  
Novato, CA 94949

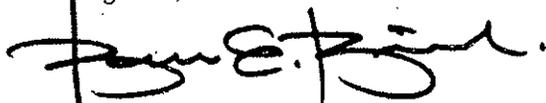
Re: Happy Hollow Park and Zoo-Zoo and Attractions bid protest

Dear Mr. Thompson,

Yesterday, the City Public Works Department received a formal bid protest from Robert A. Bothman, Inc. for the Happy Hollow Park and Zoo-Zoo and Attractions project within the time prescribed by the bid documents. We invite you to respond to the issues identified in the attached letter before the Department makes a final determination on the matter.

Please provide your response, if any, on or before close of business on Monday, August 20 so that we may resolve this matter in a timely manner. Response by email is acceptable by Monday but we request that you deliver an original hard copy to the address below.

Regards,



Bruce E. Biordi  
Sr. Landscape Architect.

CFAS Division  
Department of Public Works  
City of San Jose  
200 East Santa Clara Street, 6<sup>th</sup> Floor  
San Jose, CA 95113-1905

Email: [bruce.biordi@sanjoseca.gov](mailto:bruce.biordi@sanjoseca.gov)

Attachment

# ROBERT A. BOTHMAN, INC.

General Engineering and Building Contractors

CA License 440332 • NV License 0027271 • AZ License 150057



August 15, 2007

Arlene Nakagawara  
Project Manager  
City of San Jose – Dept. of Public Works  
City Facilities Architectural Services Division  
200 E. Santa Clara Street, 6<sup>th</sup> Floor Tower  
San Jose, CA 95113-1905

RE: Happy Hollow Park and Zoo- Zoo and Attractions Package,  
**BID PROTEST**

Dear Ms. Nakagawara:

On Thursday, August 9<sup>th</sup>, 2007 bids were submitted to the City of San Jose (City) for construction of the above referenced project. A total of two (2) bids were submitted by interested contractors. West Bay Builders, Inc. (WBB), submitted a proposal in the amount of \$37,830,000 for base bid construction. Robert A. Bothman, Inc. (RAB) submitted the apparent second low base bid of \$38,952,000.00.

We have reviewed the bid proposal documents submitted by West Bay Builders, Inc. and find that their bid is incomplete and irregular. It is our contention, based upon the information stated herein, that the bid submitted by West Bay Builders, Inc. should be deemed non-responsive and rejected. The following represents the basis of our protest.

#### List of Subcontractors

The List of Subcontractors submitted by WBB contains numerous irregularities.

First, the List of Subcontractors form supplied by the City included a comprehensive list of trades for which bidders were to identify subcontractors who would perform the work or the Contractor's intention to self-perform portions of the work. WBB, deleted numerous trade categories shown on the List of Subcontractors form furnished by the City that are, in fact, required for performance of the scope of work outlined. WBB neither listed subcontractors for these trades, nor listed "By General Contractor" or some other reference to self-performing these trades. WBB simply omitted the subcontractor information and deleted the reference to the trade.

WBB also included three different subcontractors on its List of Subcontractors form that are not licensed by the California State Contractors License Board. Specifically, these unlicensed contractors include ACME (for Signage and Retail Fixtures), International Rides (for Exhibit Rides Equipment installation) and Dynamic Designs (for Dragon Ride installation). The City Standard Specification Section 2-1.15B (f) requires that subcontractors be licensed at the time of bid.

In addition to the lack of compliance with City requirements of listing the trades provided by the City on the List of Subcontractors form, WBB also failed to comply with City Standard Specification

Happy Hollow Park and Zoo- Zoo and Attractions Package

Bid Protest by Robert A Bothman, Inc.

August 15, 2007

Page 2 of 2

section 2-1.15 as well as Public Contract Code section 4100, by failing to list subcontractors for Structural Steel and/or Misc. Iron, Casework/Millwork, Low Voltage, or Playground Equipment installation (sub trades representing over ½ of 1% of the contract dollar value). The lack of listing suggests that West Bay Builders is licensed and qualified to install the associated work. In the case of the playground installation equipment, no subcontractor was listed, assuming WBB is qualified to and will self-perform this item under City Standard Specification section 2-1.15A 4. which states:

"If the contractor fails to specify a subcontractor or if the Contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of ½ of one percent of the Contractor's total proposal, the Contractor agrees that it is fully qualified to perform that portion itself, and the Contractor shall perform that portion of the work."

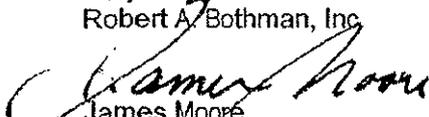
Specification Section 02882 Playground Equipment and Structures, 1.05 A. Installer Qualifications outlines equipment installation experience requiring a minimum of 5 installations of similar size and scope over the past 3 years and specializing in installation of the playground equipment similar to this project. Given the magnitude of scope of this work (approximately \$500K), the potential safety and liability issues stemming from improper installation by an unqualified installer, and the stringent requirements for installer qualification, it is essential that Installer Qualifications be met. Furthermore, WBB is not an approved playground installer by the equipment companies specified, as the quality assurance specification requires. RAB maintains, therefore, that WBB is not properly qualified to install the toy structures, and WBB's failure to list a qualified playground installer makes their bid fatally non-responsive.

The actions of WBB in completing and submitting their List of Subcontractors form clearly allows the opportunity for "bid shopping" or "bid pedaling" after award of contract, which violates Section 2-1.15 of the City Standard Specifications and Public Contract Code Section 4100. Furthermore, WBB's bid is incomplete and subject to disqualification per Special Provisions section 2-1.10 9. WBB also lacks competency for the toy installation elements and is, therefore, subject to disqualification per Special Provisions section 2-1.10 4.

Based upon the information presented herein, we feel the bid submitted by West Bay Builders, Inc. should be deemed non-responsive. We request that the City of San Jose maintain the integrity of its' bid process and support our letter of protest. We feel strongly that the contract should be awarded to Robert A. Bothman, Inc. the apparent second low bidder.

Thank you in advance for the courtesy of reviewing this bid protest. We look forward to your judgment on this matter.

Very truly yours  
Robert A. Bothman, Inc.

  
James Moore  
Vice President

Cc: William Hurley, Esq.  
Brian Bothman  
Krisztina M. Kiss, Esq.

# ROBERT A. BOTHMAN, INC.

General Engineering and Building Contractors

CA License 440332 • NV License 0027271 • AZ License 150057 • HI License AC-026294



August 23, 2007

Bruce E. Biordi  
Senior Landscape Architect  
City Facilities Architectural Services Division  
Department of Public Works  
City of San Jose  
200 East Santa Clara Street, 6th Floor  
San Jose, CA 95113

Arlene Nakagawara  
Project Manager  
City of San Jose – Dept. of Public Works  
City Facilities Architectural Services Division  
200 E. Santa Clara Street, 6<sup>th</sup> Floor Tower  
San Jose, CA 95113-1905

Telephone: (408) 535-8360

Fax: (408) 292-6288

RE: Happy Hollow Park and Zoo- Zoo and Attractions Package,  
**SUPPLEMENT TO BID PROTEST**

Dear Mr. Biordi and Ms. Nakagawara:

This letter shall serve as a rebuttal and supplemental response to the letter by attorney Timothy L. McInerney, counsel for West Bay Builders, Inc., ("WBB") responding to the bid protest filed by Robert A Bothman, Inc. ("RAB").

WBB's response to RAB's bid protest fails to resolve several serious deficiencies with WBB's bid proposal, which renders the bid non-responsive to the call for bids and subjects WBB to disqualification within the meaning of San Jose Standard Specification 2-1.06 and 2-1.10.

San Jose Standard Specification 2-1.10 allows the City, in its sole discretion, to disqualify a bidder and reject its bid due to the "Failure of the bidder to provide prices for all items in the proposal, including alternatives, or submitting an incomplete or otherwise non-responsive proposal."

In addition, per San Jose Standard Specification 2-1.06, "Proposals submitted which are not in strict compliance with the directions in the Notice to Contractors, may in the City's sole discretion, be deemed non-responsive and rejected on that basis."

WBB's failure to identify subcontractors for playground installation, low voltage, security, and ride installation (sub trades representing over 1/2 of one percent of the contract dollar value) renders WBB's bid nonresponsive to the call for bids. WBB's response to RAB's bid protest has not resolved this irregularity. WBB simply states that each of these portions of work is "minor" without providing any supporting facts, evidence, or documents. RAB disagrees that this work is "minor" and provides support and evidence with this supplemental response that each of these portions is nearly twice the threshold limit of 1/2 of 1% of the contract dollar value. Therefore, RAB urges the City to request from WBB evidence that WBB employed due diligence in estimating the value of the work to be under the legal threshold for listing subcontractors.

Furthermore, when the City of San Jose considers WBB's bid form overall, the City has every right to be concerned that WBB is not a responsible bidder because WBB has not given enough attention to determining qualified subcontractors to perform work on this project and is disregarding the Subletting and Subcontracting Fair Practices Act. In addition to WBB's failure to identify

650 Quinn Avenue • San Jose, California 95112-2604  
408 • 279 • 2277 Facsimile 408 • 279 • 2281  
www.bothman.com

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subcontractors for trades identified above, WBB's listing of non-California licensed subcontractors and failure to identify who will be performing asbestos remediation supports a finding by the City that WBB is not a responsible bidder.

1. List of Subcontractors

WBB crossed out numerous trade categories shown on the List of Subcontractors form which are in fact, required for performance of the scope of work outlined. WBB neither listed subcontractors for these trades, nor listed "By General Contractor" or some other reference to self-performing these trades. WBB simply omitted the subcontractor information and deleted the reference to the trade.

Attorney McInerney argues:

*"In reality, the work in question is minor in cost and well below the limit required for listing."*

Mr. McInerney does not provide any facts or specifics in support of this contention. He does not clarify (1) what portion of the work will be self performed by West Bay and (2) does not identify the dollar amounts of the work for the blank portions to be performed by subcontractors in order to alleviate the concern that the cost of the work is not greater than ½ of one percent of its bid.

