



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

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

**SUBJECT:** NEW CIVIC CENTER  
PARKING GARAGE

**DATE:** 11-26-07

Approved

Date

12/3/07

**COUNCIL DISTRICT:** Citywide

## RECOMMENDATION

- a. Approval of Contract Change Order No. 19 (CCO #19) for the New Civic Center Parking Garage Project with Swinerton Builders in the amount of \$557,546, for a total contract amount of \$22,918,150.
- b. Adoption of the following 2007-2008 Appropriation Ordinance Amendments in the Civic Center Parking Fund (Fund 433):
  1. Increase the New Civic Center Parking Garages appropriation to the Public Works Department in the amount of \$484,000; and
  2. Decrease the Reserve for Civic Center Off-Site Parking Garage by \$484,000.

## OUTCOME

Approval of Contract Change Order #19 and appropriation of funds completes the dispute resolution process on the New Civic Center Parking Garage Project and allows the contract to be closed.

## EXECUTIVE SUMMARY

The New Civic Center Parking Garage was completed approximately eight months after contractual requirements. The contractor, Swinerton Builders, submitted a delay claim for approximately \$2 million and the City countered with liquidated damages of \$750,000. Unable to settle its dispute, the City and contractor agreed to participate in an alternative dispute resolution per City policy. By mutual agreement between the two parties, an independent third party was retained to provide first, a neutral evaluation and ultimately, mediation services. These efforts resulted in a settlement agreement whereby the City agreed to pay Swinerton Builders \$557,546 as compensation for all claims, and Swinerton Builders agreed not to bid on any City or Redevelopment Agency projects for a period of three years.

## **BACKGROUND**

The New Civic Center Parking Garage is an eight-story, 370,000 square foot post-tensioned concrete structure located between 4<sup>th</sup> and 5<sup>th</sup> Streets and Santa Clara and St. John Streets, just north of the new city hall. It contains 1128 parking spaces for city hall employees, Department of Transportation (DOT) offices, DOT maintenance shops and proposed retail space on 5<sup>th</sup> Street.

On February 1, 2005, the City Council awarded a \$21,688,000 contract to Swinerton Builders for construction of the New Civic Center Parking Garage. Swinerton Builders began construction on April 1, 2005. The construction contract initially required Swinerton Builders to complete construction of the project on or before May 31, 2006. However, due to a number of issues that arose during construction, the City extended the contractual completion date by 14 days to June 14, 2006. Even still, Swinerton Builders did not substantially complete the project until January, 2007, about eight months beyond the revised contractual completion date.

A number of construction-related disputes arose between the City and Swinerton Builders both during and after construction. Ultimately, Swinerton Builders made a claim against the City for approximately \$2 million for extended general conditions, forced acceleration, escalation and a variety of other claims related to the lengthened construction period. For its part, the City made a claim against Swinerton Builders consisting mostly of \$750,000 in liquidated damages.

Unable to resolve the various disputes, Public Works and Swinerton Builders agreed to participate in alternative dispute resolution in accordance with the City's Dispute Avoidance and Dispute Resolution Policy (San José Municipal Code, Chapter 14.06). The parties agreed to retain the services of Michael J. Timpane, a San Francisco attorney specializing in alternative dispute resolution of construction claims. The dispute resolution process with Mr. Timpane involved two phases: (1) a neutral evaluation and (2) mediation.

Both Swinerton Builders and the City prepared position papers for each of the 120 issues in dispute. Both sides exchanged documents and were given an opportunity to prepare a rebuttal. All of the information was submitted to Mr. Timpane for final review. After meeting individually with each party to understand the respective positions and evaluating all of the documentation, Mr. Timpane prepared a 29-page written report that summarized his conclusion and analysis on each of the 120 items open for review.

Both sides reviewed Mr. Timpane's report and agreed with all but seven items. On October 26, 2007, all parties met in city hall for a mediation session in an attempt to reach agreement on the remaining seven items. After listening to each party's position on the seven issues, Mr. Timpane revised his recommendation. Ultimately, Mr. Timpane recommended that the City pay Swinerton Builders \$557,546 and that the City was not entitled to liquidated damages. Negotiations continued throughout the session. Public Works and Swinerton Builders finally

agreed in principle to settle at the aforementioned figure, with the additional condition that Swinerton Builders would not bid on any City or Redevelopment Agency projects for a period of three years.

### **ANALYSIS**

For the following reasons, Public Works recommends paying Swinerton Builders \$557,546, with an agreement from Swinerton Builders not to bid on any City or Redevelopment Agency projects for a period of three years, as a complete settlement of all outstanding issues.

#### **1. Change Orders**

At the end of the project, there were a number of unresolved, outstanding change orders issued by Public Works for additional and/or changed work. Public Works anticipated having to pay compensation for the work related to these change orders, although the parties could not agree upon the amount of compensation due. Swinerton Builders claimed \$691,254 as direct compensation for these outstanding change orders. Swinerton Builders also claimed \$98,778 as an additional markup on *all* change orders.

Mr. Timpane concluded that Swinerton Builders was only entitled to \$258,351 as direct compensation for the outstanding change orders. There was conflicting contract language regarding the entitlement of Swinerton Builders to a markup on all change orders. Mr. Timpane concluded that this conflict should be resolved in favor of Swinerton Builders and that Swinerton Builders should receive \$103,572 as a markup on all change orders.

