



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: David Sykes

SUBJECT: SAN JOSE ENVIRONMENTAL
INNOVATION CENTER PROJECT
(SJEIC)

DATE: June 13, 2013

Approved

Date

6/14/13

COUNCIL DISTRICT: 3

REASON FOR ADDENDUM

In order to maintain commitments to project investors and meet schedule commitments for this project, staff requests Council approval at its June 18, 2013 meeting.

RECOMMENDATION

Adopt a resolution authorizing the Director of Public Works to do the following with regard to the San José Environmental Innovation Center project:

- (a) To terminate the construction agreement with Applegate Johnston, Inc., in whole or in part, if the Director determines that the contractor's pace of progress continues to be inadequate to complete the project by December 31, 2013, or the contractor otherwise fails to perform in accordance with the terms of the construction contract; and
- (b) In the event the Director terminates the construction agreement with Applegate Johnston, to develop and execute one or more appropriate construction contracts to complete the project by December 31, 2013, procured consistent with applicable requirements, and in an aggregate amount not to exceed the current appropriations for the project; and
- (c) To negotiate and execute consultant agreements, including an agreement for a construction manager, as needed to complete the project in an aggregate amount not to exceed the current appropriations for the project.

OUTCOME

The recommended action will allow the Director to terminate the construction contract under the specified conditions. If termination becomes necessary, the recommended action would allow the City to secure a replacement contractor or contractors to continue construction on the existing

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warehouse renovation in a timely manner. Time is of the essence with regard to completing this project by December 31, 2013.

BACKGROUND

The San José Environmental Innovation Center (SJEIC), Phase II Project (“Project”) involves the renovation of a 46,000 square foot warehouse built in 1958 and the construction of a new approximately 10,000 square foot household hazardous waste facility, associated driveways, landscaping and site amenities.

The Project is financed through the New Markets Tax Credit (NMTC) program. The Phase II construction contract in the amount of \$11,094,935 was awarded by the Council on May 31, 2011, to Applegate Johnston, Inc. (AJI). Council also approved a 12% contingency in the amount of \$1,330,000. The timing of the award facilitated the securing of NMTC financing.

The original contract completion date for construction of the Project was December 20, 2012. However, since entering into the construction contract, there have been various construction delays. The NMTC “investors” are currently insisting on a firm Project completion date which was last estimated to be December 31, 2013. This completion date is consistent with the completion date needed to timely deliver the renovated warehouse to future tenants.

ANALYSIS

Much of the delay in construction of the Project is attributable to Applegate – particularly since the end of February 2013. For example, at the end of February, AJI represented that between six to eight weeks of critical structural steel installation work remained on the warehouse. As of this memo it has been over 16 weeks and Applegate still has not completed the critical work – nor can it give a reliable date for when it will be complete.

To date, Department of Public Works staff has attempted to work with Applegate on a range of other contract performance and compliance issues, including:

1. Lack of coordination of the new work with the existing conditions.
2. Insufficient management of subcontractors.
3. Lack of protection of installed work.
4. Inadequate resources applied to meet contract schedule.
5. Lack of adherence to safety regulations.
6. Lack of adherence to environmental regulations.

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On May 3, 2013, the City notified Applegate that that the City was concerned about the lack of satisfactory progress on the Project in general and the critical steel installation in specific. On June 14, 2013, the City reiterated its concerns about Applegate's progress via letter stating that unless multiple significant defects were addressed satisfactorily that the City would have to consider AJI in material breach of the contract.

Public Works has repeatedly conveyed to Applegate the importance of completing the Project by December 31, 2013. Public Works is increasingly concerned about Applegate's commitment, willingness and/or ability to complete the Project by the needed date. Unfortunately, it may be necessary to terminate the construction agreement with Applegate if the contractor's pace of progress continues to be inadequate to complete the Project by December 31, 2013, or the contractor otherwise fails to perform in accordance with the terms of the construction contract. The proposed recommendation would authorize the Director to terminate the construction agreement under such circumstances. Given the time constraints on this Project, such a delegation of authority would allow termination to occur in a timely manner.

In the event it becomes necessary for the Director to terminate the construction agreement, the Project time constraints dictate that the City be able to continue construction as quickly as possible. Accordingly, the proposed recommendation would authorize the Director to develop and award one or more construction contracts, and negotiate and execute any consultant agreements (including a construction manager agreement), as appropriate to complete the Project in a timely manner. The Director would procure all such contracts and agreements consistent with applicable requirements, and the aggregate amount of all such contracts and agreements could not exceed the current appropriations for the Project.

EVALUATION AND FOLLOW-UP

Staff will follow up with a status report in late August 2013. If costs for completion of the project, inclusive of staff, consultants and contractors, are projected to exceed the available funding, additional funding requests will be forwarded for Council consideration.

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 recommendation does not meet any of the above criteria; however, this memorandum will be posted on the City's website for the June 18, 2013, Council Meeting Agenda.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office, the City Manager's Budget Office, and the Environmental Services Department.

COST SUMMARY/IMPLICATIONS

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| 1. COST OF RECOMMENDATION: | TBD |
| 2. COST OF PROJECT: | |
| Project Delivery | \$ 5,113,382 |
| Construction | 11,094,935 |
| Utilities | 81,970 |
| Executed Change Orders (<i>through CCO. No 35</i>) | 962,701 |
| Remaining Contingency | 1,153,665 |
| | <hr/> |
| | TOTAL |
| | \$18,406,653 |
| Prior Year Expenditures* | \$12,095,640 |
| Remaining Project Costs: | \$ 6,311,013 |
| 3. SOURCE OF FUNDING: | 423 – Integrated Waste Management Fund |
| 4. OPERATION COSTS: | There are no cost implications to the General Fund as a result of this action. |

*A total of \$12,095,640 was expended and encumbered in prior fiscal years for project delivery and construction costs, including feasibility, design, construction and construction management.

BUDGET REFERENCE

Fund #	Appn. #	Appn. Name	RC #	2012-2013 Total Appn.	Amt. for Contracts	Adopted Budget (Page)	Last Budget Action (Date, Ord. No.)
Approved Project Funding Available							
423	7275	Household Hazardous Waste Las Plumas Facility	169005	\$8,619,547	TBD	XI-54	10/16/12 Ord. No. 29163
423	0762	Non-Personal/Equipment	500540	\$4,365,791	TBD	XI-54	2/12/13 Ord. No. 29208
Total Approved Funding							

CEQA

Negative Declaration for the renovation of the SJEIC was adopted on December 1, 2009, File No. PP09-138.

/s/
DAVID SYKES
Director of Public Works

For questions please contact Barry Ng, Deputy Director, at 408-535-8300.

**ATTACHMENT A: LOCATION MAP
SAN JOSE INNOVATION CENTER
1608 LAS PLUMAS AVENUE, SAN JOSE, CA**