The bid specifications package specifically directs bidders to comply with San Jose Standard Specification 2-1.15A, which requires each bidder to designate the name and location of each subcontractor who will perform more than ½ of one percent of the Contractor's total bid. This requirement is also codified in California's Fair Subletting and Subcontracting Act (see Public Contracts Code §4104). "As to subcontractors, the act seeks to prevent 'bid shopping and bid peddling.'" *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4<sup>th</sup> 757, 765.

In the case of WBB's bid, WBB must list all subcontractors whose work will exceed \$189,150 (.005 x \$ 37,830,000). RAB urges the City to request and obtain from WBB evidence demonstrating that the value of the work for each omitted category is less than the threshold amount. A reasonable suspicion has arisen which casts doubt on WBB's entire List of Subcontractors due to WBB's failure to identify subcontractors for: Play Equipment Installation, Low Voltage, Security, and Rides Installation, each of which constitute nearly twice or more of the threshold of ½ of one percent of RAB's bid. WBB concedes that it will not be self-performing these portions of work. Therefore, the subcontractors WBB will use must be identified, and WBB's failure to do so is an egregious error and violation of California law.

a. Play Equipment Installation

WBB does not identify who will install the playground equipment. Attorney McInerney asserts:

*"West Bay used quotes from several playground equipment suppliers which individually did not exceed ½%. The installation of all the playground equipment combined is also less than ½% and will be installed pursuant to section 02882."*

Mr. McInerney does not identify who the "several playground equipment suppliers" are, does not identify the amount of the bids, and does not represent that any of the bidders have the qualifications

set forth in Specific Section 02882 Playground Equipment and Structures. Furthermore, pursuant to San Jose Standard Specification 2-1.15A(3), WBB may use only one subcontractor for playground installation – therefore, it is questionable as to what is meant by the statement, "West Bay used quotes from several playground equipment suppliers which individually did not exceed 1/2%." RAB asks the City to seek time/date-stamped and/or verifiable documentation from WBB to fully remove doubt and demonstrate WBB's due diligence.

RAB listed Community Playgrounds from Novato, CA as the play equipment installer. The bid from Community Playgrounds is \$465,682 which is nearly 2.5 times the threshold set forth by San Jose Standard Specification 2-1.15A. Attached is a letter from Community Playgrounds identifying its qualifications for play equipment installation which meet Specification Section 02882 Playground Equipment and Structures.

RAB urges the City to require WBB to provide proof that the cost of the playground installation will not exceed \$189,150 with an installer who is qualified within the meaning of Specification Section 02882.

b. Low Voltage & Security

WBB did not list a subcontractor for "Low Voltage" and "Security" and crossed out these trades on its bid proposal. Mr. McInerney's letter states:

*"The low voltage work, as is common in the industry, is being performed by Scott Electric, a qualified licensed and listed electrician."*

However, Scott Electric was not identified on WBB's List of Subcontractors for Low Voltage and/or Security. RAB believes that the Low Voltage and Security will each constitute more than 1/2 of one percent of WBB's bid proposal. RAB listed Intermountain Electric Company from San Carlos for this scope of work. Intermountain Electric's bid for Low Voltage is \$528,000 (nearly 3 times the threshold) and for Security is \$282,000, which is over \$100k beyond the threshold required for listing subcontracts on this project.

RAB urges the City to require WBB to provide time/date stamped copies of the quote it used from Scott Electric demonstrating that the bids is less than \$189,150 for each portion of work.

c. Exhibit Rides Equipment

WBB listed unlicensed contractors, International Rides for the "Exhibit Rides Equipment", and Dynamic Designs for the "Danny the Dragon" portion of work. In response to RAB's bid protest, WBB responds:

*International Rides was specially listed by the City in the specifications section 02885 as an approved manufacturer. Dynamic Designs is the appointed supplier of the Danny the Dragon ride by International Rides. The amount of installation needed for these rides is relatively minor in scope and price. West Bay will verify that the installation portion of the work, however minor, will be performed by properly licensed contractors in strict compliance with the experience requirements of the City's specifications.*

Based on this response, at this time WBB does not know who it will use for installation of the Exhibit Rides Equipment and Danny the Dragon ride and does not know how much the installation will cost.

RAB listed Community Playgrounds for Exhibit Rides Equipment. RAB estimated the cost of installation of the rides work at \$277,277, which is \$90,000 over the threshold of ½ of one percent of the bid price. Therefore, the installation subcontractor should have been identified by WBB pursuant to San Jose Standard Specification 2-1.15A (accord Pub. Cont. Code §4100 et. seq.) rather than the supplier.

2. Doubts As to whether WBB is a Responsible Bidder

In addition to finding that WBB's bid is not responsive to the call for bids due to the reasons articulated above, the City of San Jose also has sufficient evidence to determine that WBB is not a responsible bidder due WBB's startling failure to have decided what subcontractors it will use on this project, the listing of unlicensed subcontractors, and failure to identify who will perform Asbestos Abatement.

"An agency has discretion to determine whether a low bidder is 'responsible', that is whether the bidder has the fitness, quality and capacity to perform the proposed work satisfactorily." *D.H. Williams*, 146 Cal.App.4<sup>th</sup> 757, 463. The agency's decision will be upheld by a reviewing court so long as it was not made arbitrarily, is supported by evidence, and is consistent with proper procedure – giving the bidder notice and opportunity to respond." *Id.* at 763.

"It is entirely proper for a public agency to make a determination that a lapsed or nonexistent subcontractor's license, under particular circumstances, renders a low bidder not responsible." (*Id.* at 771). WBB has now clarified that it will not use unlicensed contractors International Rides and Dynamic Designs for ride installation because WBB does not know at this time who it will use for this work. However, WBB does intend to use a non-licensed contractor, ACME from Portland Oregon. The City of San Jose may decide that WBB's intended use of a non-licensed contractor makes WBB a non responsible bidder.

In addition, WBB does not identify who will perform asbestos abatement. California Code of Regulations Division 8, Title 16, Article 3, section 7058.5 states that, "No contractor shall engage in asbestos-related work, as defined in Section 6501.8 of the Labor Code, which involves 100 square feet or more of surface area of asbestos containing materials, unless the qualifier for the license passes an asbestos certification examination." WBB does not have Asbestos certification listed with the California Contractor's license board.

When dealing with contamination, such as asbestos, there is a strong public policy in favor of ensuring that the materials are handled by appropriately trained and certified handlers. WBB does not identify who will perform the Absestes Abatement. RAB will subcontract demolition work to Heim Bros, who will sub-subcontract the asbestos abatement to Synergy Environmental, a State of California Licensed abatement contractor certified to remove and properly dispose of asbestos and lead. Attached is a letter from Heim Bros. in support, along with the California Contractor's License detail for Synergy Environmental demonstrating they have the appropriate license.

Happy Hollow Park and Zoo- Zoo and Attractions Package

Supplement to Bid Protest by Robert A Bothman, Inc.

August 23,2007

Page 5 of 5

The City of San Jose may decide that WBB's failure to identify who it will use for asbestos abatement, once again, makes WBB a non responsible bidder.

Overall, WBB's bid should raise serious concerns on the part of the City of San Jose with respect to the responsiveness of the bid and the responsibility of WBB as a bidder. On a project of this magnitude (\$37,000,000+) where the bid date was extended twice the City should expect Contractors to submit bids which conform to City Standard Specifications, to have decided on the subcontractors they will use, and to use subcontractors who are licensed in the State of California.

Based upon the information presented herein, we ask the City to find the bid submitted by West Bay Builders, Inc. is non-responsive and/or West bay Builders, Inc. is not a responsible bidder. We request that the City of San Jose maintain the integrity of its' bid process and support our letter of protest. We feel strongly that the contract should be awarded to Robert A. Bothman, Inc. the apparent second low bidder.

Thank you in advance for the courtesy of reviewing this bid protest. We look forward to your judgment on this matter.

Very truly yours  
Robert A. Bothman, Inc.



Krisztina M. Kiss, Esq.  
Contracts Manager

Cc: William Hurley, Esq.  
Brian Bothman, VP Project Management  
James Moore, VP Estimating

**Community Playgrounds**  
1620 Grant Avenue, Suite 5  
Novato, CA 94945

August 20, 2007

Robert A. Bothman Corporation  
Attn: Jay Cullen  
650 Quinn Avenue  
San Jose, CA 95112-2604

Re: Happy Valley Zoo Project  
Installation of Play Equipment

Mr. Cullen:

I understand there was no subcontractor named for the play equipment installation for this project by the apparent low bidder. My question is how will the qualifications and experience be evaluated for this scope of work.

For your information our company is certified by the manufacturers as qualified installers for the products specified on this project. Our lead crew members are also certified playground safety inspectors, (C.P.S.I.).

Other memberships, associations and experience:

National Playground Contractors Association, which pre-qualifies its members.

California Park & Recreation Society, certified installers for major playground manufacturers.

Over 10,000 playgrounds successfully built of which numerous playgrounds were installed for San Jose Parks and schools.

If any additional information is needed, please contact me.

Sincerely,

***Curt Wear***

Curt Wear, President

(415) 892-8100



August 22, 2007

Mr. James Moore  
Robert A Bothman, Inc  
650 Quinn Ave  
San Jose, CA 95112

Re: Happy Hollow Park and Zoo

James,

In respect to the Happy Hollow Zoo and per your request the following is the breakdown for security and low voltage.

Security - \$282,000.00  
Low Voltage - \$528,000.00

Please feel free to contact me with any questions.

Regards,

A handwritten signature in black ink, appearing to read 'David Signorello', written over a horizontal line.

David Signorello  
President

c.c. Kriztina Kiss

# HEIM BROS. INC.

OVER 50 YEARS SERVING THE BAY AREA

---

LAND CLEARING

DEMOLITION

TREEREMOVAL

---

August 21, 2007

Vern  
Estimator  
Robert A. Bothman

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RE: Happy Hollow Park and Zoo  
SUBJECT: Subcontractor List

Vern,

Please be advised that Heim Bros. Inc. will be using Synergy Environmental, a State of California Licensed abatement contractor certified to remove and properly dispose of asbestos and lead, as our abatement contractor.

