

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Settlement Agreement and Mutual
Release with San Jose
Conservation Corps

DATE: December 17, 2009

RECOMMENDATION

Approve a settlement with the San Jose Conservation Corps and authorize the City Attorney to execute a Settlement Agreement and Mutual Release with the San Jose Conservation Corps, in exchange for \$160,000 in additional services provided to the City if the additional services are completed on or prior to July 1, 2011.

OUTCOME

Approval of a Settlement Agreement and Mutual Release to mutually resolve disputed findings that the City overpaid the Conservation Corps for services provided under the Master Agreement with the Conservation Corps and certain additional agreements specified in the audit report.

BACKGROUND

City Council considered this item during the Closed Session held on December 15, 2009. The City Audit report of May 2009 identified significant weaknesses in the Conservation Corps's accounting practices and inadequate City administrative oversight. A majority of issues relate to the City's master agreement with the Conservation Corps which is set to expire on December 31, 2009 as of the date of this memo. The City Auditor concluded that the City overpaid the San Jose Conservation Corps approximately \$487,000 more than Conservation Corps documented actual costs of services provide to the City from 2004-08.

ANALYSIS

Settlement is recommended to avoid the costs of litigation. The proposed settlement amount of \$160,000 plus 3% interest from the date of execution (interest would be

forgiven if the Conservation Corps fully complies with the Agreement) is based upon a compromise of the amounts identified by the City Auditor, as further explained below.

After the audit report was issued, San Jose Conservation Corps provided the auditor with supporting documentation regarding \$200,685 of recycling work done by the Conservation Corps for the City's Department of Environmental Services under the Master Agreement and which was identified in the audit. The additional documentation demonstrated that the recycling work was done by the Conservation Corps within the City of San Jose – thereby benefiting the City in a general manner even if not technically in compliance with the terms of the Master Agreement.

The Corps also provided documentation showing that the \$133,140 of additional Environmental Services Department ("ESD") recycling work, identified in the audit as being double billed to the State of California and the City, was a financial misstatement and that unrestricted State reimbursements for recyclables should not have been applied to the Master Agreement projects paid for by the City. The Conservation Corps offered to go back and reconcile its accounts for all of the recycling services projects performed for ESD. However it was felt that the time and cost that would have to be expended by the Conservation Corps to retroactively reconcile and adjust accounting records would be extensive. Because recycling work equal to the amount paid by the City was performed within the City of San Jose, staff recommends that the City accept the documentation and further explanation provided by the Conservation Corps related to the ESD charges for purposes of the settlement, thereby subtracting \$333,825 from the overcharges identified in the audit. The settlement includes a number of provisions to improve the Corps on-going fiscal practices which are further described later in this memorandum.

In addition to the costs incurred on ESD projects, the City Auditor's report also recommended that the City seek repayment of \$174,022 – consisting of \$75,637 paid by the City for Master Agreement projects for the Fire Department which the Auditor found were overpayments above the actual costs incurred by Conservation Corps and \$98,385, which the City Auditor found to be indirect costs charged to the City that could not reasonably be allocated to City projects. The Conservation Corps disputes that these amounts were overpayments. A settlement amount of \$160,000 was reached as a reasonable compromise of those remaining amounts.

The Settlement Agreement allows the Conservation Corps to repay the City through in-kind services worth at least \$160,000, referred to as "Additional Services". "Additional Services" shall only include new services projects provided within and for the benefit of the City, and which are over and above services that would be otherwise be provided by the Conservation Corps or which would ordinarily have been paid for by the City of San Jose, in the City Manager's reasonable judgment. The Additional Services shall not replace nor reduce any services that would otherwise be provided to City by the Conservation Corps.

Examples of qualified Additional Services are services not previously provided by the Conservation Corps within the City of San Jose, services provided under newly available grant funds not previously used for such services within the City of San Jose, or services provided pursuant to grant applications filed after the date of this Settlement Agreement for new grant funding that the Conservation Corps could have and has in the past directed to projects located outside of the City of San Jose.

Since release of the audit, the San Jose Conservation Corps has taken significant steps to improve its fiscal management, including cost accounting and policies, with active engagement from its Board of Directors.

The proposed Settlement Agreement also requires the Conservation Corps to maintain the strengthened fiscal management practices implemented after the audit. The Conservation Corp's outside auditor shall provide the City with an annual certification that the strengthened fiscal management practices identified in the Settlement Agreement have been followed and continuously maintained throughout the year, and that the hourly rate and indirect cost model used by the Corps in City agreements were calculated in conformance with OMB Circular 122, OMB Circular 133 and in conformance with Generally Accepted Accounting Principles.

The proposed Settlement Agreement authorizes the City Manager to extend due dates for commencement of services, delivery of reports and completion of the required Additional Services, provided that an extension of the Full Repayment date for more than 6 months beyond July 1, 2011 requires City Council approval.

The Conservation Corps has agreed that the extended repayment period allowed in the Settlement Agreement (from the date of execution to July 1, 2011 as it may be extended) will not be used by the Conservation Corps as an affirmative defense against the City's claim for repayment under the Agreements identified in the audit report, if the Conservation Corps breaches the Settlement Agreement and the City commences litigation against the Corps.

PUBLIC OUTREACH/INTEREST

This memorandum and the settlement agreement have been posted on the City's website for the January 12, 2010 agenda.

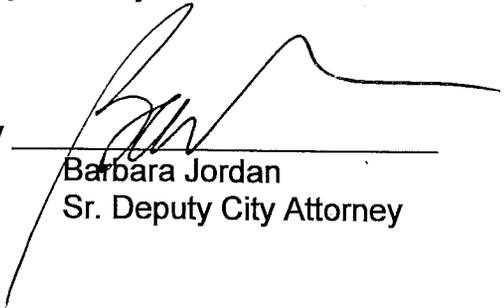
COORDINATION

The City Manager was advised of the proposed settlement.

CEQA

Not a Project

RICHARD DOYLE
City Attorney

By 

Barbara Jordan
Sr. Deputy City Attorney

cc: Debra Figone, City Manager

For questions please contact RICHARD DOYLE, City Attorney, at (408) 535-1900.