Public Works believes that Mr. Timpane's recommendation to resolve all outstanding change order issues for \$361,923 is reasonable. Compensating Swinerton Builders in the amount of \$258,351 for the direct cost of outstanding change orders represents fair compensation of the change order work performed by Swinerton Builders. As for the markup, Mr. Timpane's conclusion is not unreasonable given that the City was responsible for drafting the construction agreement that contained the conflict.

#### **2. City Delay**

Mr. Timpane concluded that, in addition to the time by which the City extended the contractual completion date, the City was responsible for an additional 31 days of delay. Public Works believes that Mr. Timpane's recommendation to resolve all of the outstanding issues related to this delay for the amount of \$205,503 is reasonable. Mr. Timpane calculated the \$205,503 as follows:

<u>Disputed Item</u>	<u>Amount Claimed By Swinerton</u>	<u>Amount Recommended By Mr. Timpane</u>
Extended General Conditions	\$504,620	\$101,130
Extended Home Office Overhead	282,759	32,027
Subcontractor Extended Costs	62,953	27,229
Escalation	184,291	45,117
Forced Acceleration	186,077	0.00
Interest Expense	50,445	0.00
Total	\$1,271,145	\$205,503

### 3. Liquidated Damages

For Public Works, the disappointing part of Mr. Timpane's report is that the City is not entitled to any liquidated damages.

Mr. Timpane concluded that Swinerton Builders was responsible for delaying completion of the project from August 11, 2006, through project completion based primarily on its failure to complete the elevators. However, Mr. Timpane concluded that the City also delayed the project during the same period of time. Mr. Timpane concluded that City delays between August 11, 2006, and September 15, 2006, related to change order work involving utility boxes, stiffeners and drain lines. After September 15, 2006, Mr. Timpane concluded that the City delays related to additional work required by the City Fire Marshal for safety-related systems.

Mr. Timpane applied the general rule that where the owner and the contractor are both responsible for delaying a project *at the same time*, neither party is entitled to recover damages for the delay. Mr. Timpane used this general rule to reject significant portions of Swinerton Builder's claims. He also used it to reject the claim of Public Works for liquidated damages.

Public Works does not believe that Mr. Timpane's reasoning on the "concurrent delay" issue is unreasonable. Given the risk and additional cost of litigating this issue, and given the reasonableness of the overall result, Public Works believes that the recommended settlement is appropriate. This is especially true given that Swinerton Builders will also agree not to bid on any City and Redevelopment Agency projects for a period of three years.

As detailed in the Cost Summary/Implications section below, remaining project costs total \$593,078. This consists of Contract Change Order No. 19 (\$557,546) and anticipated project delivery costs to close-out the project. The current funding allocated

(\$110,000) is insufficient to cover these costs. Accordingly, an augmentation of \$484,000 is recommended to fully fund the anticipated remaining project costs.

### **EVALUATION AND FOLLOW UP**

This project is complete. No additional follow up action with Council is expected.

### **PUBLIC OUTREACH/INTEREST**

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

This item does not meet any of the above criteria. This memorandum will be posted on the City's website for the December 18, 2007 Council agenda.

### **COORDINATION**

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

### **FISCAL/POLICY ALIGNMENT**

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

**COST SUMMARY/IMPLICATIONS**

1.	<b>COST OF RECOMMENDATION/COST OF PROJECT:</b>	\$557,546
	Project Delivery	\$4,158,912
	Construction	21,688,000
	Change Orders 1-18	672,604
	Proposed Change Order No. 19	557,546
	Contingency Balance	<u>0</u>
	<b>Total</b>	<b>\$27,077,062</b>
	Prior Year Expenditures*	\$26,483,984
	<b>Remaining Project Costs</b>	<b>\$593,078</b>

\* A total of \$26,483,984 was expended or encumbered in prior fiscal years for the construction and delivery of this project.

2. COST ELEMENTS OF CONTRACT: Lump sum contract

3. SOURCE OF FUNDING: 433–Civic Center Parking Fund  
 473– Civic Center Improvement Fund  
 533–General Purpose Parking Fund

**BUDGET REFERENCE**

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

Fund #	Appn #	Appn. Name	RC #	Total Appn	Amt. for Contract	2007-08 Adopted Capital Budget (Page)	Last Budget Action (Date, Ord. No.)
<b>Remaining Project Costs</b>				<b>\$593,078</b>			
<b>Funding Available</b>							
433	6885	New Civic Center Parking Garages		110,000	100,000	V-1208	10/16/2007 Ord. No. 28143
<b>Total Funding Available</b>				<b>\$110,000</b>			
<b>Recommended Budget Actions</b>							
433	8061	Reserve for Civic Center Off-Site Parking Garage		484,000	457,546	V-1213	10/16/2007 Ord. No. 28143
<b>Total Project Funding</b>				<b>\$594,000</b>	<b>\$557,546</b>		

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**CEQA**

CEQA: EIR Resolution No. 68905, PP98-03-072, Civic Plaza Redevelopment Plan (completed in 1999) SEIR Resolution No. 71743, PP03-03-088 (completed in 2003), FRSEIR Resolutions 72230 and 72230.1 (adopted June 29, 2004).



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