Very Truly Yours,  
Rick DeKay

Welcome to

California

**CALIFORNIA CONTRACTORS STATE LICENSE BOARD**

License Detail

Contractor License # 516185

**DISCLAIMER**

A license status check provides information taken from the CSLB license data base. Before relying on this information, you should be aware of the following limitations:

- CSLB complaint disclosure is restricted by law (B&P 7124.6). If this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.
- Per B&P 7071.17, only construction related civil judgments reported to the CSLB are disclosed.
- Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.
- Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

Extract Date: 08/22/2007

**\*\*\* Business Information \*\*\***

AMERICAN SYNERGY ASBESTOS REMOVAL SERVICES INC  
dba SYNERGY ENVIROMENTAL  
P O BOX 965  
UNION CITY, CA 94587  
Business Phone Number: (510) 259-1710

Entity: Corporation

Issue Date: 08/17/1987 Expire Date: 08/31/2007

**\*\*\* License Status \*\*\***

This license is current and active. All information below should be reviewed.

**\*\*\* Classifications \*\*\***

Class	Description
C-2	INSULATION AND ACOUSTICAL
C17	GLAZING
C10	ELECTRICAL
B	GENERAL BUILDING CONTRACTOR
C20	WARM-AIR HEATING, VENTILATING AND AIR-CONDITIONING

**\*\*\* Certifications \*\*\***

Cert	Description
ASB	ASBESTOS - Check DOSH Registration

LAW OFFICES  
**McINERNEY & DILLON**  
PROFESSIONAL CORPORATION  
1999 HARRISON STREET - SUITE 1700  
OAKLAND, CALIFORNIA 94612-4700

TELEPHONE (510) 465-7100  
FAX (510) 465-8556

Timothy L. McInerney

tlm@mcinerney-dillon.com

August 20, 2007

Bruce E. Biordi  
CFAS Division  
Department of Public Works  
City of San Jose  
200 East Santa Clara St., 6th Floor  
San Jose, California 95134-1905

Re: Happy Hollow Park and Zoo  
Zoo and Attractions bid protest

Dear Mr. Biordi:

I represent West Bay Builders, Inc., ("West Bay") regarding the protest filed by Robert A Bothman, Inc., ("Bothman") on the City of San Jose's ("City") Happy Hollow Park and Zoo project.

Bothman makes two pleas in an attempt to protest the lowest responsible bid of West Bay; first, West Bay did not list subcontractors for certain items of work and second, West Bay's listed subcontractors are not licensed. These arguments are based on erroneous assumptions, incorrect law and do not reflect on the "responsiveness" of West Bay's bid. Bothman's protest is without legal or factual merit and must be dismissed.

Bothman's first argument involves the tiered theory that failing to list a subcontractor for a specific trade renders the bid nonresponsive. Contrary to Bothman's position, both the California Public Contract Code section 4106 and the City's specifications 2-1.15A address and anticipate such common industry practice. Both sections 4106 and 2-1.15A state that not listing a subcontractor is the same as listing West Bay to perform the work. The technical omission of the words "By General" on the List of Subcontractors form is remedied by the plain language of the section 4106 and specification section 2-1.15A.4. Finally, the City's specifications do not list this issue as one of the several grounds for rejection of the bid.

Undaunted by the law or facts, Bothman argues that West Bay failed to list subcontractors for various items of work. Bothman erroneously assumes that the work for which no subcontractor was listed exceeds the ½ % threshold required to list such work. In reality, the work in question is minor in cost and well below the limited required for listing. Furthermore, West Bay is fully qualified to furnish and install the concrete, structural steel and casework. The low voltage work, as is common in the industry, is being performed by Scott Electric, a qualified, licensed and listed electrician. West Bay used quotes from several playground equipment suppliers which individually did not exceed ½ %. The installation of all the playground equipment combined is also less than ½ % and will be installed pursuant to section 02882.

The second argument made by Bothman focuses on the proposition that certain listed subcontractors are not licensed and therefore West Bay's bid is not responsive. There are numerous fatal defects with this theory. Initially, California case law dictates that a subcontractor's license status is not grounds to reject a bid. D.H. Williams Construction, Inc. v. Clovis Unified School District (2007)146 Cal. App.4<sup>th</sup> 757. The court in Williams clearly articulated that a bid that listed an unlicensed subcontractor cannot be summarily rejected. The Williams court held the Public Contract Code does not require bidders on public contracts to list only subcontractors who are licensed at the time of bid. The court pointed out that nowhere in the code is there an expressed requirement that all listed subcontractors be licensed and concluded:

*...we conclude effective enforcement of the act does not require an implied, blanket requirement of that all subcontractors be licensed at the time prime bids are submitted.*

Nor do the City's specifications, which mirror the Public Contract Code, support Bothman's desire. Contrary to Bothman's claim that the City specification section 2-1.15B(f), "requires that subcontractors be licensed at the time of bid", no such mandate exists. Section 2-1.15B involves the grounds for "Substitution of Subcontractors", as stated in the heading. It does not set forth a requirement for the content of the List of Subcontractors form. Bothman's blatant attempt to mislead the City is noteworthy.

Two of the three subcontractors singled out by Bothman, Dynamic Designs and Internations Rides Management are primarily suppliers of specialized equipment. International Rides was specially listed by the City in the specifications section 02885 as an approved manufacturer. Dynamic Designs is the appointed supplier of the Danny the Dragon ride by International Rides. The amount of installation needed for these rides is relatively minor in scope and price. West Bay will verify that the installation portion of the work, however minor, will be performed by properly licensed contractors in strict compliance with the experience requirements of the City's specifications.

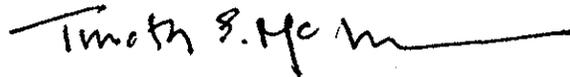
Bruce E. Biordi  
August 20, 2007  
Page 3

The other subcontractor, ACME is an experienced signage company from Portland, Oregon. They will be licensed prior to the start of their work, which will not commence until the end of the project.

It should be noted that Bothman's false assumptions about the content of West Bay's bid is not relevant to the responsiveness of West Bay's bid. Compliance with the listing laws is a post-award issue. The Public Contract Code and the City specifications both handle potential listing issues post award.

Bothman's protest is not grounded in any facts or law, but is solely based on its faulty perception of the content of West Bay's bid. The protest must be rejected and the contract awarded to West Bay, the lowest responsible bidder by over a million dollars. West Bay is ready and eager to begin working with the City on this exciting project.

Sincerely,

A handwritten signature in black ink that reads "Timothy L. McInerney". The signature is written in a cursive style with a long horizontal line extending to the right.

Timothy L. McInerney

TLM:sjf

cc: West Bay Builders, Inc.  
Robert A. Bothman, Inc.

Timothy L. McInerney

LAW OFFICES  
**McINERNEY & DILLON**  
PROFESSIONAL CORPORATION  
1999 HARRISON STREET · SUITE 1700  
OAKLAND, CALIFORNIA 94612-4700  
TELEPHONE (510) 465-7100  
FAX (510) 465-8556

August 24, 2007

Bruce E. Biordi  
Senior Landscape CFAS Division Architect  
City of San Jose  
200 East Santa Clara Street, 6<sup>th</sup> Floor  
San Jose, CA 95113

Re: Happy Hollow Park and Zoo  
Zoo and Attractions Bid Protest  
Reply on behalf of West Bay Builders, Inc.

Dear Mr. Biordi:

Robert A. Bothman, Inc.'s ("Bothman") response to West Bay Builders Inc., ("West Bay") August 20, letter accepts West Bay's position on the applicable law but continues to regurgitate its erroneous theories, misstates the facts, and ultimately request the City of San Jose ("City") to violate the California Public Code. West Bay's bid is responsive and nothing mentioned in Bothman's letter affects this status.

1. List of Subcontractors

The majority of Bothman's supplemental letter merely "urges the City to request from WBB evidence" that certain subcontractor bids were below the ½ % threshold. This request asks the City to violate the California Public Contract Code and well settled California case law.

A bid is responsive if it promises to do what the bidding instructions require. *MCM Construction Inc., v. City and County of San Francisco* (1998) 66 Cal. App. 4<sup>th</sup> 359. However, in determining the responsiveness of a bid a public agency may not look beyond the face of the bid.<sup>1</sup> For over 20 years numerous California cases have reiterated this clear principle. "In most cases, the determination of nonresponsiveness will not depend on outside investigation..."

---

<sup>1</sup> The only exception involves compliance with MBE/WBE goals, not relevant here. California Public Contract Code section 2000. *Monterey Mechanical Co. v. County of Sacramento Regional County Sanitation Dist.* (1996) 44Cal App 4<sup>th</sup>, 1391.

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*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal. App. 3<sup>rd</sup> 1331. Responsiveness is a “fact usually determined from the face of the bid without outside investigation or information”. *Valley Crest Landscape v. City Council* (1996) 41 Cal. App. 4<sup>th</sup> 1432. “Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation”. *Id. MCM Construction*.

The law makes sense when viewed with the remedies set forth in Section 4110 for any listing law violation. As mentioned in the previous letter, any violation of the listing law is handled post award. In other words, the project must be awarded to West Bay and then if the City finds an unauthorized substitution once the actual work begins the remedies are specifically addressed in section 4110. The majority of Bothman’s complaints, even if true, are not relevant to the issue of responsiveness and the award of the contract.

Without regard to the law or Bothman’s urging, West Bay would be happy to meet with the City to review the entire content of its bid.

a. Playground Equipment Installation

Again, West Bay used several quotes below the ½ % threshold from several playground equipment suppliers to fulfill the specifications. These entities will act as pure material suppliers that are not required to be listed regardless of price. The installation will be done by a separate qualified subcontractor. The value of all the playground equipment installation is less than ½ % . Bothman’s self-serving example of its own subcontractor misses the issue and is not relevant. The mere fact that Bothman is paying one entity to supply and install all the playground equipment is not relevant to the listing of pure suppliers or installation only subcontractors that are only doing work valued at less than ½ % . Neither of which are required to be listed.

Bothman also intentionally misquotes the City specifications, when its states that pursuant to section 2-1.15A(3), “WBB may use only one subcontractor for playground installation....” This is wrong. Section 2-1.15A(3) actually states that:

*The Contractor shall list only one subcontractor for each portion of the work as defined by the Contractor in their proposal.*

Here, West Bay, as allowed by the specifications, determines “each portion of the work”.

b. Low Voltage & Security

Incredibly, Bothman argues that while West Bay listed Scott Electric, it did not list a low voltage subcontractor. As allowed by section 2-1.15A(3) and industry custom, West Bay defined the electrical portion of the work to include the low voltage work. Again, Scott Electrical is

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doing all the electrical work, including low voltage. The City is free to call Scott Electrical and discuss the exact content of its bid and its qualifications.

c. Exhibit Rides Equipment

Bothman continues to believe that obtaining a California Contractors License from the CLSB is requirement which must be fulfilled before being listed as a subcontractor for the City. However, California Public Contract Code and the City's Specifications, concerning this matter, do not require that an entity to have a California Contractors License to be "listed" as a subcontractor. *D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757. In a tacit admission of West Bay's position, Bothman's letter completely ignores the law on this point. The code and the specifications state "*The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor to the in or about the construction of the work or improvement, or a subcontractor licensed by the State of California...*". The word "or" preceding "*a subcontractor licensed by the State of California...*" is definitive. West Bay contends that by listing International Rides and Dynamic Designs it is in strict compliance with the City's Specifications and California Public Contract code.

Bothman misquotes West Bay's letter and uses its estimate as attempted proof of the content of West Bay's bid. The amount of Bothman's estimate is wholly irrelevant to this issue of how West Bay bid the project. International Rides and Dynamic Designs were listed. West Bay did use a price for installation of the rides in its bid. That price was below the threshold.

Since International Rides and Dynamic Designs will play pivotal roles concerning the "Exhibit Rides Equipment" and the City's critical experience requirements concerning the Exhibit Rides Equipment it imperative that the City be aware that West Bay intends to utilize City endorsed manufacturers. Bothman on the other hand chose not to divulge where they intend to purchase the Exhibit Rides Equipment. While this act may be in compliance with the Public Contract Code and the City's Specifications it will preclude whomever Bothman chooses to purchase the equipment from being involved in the onsite activity, which West Bay believes will be imperative for a quality installation.

2. West Bay is a Responsible Contractor.

In a last ditch effort to attack West Bay, Bothman hypocritically argues that West Bay's failure to list an asbestos abatement contractor makes West Bay "nonresponsible". This position is wrong and based on pure speculation. It is however, enlightening of Bothman's entire

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argument and the absolute lack of merit thereof.

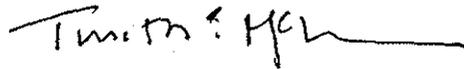
First, attached is the asbestos bid received by West Bay. It shows that the asbestos work is worth \$ 19,000 and will be performed by a certified abatement contractor, Bayview Environmental Services, Inc.

Second, Bothman's exhibits attached to its letter evidence that Bothman's asbestos abatement contractor was not listed and working as a second tier subcontractor to Heim Bros. While there is nothing wrong with this arrangement, it is exactly what Bothman argues is illegal when discussing West Bay use of Scott Electric and the low voltage work.

Finally, West Bay has been successfully performing public work projects for almost 20 years, with a long list of references. West Bay concentrates its work in Northern California to assure quality control and timely performance. Again, West Bay will be happy to present extensive evidence of its responsibility at any time.

Bothman's arguments are not factually supported and run directly contrary to California law. West Bay is the lowest responsible bidder and is entitled to the award.

Very truly yours,



Timothy L. McInerney

TLM:sjf

cc: Robert A. Bothman  
W. Hurley  
West Bay Builders, Inc.

**BV** BAYVIEW ENVIRONMENTAL SERVICES INC. #684341

6925 SAN LEANDRO STREET, OAKLAND, CALIFORNIA 94621 510.562.6181 FAX 510.562.6182

August 1, 2007

**Scope of Work Letter**  
**Happy Hollow Park Zoo and Zoo Attractions San Jose CA.**  
**Abatement of Asbestos Materials, Loose & Peeling Lead Paint, PCBs light**  
**ballast's and light tubes**

- This proposal includes the items identified in the Sierra Environmental Inc. Hazardous Materials Related Documents dated on March 31, 2007.
- Bayview will properly notify applicable government agencies and pay required fees.
- Work areas will be setup up under full containment and negative air as required for the class of work being performed.
- All waste will be disposed of at a properly licensed landfill.
- Third party Consultant and air Clearance are the owner's responsibility.
- All work will be completed in 5 regular hour shifts.
- Bayview Environmental is a union contractor.
- General Contractor will safe-off utilities and provide temporary power and water.
- Excludes site demolition, concrete cutting and demolition.
- Excludes soft demo of non-hazardous interior items.
- Excludes patch and repair.

**Base Bid:** Removal and disposal of Hazardous Materials as described above: \$19,750.00

**Alternate 1:** Unit cost to Remove and dispose of less than 1% ACM drywall: \$2.75 per s.f.

IF YOU HAVE ANY QUESTIONS REGARDING THIS BID OR NEED ADDITIONAL INFORMATION, PLEASE CALL MARTIN LEDESMA (510) 544-5217 or nextel phone (510) 772 - 9650.

**RESOLUTION NO.****RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN JOSE APPROVING THE HAPPY HOLLOW PARK & ZOO RENOVATION PROJECT, FOR WHICH AN INITIAL STUDY/MITIGATED NEGATIVE DECLARATION WAS PREPARED IN ACCORDANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, AND ADOPTING A MITIGATION MONITORING AND REPORTING PROGRAM**

**WHEREAS**, prior to the adoption of this Resolution, the Planning Director of the City of San Jose prepared an Initial Study and adopted a Mitigated Negative Declaration for the Happy Hollow Park & Zoo Renovation Project (Planning File No. PP05-142) in accordance with the requirements of the California Environmental Quality Act of 1970, as amended ("CEQA"), and state and local guidelines implementing CEQA; and

**WHEREAS**, the Happy Hollow Park & Zoo Renovation Project ("Project") analyzed under the Initial Study/Mitigated Negative Declaration consisted of the development of new attractions and exhibits, removal of outdated facilities, the addition of a new parking lot and associated driveway, installation of a pedestrian bridge over Coyote Creek, and the development of a multi-use trail along the east side of Coyote Creek within with approximately 40-acre project site of the Kelly Park bounded by Story Road to the north, Senter Road to the west, Roberts Avenue to the east, and developed and undeveloped portions of the park to the south, San José, California 95112; and

**WHEREAS**, the Initial Study/Mitigated Negative Declaration concluded that implementation of the Project could result in a number of significant effects on the environment and identified mitigation measures that would reduce the significant effects to a less-than-significant level; and

**WHEREAS**, in connection with the approval of a project involving the preparation of an initial study/mitigated negative declaration that identifies one or more significant environmental effects, CEQA requires the decision-making body of the lead agency to incorporate feasible mitigation measures that would reduce those significant environment effects to a less-than-significant level; and

**WHEREAS**, whenever a lead agency approves a project requiring the implementation of measures to mitigate or avoid significant effects on the environment, CEQA also requires a lead agency to adopt a Mitigation Monitoring and Reporting Program to ensure compliance with the mitigation measures during project implementation; and

**WHEREAS**, the City of San Jose is the lead agency on the Project, and the City Council is the decision-making body for the proposed Project; and

**WHEREAS**, the City Council has reviewed and considered the Initial Study/Mitigated Negative Declaration and related Mitigation Monitoring and Reporting Program for the Project and intends to take actions on the Project in compliance with CEQA and state and local guidelines implementing CEQA; and

**WHEREAS**, the Initial Study/Mitigated Negative Declaration and the Mitigation Monitoring and Reporting Program for the Project are, by this reference, incorporated into this Resolution as if fully set forth herein; and

**WHEREAS**, the Project will not individually or cumulatively have an adverse effect on wildlife resources, as defined in Section 711.2 of the California Department of Fish and Game Code.

**NOW THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE AS FOLLOWS:**

**THAT THE CITY COUNCIL** does hereby make the following findings: (1) it has independently reviewed and analyzed the Initial Study/Mitigated Negative Declaration and other information in the record and has considered the information contained therein, prior to acting upon or approving the Project, (2) the Initial Study/Mitigated Negative Declaration prepared for the Project has been completed in compliance with CEQA and consistent with state and local guidelines implementing CEQA, and (3) the Initial Study/Mitigated Negative Declaration represents the independent judgment and analysis of the City as lead agency for the Project. The City Council designates the Director of Public Works at the Director's Office at 200 East Santa Clara Street Tower 5, San Jose CA 95113, as the custodian of documents and records of proceedings on which this decision is based.

**THAT THE CITY COUNCIL** does hereby approve construction of the Project (Planning File No.PP05-142) and adopt the Mitigation Monitoring and Reporting Program prepared for the Project. The Initial Study/Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program are: (1) on file in the Office of the Director of Planning, located at 200 East Santa Clara Street Tower 3, San Jose CA 95113 and (2) available for inspection by any interested person.

ADOPTED this 6th day of November, 2007, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

VACANT:

---

Chuck Reed  
Mayor

ATTEST:

---

LEE PRICE, CMC  
City Clerk

**DRAFT**  
**MITIGATED NEGATIVE DECLARATION**

The Director of Planning, Building and Code Enforcement has reviewed the proposed project described below to determine whether it could have a significant effect on the environment as a result of project completion. "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.

**NAME OF PROJECT:** HAPPY HOLLOW PARK & ZOO RENOVATION PROJECT

**PROJECT FILE NUMBER:** PP05-142

**PROJECT DESCRIPTION:** The project is the renovation and expansion of Happy Hollow Park and Zoo, including development of new attractions and exhibits, addition of a new parking lot and associated driveway, installation of a pedestrian bridge over Coyote Creek, and removal of outdated facilities. This Project also addresses the development of a multi-use trail along the east side of Coyote Creek, within the project boundaries.

**PROJECT LOCATION & ASSESSORS PARCEL NO.:** The project site is located in Kelley Park in San Jose, on about 40 acres bounded by Story Road to the north, Senter Road to the west, Roberts Avenue to the east, and developed and undeveloped portions of the Kelley Park to the south; 477-10-001, 477-12-001 & 477-12-002

**COUNCIL DISTRICT:** 7

**APPLICANT CONTACT INFORMATION:** City of San Jose Department of Public Works, City Facilities Architectural Services Division, 200 E. Santa Clara Street, San Jose, CA 95113 Contact: Arlene Nakagawara (408) 535-8300 [arlene.nakagawara@sanjoseca.gov](mailto:arlene.nakagawara@sanjoseca.gov)

**FINDING**

The Director of Planning, Building & Code Enforcement finds the project described above will not have a significant effect on the environment in that the attached initial study identifies one or more potentially significant effects on the environment for which the project applicant, before public release of this draft Mitigated Negative Declaration, has made or agrees to make project revisions that clearly mitigate the effects to a less than significant level.

**MITIGATION MEASURES INCLUDED IN THE PROJECT TO REDUCE POTENTIALLY SIGNIFICANT EFFECTS TO A LESS THAN SIGNIFICANT LEVEL**

**I. AESTHETICS**

The project will not have a significant impact on this resource, therefore no mitigation is required.

**II. AGRICULTURE RESOURCES**

The project will not have a significant impact on this resource, therefore no mitigation is required.

### III. AIR QUALITY

In order to minimize PM<sub>10</sub> emissions during construction, the project contractor shall implement the following dust control measures:

- Water all active construction areas at least twice daily.
- Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least two feet of freeboard.
- Pave, apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.
- Sweep daily (with water sweepers) all paved access roads, parking areas and staging areas at construction sites.
- Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets.

Implementation of the above mitigation will reduce the impacts to less than significant.

### IV. BIOLOGICAL RESOURCES

#### *Mitigation for Direct and Indirect Impacts to the Riparian Woodland*

- To compensate for the removal of 1,440 square feet (0.03 acre) of riparian woodland and 20 linear feet of Shaded Riverine Aquatic (SRA) habitat during placement of the bridge over Coyote Creek, the San Jose Public Works Department shall prepare and implement a riparian revegetation plan that recreates riparian woodland at a 3:1 ratio and SRA cover at a 1:1 ratio (see Table 2). The revegetation plan shall be prepared prior to project construction. The SRA revegetation shall occur along the creek bank; 20 linear feet of open area along the creek edge occur immediately upstream of the proposed bridge site on the west bank would be suitable for replacement of SRA cover. The riparian woodland revegetation shall occur along Coyote Creek in the greater project vicinity. Suitable areas along the east bank on City-owned land that are immediately adjacent to the riparian woodland and support non-native grassland are suitable for this revegetation. The City shall secure all necessary permits from the regulatory agencies for the proposed project.

The revegetation plan, prepared prior to construction and implemented within one year of the completion of construction, shall specify the detailed location of all plantings, the use of locally native riparian plant species collected from the Coyote Creek watershed, and include a five-year maintenance and monitoring program. The plan shall specify that the City monitor the revegetation areas a minimum of once a year for five years, or longer if stated success criteria are not met within five years. During each year of the five-year monitoring period, plantings shall achieve a minimum 80% survival rate with a health rating of "good" or better for the revegetation to be deemed successful. Plant species recommended for the revegetation are listed on Table 3; plant species used for the mitigation shall be native to the Coyote Creek watershed and grown from locally-obtained planting stock.

The City shall prepare yearly monitoring reports and submit these reports to the City's Environmental Principal Planner and any required environmental resource agencies at the end of each monitoring year. The reports shall identify the plant survival rate, maintenance actions at the site and include photographs documenting the status of the revegetation. The City shall implement remedial measures should the success criteria not be achieved in any of the five monitoring years. Remedial measures may include replacement plantings, an increase in maintenance or changes to the irrigation regime.

Table 3 Recommended Planting List for Riparian Woodland and SRA Mitigation Areas		
Common Name	Scientific Name	Average Spacing
<b>SRA Mitigation Area</b>		
Willow	<i>Salix spp.</i>	6' o.c.
Fremont Cottonwood	<i>Populus fremontii</i>	6' o.c.
<b>Riparian Woodland Mitigation Area</b>		
Coast Live Oak	<i>Quercus agrifolia</i>	15' o.c.
Blue Elderberry	<i>Sambucus mexicana</i>	15' o.c.
Valley Oak	<i>Quercus lobata</i>	15' o.c.
Western Sycamore	<i>Platanus racemosa</i>	15' o.c.
California Buckeye	<i>Aesculus californica</i>	15' o.c.
Box Elder	<i>Acer negundo</i>	15' o.c.
California Rose	<i>Rosa californica</i>	8' o.c.
Flowering Currant	<i>Ribes sanguineum</i>	8' o.c.
Toyon	<i>Heteromeles arbutifolia</i>	8' o.c.
Coffee Berry	<i>Rhamnus californica</i>	8' o.c.
Coyote Brush	<i>Baccharis pilularis</i>	8' o.c.
California Sage	<i>Artemisia californica</i>	8' o.c.
Snowberry	<i>Symphoricarpos albus</i>	8" o.c.
Mugwort	<i>Artemisia douglasiana</i>	8" o.c.
California Figwort	<i>Scrophularia californica</i>	4' o.c.

***Mitigation for Impacts to Trees Outside the Riparian Corridor***

- In addition to trees to be planted for riparian habitat mitigation, trees to be removed by the project shall be replaced at the ratios set forth in the table below:

Diameter of Tree to be Removed	Type of Tree to be Removed			Minimum Size of Each Replacement Tree
	Native	Non-Native	Orchard	
18 inches or greater	6:1	4:1	4:1	24-inch box
12-17 inches	3:1	2:1	none	24-inch box
Less than 18 inches	1:1	1:1	none	15-gallon container
x:x = tree replacement to tree loss ratio				
Note: Trees greater than 18' diameter shall not be removed unless a tree removal permit, or equivalent, has been approved for the removal of such trees.				

In the event the project site does not have sufficient area to accommodate the required tree mitigation, one or more of the following measures shall be implemented, to the satisfaction of the City's Environmental Principal Planner, at the development permit stage:

- The size of a 15-gallon replacement tree can be increased to 24-inch box and count as two replacement trees.
- An alternative site(s) will be identified for additional tree planting. Alternative sites may include local parks or schools or installation of trees on adjacent properties for screening purposes to the satisfaction of the Director of the Department of Planning, Building, and Code Enforcement<sup>1</sup>
- A donation of \$300 per mitigation tree to Our City Forest or San Jose Beautiful for in-lieu off-site tree planting in the community. These funds will be used for tree planting and maintenance of planted trees for approximately three years. A donation receipt for off-site tree planting will be provided to the Planning Project Manager prior to issuance of a development permit.

The City shall retain a qualified arborist during construction to oversee and monitor tree protection and pruning measures. The project shall implement measures in accordance with the arborist's and City's requirements (identified in Appendix B of the Initial Study).

***Mitigation for Direct and Indirect Impacts to Special Status Wildlife Species and Their Habitats***

- Site grading and other heavy equipment work within the 100-foot riparian setback area shall occur outside the breeding period of riparian bird species (e.g., construction shall occur after August 1 and before March 15<sup>th</sup>). If this is not possible, a qualified wildlife biologist, under contract to the City, shall conduct pre-construction surveys for nesting birds to determine if they occur on the site. The surveys shall be conducted by a qualified biologist no earlier than 45 days and no later than 20 days prior to commencement of grading or construction. If raptors or other protected bird species are nesting on the site, the City shall postpone construction within 300 feet of raptor nests and within 50 feet of other bird nests until all young have fledged. The wildlife biologist shall document that the young have fledged prior to commencement of construction work, and shall submit documentation to the City's Environmental Principal Planner.
- Prior to any construction on the east side of Coyote Creek, a qualified biologist, under contract to the City of San Jose, shall conduct a protocol-level burrowing owl survey prior to project construction (i.e., between April 15 and July 15) in accordance with the requirements of the Burrowing Owl Survey Protocol and Mitigation Guidelines (Burrowing Owl Consortium, 1993). If burrowing owls are found on the project site, the project shall be reconfigured to avoid impacting the species, if possible. Minor project reconfiguration may be feasible if owls are found to occupy a corner of the proposed parking facility; however, measures are recommended to offset impacts to the owl if project reconfiguration is not possible. As it is unlawful to take, possess or destroy burrowing owls, their nests or their eggs, any impacts to the species during the breeding season (February 1-August 31) shall be avoided. Avoidance measures include rescheduling construction after all young have fledged and/or establishing a 250-foot buffer area around the occupied habitat. The buffer areas shall be established by a qualified biologist in consultation with CDFG. Under the direction of a qualified wildlife biologist (under contract to the City of San Jose), the outside edge

of the 250-foot wide buffer shall be demarcated by the placement of plastic construction fencing. Prior to commencement of construction activities, the City shall arrange for a qualified wildlife biologist to inform workers of the presence of burrowing owls, their protected status, work boundaries, and measures to be implemented to avoid loss of these species during construction activities. Construction workers shall be informed that no construction activities are to occur within the buffer area until owls depart from the site and as directed by the consulting wildlife biologist (i.e., all young have fledged and are able to forage independent of the parents, as determined by monitoring by a qualified biologist).

- If impacts to breeding habitat cannot be avoided, the City shall establish and preserve a minimum of 6.5 acres of off-site habitat for each pair of owls or each unpaired owl impacted by the project. At least two enhanced or artificial burrows shall be provided for each burrow impacted. The land identified to offset impacts to burrowing owls shall be protected in perpetuity by either a conservation easement or fee title acquisition. The burrowing owl habitat mitigation land shall be adjacent to occupied burrowing owl foraging habitat in the San Jose area. The final mitigation requirements will depend upon the number of pairs of birds or single birds that are found in the surveys and the City's consultation with CDFG. Site construction cannot occur until this habitat mitigation plan and mitigation agreement is finalized between the City and CDFG.
- Additionally, impacts to the species during the winter residency period (December 1- through January 31) shall be avoided. To avoid impacts to the species during this time, pre-construction surveys shall be conducted to avoid impacting individual owls. No earlier than 30 days prior to commencement of grading or construction on the site, a qualified wildlife biologist, under contract to the City of San Jose, shall conduct protocol-level pre-construction surveys for burrowing owls. The surveys shall be conducted by a qualified biologist according to current CDFG survey protocol. The results of the pre-construction surveys shall be submitted to the California Department of Fish and Game for review and approval prior to site construction. If non-breeding season owls are observed on the site, the City of San Jose shall consult with CDFG regarding passive relocation of the owls (e.g., using one-way doors) prior to construction.
- A qualified wildlife biologist, under contract to the City, shall conduct pre-construction surveys for nesting woodrats to determine if they occur on the site. A qualified biologist shall conduct the surveys no earlier than 30 days prior to commencement of grading or construction. If woodrats are nesting on the site, the City shall consult with CDFG regarding the best method for relocation of the nest. Nests may be disassembled by hand to allow woodrats to escape into nearby areas if they cannot be relocated (i.e., if they are attached to tree trunks).
- A qualified wildlife biologist, under contract to the City, shall conduct pre-construction surveys for California red-legged frog in the riparian habitat no more than two weeks prior to any construction related disturbance in that area. If any red-legged frogs are observed, the City shall consult with the USFWS on additional avoidance measures before proceeding with the work. Documentation shall be submitted to the City's Environmental Principal Planner.
- No heavy equipment or vehicles shall enter the live creek channel during construction to avoid take of steelhead. The creek shall not be diverted for construction. Implementation of erosion control measures shall be implemented to avoid sedimentation to the creek that may adversely affect steelhead.
- Night lighting along the pedestrian walkway within the riparian corridor shall be the minimum necessary for security. The towers should be unlighted, if feasible. If it is necessary to provide safety lighting on the bridge towers, the lighting should be white strobe lights with the minimum number, intensity, and flashes per minute allowable by the FAA in order to reduce potential bird collisions with the towers and cables, as recommended by the USFWS for towers in bird migration areas (USFWS 2000).

- To compensate for the temporary loss of riparian bird habitat by tree removal and limbing, the City shall develop and implement a nest box program. Within one year from the completion of project construction, the City shall install a minimum of five nest boxes suitable for use by native cavity nesting bird species (e.g., chickadees) along the eastern edge of the riparian corridor. The boxes shall be attached to mature riparian trees that have nearby brush cover. Boxes shall be placed a minimum of five feet above the ground and a minimum of 100 feet apart. The boxes shall have a floor dimension of 4" x 4," a wall height of 5," and an entrance hole of 1 1/4" in diameter.
- Prior to May 1 of the construction year, the City shall install exclusionary fencing around the limits of grading for the parking lot east of Coyote Creek to prevent turtles from entering the construction area and laying eggs. The fencing shall be buried at least six inches to one foot deep to prevent turtles from going under the fence, shall extend at least two feet above ground, and shall be held in place by sturdy stakes. Materials that are suitable for an exclusion fence include silt fence, 1/8-inch plywood, and aluminum window screening. The fence shall be checked at least twice per week to ensure that gaps have not developed. The fence shall be repaired as necessary.

Implementation of the above mitigations will reduce the impacts to less than significant.

## V. CULTURAL RESOURCES

- Develop appropriate language to be inserted in the standard conditions of any grading or excavation contract (or contracts for other activities that may have subsurface soil impacts) that alerts construction personnel to the potential for the exposure of unexpected cultural materials and the procedures for dealing with the inadvertent exposure of archaeological deposits. This should include implementation of a background briefing for supervisory construction personnel.
- Retain a qualified archaeologist to monitor any subsurface construction in "native" soil to the extent determined by a qualified archaeologist. The archaeologist shall review the grading and excavation plans to determine project impacts within potentially sensitive archaeological areas (i.e., along Coyote Creek, Maze Area, trail alignment near recorded archaeological sites, etc.). The frequency and duration of the monitoring shall be at the discretion of the archaeologist and dependent on his/her subsurface observations during construction operations. The monitoring archaeologist shall have the authority to stop construction.
- If any cultural materials are exposed or discovered during either site preparation or subsurface construction activities, operations shall be halted within 25 feet of the find and a qualified archaeologist retained for evaluation and further recommendations. Potential recommendations could include evaluation, collection, recordation, analysis, and reporting of any significant cultural materials. If the find is determined to be significant, a mitigation program shall be prepared and submitted to the Director of Planning, Building, and Code Enforcement for consideration and approval. Copies of appropriate reports should also be forwarded to the CHRIS/NWIC.
- Pursuant to Section 7050.5 of the Health and Safety Code, and Section 5097.94 of the Public Resources Code of the State of California in the event of the discovery of human remains during construction, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains. The Santa Clara County Coroner shall be notified and shall make a determination as to whether the remains are Native American. If the Coroner determines that the remains are not subject to their authority, the Coroner shall notify the Native American Heritage Commission to attempt to identify descendants of the deceased Native American. If no satisfactory agreement can be reached as to the disposition of the remains pursuant to this State law, then the land owner shall re-inter the human remains and items associated with Native American burials on the property in a location not subject to further subsurface disturbance.

Implementation of the above mitigations will reduce the impacts to less than significant.

## **VI. GEOLOGY AND SOILS**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **VII. HAZARDS AND HAZARDOUS MATERIALS**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **VIII. HYDROLOGY AND WATER QUALITY**

### Construction Measures

- The City shall obtain the applicable state permits under the National Pollutant Discharge Elimination System (NPDES), as required by the State Water Resources Control Board, prior to starting construction. This shall include preparation and implementation of a Stormwater Pollution Prevention Plan (SWPPP).
- Restrict grading to the dry season or meet City requirements for grading during the rainy season.
- Use BMPs to retain sediment on the project site.
- Place burlap bags filled with drain rock around storm drains to route sediment and other debris away from the drains.
- Provide temporary cover of disturbed surfaces to help control erosion during construction.
- Provide permanent cover to stabilize the disturbed surfaces, using locally native riparian plant species collected from the Coyote Creek watershed.

### Post-Construction Measures

- The City shall identify and include site design measures, post-construction structural controls, and BMPs for reducing the volume of storm water runoff and the contamination in storm water runoff as permanent features of the project. A sufficient number of post-construction treatment measures shall be incorporated into the project in compliance with provision C.3 of the City of San Jose's NPDES permit and all other applicable local, state, and federal requirements.

Implementation of the above mitigations will reduce the impacts to less than significant.

## **IX. LAND USE AND PLANNING**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **X. MINERAL RESOURCES**

The project would not impact mineral resources, since none are located on or near the project site.

## **XI. NOISE**

- Limit construction hours to Monday through Friday, between 7 Am and 7 PM for any activities within 500 feet of residential uses, in accordance with San Jose local ordinance.
- Prohibit truck traffic from traveling or parking along Roberts Avenue.
- Construction equipment should be well maintained and used judiciously to be as quiet as practical:
  1. Locate all stationary noise-generating equipment, such as air compressors and portable power generators, as far away as possible from businesses, residences or noise-sensitive land uses
  2. Utilize 'quiet' models of air compressors and other stationary noise sources where technology exists

3. Equip all internal combustion engine-driven equipment with mufflers, which are in good condition and appropriate for the equipment
  4. Prohibit all unnecessary idling of internal combustion engines
- Notify all adjacent businesses, residences, and noise-sensitive land uses of the construction schedule in writing.
  - Designate a noise disturbance coordinator, responsible for responding to complaints about construction noise. The name and telephone number of the disturbance coordinator shall be posted at the construction site and made available to businesses, residences or noise-sensitive land uses adjacent to the construction site.

Implementation of the above mitigation will reduce the impacts to less than significant.

## **XII. POPULATION AND HOUSING**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **XIII. PUBLIC SERVICES**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **XIV. RECREATION**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **XV. TRANSPORTATION / TRAFFIC**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **XVI. UTILITIES AND SERVICE SYSTEMS**

The project will not have a significant impact on this resource, therefore no mitigation is required.

## **XVII. MANDATORY FINDINGS OF SIGNIFICANCE**

The project will not substantially reduce the habitat of a fish or wildlife species, be cumulatively considerable, or have a substantial adverse effect on human beings; therefore no additional mitigation is required.

**PUBLIC REVIEW PERIOD**

Before 5:00 p.m. on April 4, 2007, any person may:

- (1) Review the Draft Mitigated Negative Declaration (MND) as an informational document only; or
- (2) Submit written comments regarding the information, analysis, and mitigation measures in the Draft MND. Before the MND is adopted, Planning staff will prepare written responses to any comments, and revise the Draft MND, if necessary, to reflect any concerns raised during the public review period. All written comments will be included as part of the Final MND; or
- (3) File a formal written protest of the determination that the project would not have a significant effect on the environment. This formal protest must be filed in the Department of Planning, Building and Code Enforcement, 200 East Santa Clara Street, San José CA 95113-1905 and include a \$100 filing fee. The written protest should make a "fair argument" based on substantial evidence that the project will have *one or more* significant effects on the environment. If a valid written protest is filed with the Director of Planning, Building & Code Enforcement within the noticed public review period, the Director may (1) adopt the Mitigated Negative Declaration and set a noticed public hearing on the protest before the Planning Commission, (2) require the project applicant to prepare an environmental impact report and refund the filing fee to the protestant, or (3) require the Draft MND to be revised and undergo additional noticed public review, and refund the filing fee to the protestant.

Joseph Horwedel, Director  
Planning, Building and Code Enforcement

Circulated on: MARCH 07, 2007

  
Deputy

Adopted on: 4/20/07

  
Deputy

Revised 8/26/05 JAC

Environmental Impacts	Mitigation Measures	Responsibility for Compliance	Method of Compliance	Timing of Compliance
<b>Air Quality</b>				
The project would result in short-term air quality impacts during construction.	<p>During construction, the contractor shall implement the following dust control measures:</p> <ul style="list-style-type: none"> <li>▪ Water all active construction areas at least twice daily.</li> <li>▪ Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least two feet of freeboard.</li> <li>▪ Pave, apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.</li> <li>▪ Sweep daily (with water sweepers) all paved access roads, parking areas and staging areas at construction sites.</li> <li>▪ Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets.</li> </ul>	<p>Department of Public Works, City Facilities Architectural Services Division with oversight for Implementation by Environmental Principal Planner of Planning, Building, and Code Enforcement</p>	Incorporate the dust control measures into the contract specifications and documents.	Implement dust control measures during construction.
<b>Biological Resources</b>				
The project would result in significant impacts to riparian woodland habitat.	<p>1. To compensate for the removal of 1,400 square feet (0.03 acre) of riparian woodland and 20 linear feet of SRA habitat during placement of the bridge over Coyote Creek, the City shall prepare and implement a riparian revegetation plan that recreates riparian woodland at a 3:1 ratio and SRA cover at a 1:1 ratio as set forth in the IS/MND. The revegetation plan shall be prepared prior to project construction. The SRA revegetation shall occur along the creek bank; 20 linear feet of open area along the creek edge occur immediately upstream of the proposed bridge site on the west bank would be suitable for replacement of SRA cover. The riparian woodland revegetation shall occur along Coyote Creek in the greater project vicinity. Suitable areas along the east bank on City-owned land that are immediately adjacent to the riparian woodland and support non-native grassland are suitable for this revegetation. The City shall secure all necessary permits from the regulatory agencies for the proposed project.</p> <p>The revegetation plan, prepared prior to construction and implemented within one year of the completion of</p>	<p>Department of Public Works, City Facilities Architectural Services Division with oversight for Implementation by Environmental Principal Planner of Planning, Building, and Code Enforcement</p>	<p>Retain qualified biologist to prepare mitigation and monitoring plan. Obtain permits from agencies and incorporate riparian mitigation and monitoring program into the contract specifications and documents.</p>	<p>Prepare riparian mitigation and monitoring plan prior to construction. Permits to be secured prior to construction. Implement mitigation program as set forth in permits.</p>

	<p>construction, shall specify the detailed location of all plantings, the use of locally native riparian plant species collected from the Coyote Creek watershed, and include a five-year maintenance and monitoring program. The plan shall specify that the City monitor the revegetation areas a minimum of once a year for five years, or longer if stated success criteria are not met within five years. During each year of the five-year monitoring period, plantings shall achieve a minimum 80% survival rate with a health rating of "good" or better for the revegetation to be deemed successful. Plant species recommended for the revegetation are listed on Table 3; plant species used for the mitigation shall be native to the Coyote Creek watershed and grown from locally-obtained planting stock.</p> <p>2. The City shall prepare yearly monitoring reports and submit these reports to the City's Environmental Principal Planner and any required environmental resource agencies at the end of each monitoring year. The reports shall identify the plant survival rate, maintenance actions at the site and include photographs documenting the status of the revegetation. The City shall implement remedial measures should the success criteria not be achieved in any of the five monitoring years. Remedial measures may include replacement plantings, an increase in maintenance or changes to the irrigation regime.</p>		<p>Incorporate monitoring requirements into contract specifications and documents. Retain qualified biologist to conduct monitoring and prepare reports. Send monitoring reports to Environmental Principal Planner.</p>	<p>Prepare plan prior to construction; implement plan during construction. Monitor plantings for five years following construction.</p>
<p>The project would result in the removal of ordinance-sized trees and may impact trees to be retained.</p>	<p>1. In addition to trees to be planted for riparian habitat mitigation, all trees to be removed shall be replaced in accordance with the City's established tree replacement ratios. If the site does not have sufficient area to accommodate the required tree mitigation, one or more of the following measures shall be implemented, to the satisfaction of the City's Environmental Principal Planner, at the development permit stage:</p> <ul style="list-style-type: none"> <li>▪ The size of a 15-gallon replacement tree can be increased to 24-inch box and count as two replacement trees.</li> <li>▪ An alternative site(s) will be identified for additional tree planting. Alternative sites may include local parks or schools or installation of trees on adjacent properties for screening purposes to the satisfaction of the Director of the Department of Planning, Building, and Code Enforcement.<sup>1</sup></li> <li>▪ A donation of \$300 per mitigation tree to Our City</li> </ul>	<p>Department of Public Works, City Facilities Architectural Services Division with oversight for implementation by Environmental Principal Planner of Planning, Building, and Code Enforcement</p>	<p>Incorporate tree replacement plantings into contract specifications and documents.</p>	<p>During construction.</p>

Deleted:

	<p>Forest or San Jose Beautiful for in-lieu off-site tree planting in the community. These funds will be used for tree planting and maintenance of planted trees for approximately three years. A donation receipt for off-site tree planting will be provided to the Environmental Principal Planner.</p> <p>2. The City shall retain a qualified arborist during construction to oversee and monitor tree protection and pruning measures. The project shall implement measures in accordance with the arborist's and City's requirements (identified in Appendix B).</p>		<p>Incorporate tree protection measures into the contract specifications and documents. Retain certified arborist to monitor work in field.</p>	<p>During construction.</p>
<p>The project impact special status wildlife species on the site.</p>	<p>1. Site grading and other heavy equipment work within the 100-foot riparian setback area shall occur outside the breeding period of riparian bird species (e.g., construction shall occur after August 1 and before February 1). If this is not possible, a qualified wildlife biologist, under contract to the City, shall conduct pre-construction surveys for nesting birds to determine if they occur on the site. The surveys shall be conducted by a qualified biologist no earlier than 14 days prior to commencement of grading or construction. If raptors or other protected bird species are nesting on the site, the City shall postpone construction within 300 feet of raptor nests and within 50 feet of other bird nests until all young have fledged. The wildlife biologist shall document that the young have fledged prior to commencement of construction work, and shall submit documentation to the City's Environmental Principal Planner.</p> <p>2. Prior to any construction on the east side of Coyote Creek, a qualified biologist, under contract to the City of San Jose, shall conduct a protocol-level burrowing owl survey prior to project construction (i.e., between April 15 and July 15) in accordance with the requirements of the Burrowing Owl Survey Protocol and Mitigation Guidelines (Burrowing Owl Consortium, 1993). If burrowing owls are found on the project site, the project shall be reconfigured to avoid impacting the species, if possible. Minor project reconfiguration may be feasible if owls are found to occupy a corner of the proposed parking facility; however, measures are recommended to offset impacts to the owl if project reconfiguration is not possible. As it is unlawful to take, possess or destroy burrowing owls, their nests or their eggs, any impacts to the species during the breeding season (February 1-August</p>	<p>Department of Public Works, City Facilities Architectural Services Division with oversight for implementation by Environmental Principal Planner of Planning, Building and Code Enforcement</p>	<p>Retain a qualified biologist to conduct preconstruction surveys for nesting birds.</p> <p>Retain a qualified biologist to conduct preconstruction surveys for burrowing owls.</p>	<p>Surveys shall be conducted no more than 14 days prior to construction. Create buffers and postpone construction until all young have fledged, as determined by the monitoring biologist. Notify the City's Environmental Principal Planner of status.</p> <p>Surveys shall be conducted no more than 30 days prior to construction. Incorporate protection and/or relocation measures as required by CDFG.</p>

	<p>31) shall be avoided. Avoidance measures include rescheduling construction after all young have fledged and/or establishing a 250-foot buffer area around the occupied habitat. The buffer areas shall be established by a qualified biologist in consultation with CDFG. Under the direction of a qualified wildlife biologist (under contract to the City of San Jose), the outside edge of the 250-foot wide buffer shall be demarcated by the placement of plastic construction fencing. Prior to commencement of construction activities, the City shall arrange for a qualified wildlife biologist to inform workers of the presence of burrowing owls, their protected status, work boundaries, and measures to be implemented to avoid loss of these species during construction activities. Construction workers shall be informed that no construction activities are to occur within the buffer area until owls depart from the site and as directed by the consulting wildlife biologist (i.e., all young have fledged and are able to forage independent of the parents, as determined by monitoring by a qualified biologist).</p> <p>If impacts to breeding habitat cannot be avoided, the City shall establish and preserve a minimum of 6.5 acres of off-site habitat for each pair of owls or each unpaired owl impacted by the project. At least two enhanced or artificial burrows shall be provided for each burrow impacted. The land identified to offset impacts to burrowing owls shall be protected in perpetuity by either a conservation easement or fee title acquisition. The burrowing owl habitat mitigation land shall be adjacent to occupied burrowing owl foraging habitat in the San Jose area. The final mitigation requirements will depend upon the number of pairs of birds or single birds that are found in the surveys and the City's consultation with CDFG. Site construction cannot occur until this habitat mitigation plan and mitigation agreement is finalized between the City and CDFG.</p> <p>Additionally, impacts to the species during the winter residency period (December 1- through January 31) shall be avoided. To avoid impacts to the species during this time, pre-construction surveys shall be conducted to avoid impacting individual owls. No earlier than 30 days prior to commencement of grading or construction on the site, a qualified wildlife biologist, under contract to the City of San Jose, shall conduct protocol-level pre-construction</p>			
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	<p>surveys for burrowing owls. The surveys shall be conducted by a qualified biologist according to current CDFG survey protocol. The results of the pre-construction surveys shall be submitted to the California Department of Fish and Game for review and approval prior to site construction. If non-breeding season owls are observed on the site, the City of San Jose shall consult with CDFG regarding passive relocation of the owls (e.g., using one-way doors) prior to construction.</p> <p>3. A qualified wildlife biologist, under contract to the City, shall conduct pre-construction surveys for nesting woodrats to determine if they occur on the site. A qualified biologist shall conduct the surveys no earlier than 30 days prior to commencement of grading or construction. If woodrats are nesting on the site, the City shall consult with CDFG regarding the best method for relocation of the nest. Nests may be disassembled by hand to allow woodrats to escape into nearby areas if they cannot be relocated (i.e., if they are attached to tree trunks).</p> <p>4. A qualified wildlife biologist, under contract to the City, shall conduct pre-construction surveys for California red-legged frog in the riparian habitat no more than two weeks prior to any construction related disturbance in that area. If any red-legged frogs are observed, the City shall consult with the USFWS on additional avoidance measures before proceeding with the work. Documentation shall be submitted to the City's Environmental Principal Planner.</p> <p>5. No heavy equipment or vehicles shall enter the live creek channel during construction to avoid take of steelhead. The creek shall not be diverted for construction. Implementation of erosion control measures shall be implemented to avoid sedimentation to the creek that may adversely affect steelhead.</p> <p>6. Night lighting along the pedestrian walkway within the riparian corridor shall be the minimum necessary for security. The towers should be unlighted, if feasible. If it is necessary to provide safety lighting on the bridge towers, the lighting should be white strobe lights with the minimum number, intensity, and flashes per minute allowable by the FAA in order to reduce potential bird</p>		<p>Retain a qualified biologist to conduct preconstruction surveys for woodrats.</p> <p>Retain a qualified biologist to conduct preconstruction surveys for red-legged frogs.</p> <p>Incorporate the measures into the contract specifications and documents.</p> <p>Incorporate measures into the final design specifications prior to construction, as feasible.</p>	<p>Surveys shall be conducted no more than 30 days prior to construction. Incorporate protection and/or relocation measures as required by CDFG.</p> <p>Surveys shall be conducted no more than 30 days prior to construction. Incorporate protection and/or relocation measures as required by USFWS.</p> <p>Implement during construction.</p> <p>Prior to construction.</p>
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	<p>collisions with the towers and cables, as recommended by the USFWS for towers in bird migration areas (USFWS 2000).</p> <p>7. To compensate for the temporary loss of riparian bird habitat by tree removal and limbing, the City shall develop and implement a nest box program. Upon completion of project construction, the City shall install a minimum of five nest boxes suitable for use by native cavity nesting bird species (e.g., chickadees) along the eastern edge of the riparian corridor. The boxes shall be attached to mature riparian trees that have nearby brush cover. Boxes shall be placed a minimum of five feet above the ground and a minimum of 100 feet apart. The boxes shall have a floor dimension of 4"x 4," a wall height of 5," and an entrance hole of 1/4" in diameter.</p> <p>8. Prior to May 1 of the construction year, the City shall install exclusionary fencing around the limits of grading for the parking lot east of Coyote Creek to prevent turtles from entering the construction area and laying eggs. The fencing shall be buried at least six inches to one foot deep to prevent turtles from going under the fence, shall extend at least two feet above ground, and shall be held in place by sturdy stakes. Materials that are suitable for an exclusion fence include silt fence, 1/8-inch plywood, and aluminum window screening. The fence shall be checked at least twice per week to ensure that gaps have not developed. The fence shall be repaired as necessary.</p>		<p>Incorporate the measures into the contract specifications and documents.</p> <p>Incorporate the measures into the contract specifications and documents.</p>	<p>Implement after completion of construction.</p> <p>Implement during construction.</p>
<b>Cultural Resources</b>				
<p>Construction of project could uncover buried archaeological resources.</p>	<p>Develop appropriate language to be inserted in the standard conditions of any grading or excavation contract (or contracts for other activities that may have subsurface soil impacts) that alerts construction personnel to the potential for the exposure of unexpected cultural materials and the procedures for dealing with the inadvertent exposure of archaeological deposits. This should include implementation of a background briefing for supervisory construction personnel.</p> <p>Retain a qualified archaeologist to monitor any subsurface construction in "native" soil to the extent determined by a qualified archaeologist. The archaeologist shall review the grading and excavation plans to determine project impacts within potentially sensitive archaeological areas (i.e., along Coyote Creek, Maze Area, trail alignment near</p>	<p>Department of Public Works, City Facilities Architectural Services Division with oversight for <u>Implementation by Environmental Principal Planner of Planning, Building, and Code Enforcement</u></p>	<p>Incorporate measures into the contract specifications and documents. Submit final report to the City's Environmental Principal Planner when mitigation, if required, is completed.</p>	<p>During all earth moving activities. Submit final report to City's Environmental Principal Planner for any mitigation.</p>

	<p>recorded archaeological sites, etc.). The frequency and duration of the monitoring shall be at the discretion of the archaeologist and dependent on his/her subsurface observations during construction operations. The monitoring archaeologist shall have the authority to stop construction.</p> <p>If any cultural materials are exposed or discovered during either site preparation or subsurface construction activities, operations shall be halted within 25 feet of the find and a qualified archaeologist retained for evaluation and further recommendations. Potential recommendations could include evaluation, collection, recordation, analysis, and reporting of any significant cultural materials. If the find is determined to be significant, a mitigation program shall be prepared and submitted to the Director of Planning, Building, and Code Enforcement for consideration and approval.</p> <p>Pursuant to Section 7050.5 of the Health and Safety Code, and Section 5097.94 of the Public Resources Code of the State of California in the event of the discovery of human remains during construction, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains. The Santa Clara County Coroner shall be notified and shall make a determination as to whether the remains are Native American. If the Coroner determines that the remains are not subject to their authority, the Coroner shall notify the Native American Heritage Commission to attempt to identify descendants of the deceased Native American. If no satisfactory agreement can be reached as to the disposition of the remains pursuant to this State law, then the land owner shall re-inter the human remains and items associated with Native American burials on the property in a location not subject to further subsurface disturbance.</p> <p>Treatment of any Native American burials exposed during construction shall be conducted in accordance with the State of California Public Resources Code in consultation with the Native American Heritage Commission.</p>			
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**Hydrology & Water Quality**

<p>Development of the project could result in water quality impacts to Coyote Creek associated with construction and post-construction activities</p>	<p><b>Construction Measures</b></p> <ul style="list-style-type: none"> <li>The City shall obtain the applicable state permits under the National Pollutant Discharge Elimination System (NPDES), as required by the State Water Resources Control Board, prior to starting construction. This shall include preparation and implementation of a</li> </ul>	<p>Department of Public Works, City Facilities Architectural Services Division with oversight for</p>	<p>Incorporate water quality protection measures into the contract specifications and documents; submit documentation verifying compliance with identified mitigation to Environmental Principal Planner prior</p>	<p>Prepare SWPPP prior to construction. Implement water quality mitigation measures during project construction;</p>
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	<p>Stormwater Pollution Prevention Plan (SWPPP).</p> <ul style="list-style-type: none"> <li>▪ Restrict grading to the dry season or meet City requirements for grading during the rainy season.</li> <li>▪ Use BMPs to retain sediment on the project site.</li> <li>▪ Place burlap bags filled with drain rock around storm drains to route sediment and other debris away from the drains.</li> <li>▪ Provide temporary cover of disturbed surfaces to help control erosion during construction.</li> <li>▪ Provide permanent cover to stabilize the disturbed surfaces, using locally native riparian plant species collected from the Coyote Creek watershed.</li> </ul> <p><b>Post-Construction Measures</b> The City shall identify and include site design measures, post-construction structural controls, and BMPs for reducing the volume of storm water runoff and the contamination in storm water runoff as permanent features of the project. A sufficient number of post-construction treatment measures shall be incorporated into the project in compliance with provision C.3 of the City of San Jose's NPDES permit and all other applicable local, state, and federal requirements.</p>	<p><u>Implementation by Environmental Principal Planner of Planning, Building, and Code Enforcement</u></p>	<p>to project completion.</p>	<p>maintain landscaping and drainage facilities after project completion.</p>
<b>Noise</b>				
<p>Construction of the project would result in significant temporary noise. The City's General Plan policies require that construction operations use available noise suppression devices and techniques.</p>	<p>During construction, the contractor shall implement the following measures to minimize construction noise nuisance impacts:</p> <ul style="list-style-type: none"> <li>▪ Limit construction hours to Monday through Friday, between 7 AM and 7 PM for any activities within 500 feet of residential uses, in accordance with local ordinance.</li> <li>▪ Prohibit truck traffic from traveling or parking along Roberts Avenue.</li> <li>▪ Construction equipment should be well maintained and used judiciously to be as quiet as practical:</li> <li>▪ Locate all stationary noise-generating equipment, such as air compressors and portable power generators, as far away as possible from businesses, residences or noise-sensitive land uses</li> <li>▪ Utilize 'quiet' models of air compressors and other stationary noise sources where technology exists</li> <li>▪ Equip all internal combustion engine-driven equipment with mufflers, which are in good condition and appropriate for the equipment</li> <li>▪ Prohibit all unnecessary idling of internal combustion engines.</li> </ul>	<p>Department of Public Works, City Facilities Architectural Services Division <u>with oversight for Implementation by Environmental Principal Planner of Planning, Building, and Code Enforcement</u></p>	<p>Incorporate noise abatement measures into the contract specifications and documents.</p>	<p>Implement noise control measures during the entire construction period.</p>

	<ul style="list-style-type: none"><li>▪ Notify all adjacent businesses, residences, and noise-sensitive land uses of the construction schedule in writing.</li><li>▪ Designate a noise disturbance coordinator responsible for responding to complaints about construction noise. The name and telephone number of the disturbance coordinator shall be posted at the construction site and made available to businesses, residences or noise-sensitive land uses adjacent to the construction.</li></ul>			
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