



CITY OF LONG BEACH

DEPARTMENT OF DEVELOPMENT SERVICES

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April 2, 2013

HONORABLE MAYOR AND CITY COUNCIL
City of Long Beach
California

RECOMMENDATION:

Approve and authorize the City Manager to execute a Settlement Agreement with Great American Insurance Company and/or Armand Gonzales, Inc., dba Gonzales Construction; and

Approve and authorize the City Manager to execute a Takeover Agreement with Great American Insurance Company, to complete construction of Fire Station 12 and Emergency Resource Center; and

Increase appropriations in the General Fund – Redevelopment Agency “Sweep” Proceeds - (GP) in the Department of Development Services (DV) in the amount of \$500,000. (District 9)

DISCUSSION

On March 15, 2010, the City of Long Beach (City), through its former Redevelopment Agency, entered into a contract with Armand Gonzales, Inc., dba Gonzales Construction (Gonzales), for the construction of Fire Station 12 and Emergency Resource Center (Project) located at 1199 East Artesia Boulevard. The approved contract is for \$6,498,345. The former Redevelopment Agency also approved a 25 percent contingency to cover additional work.

On November 15, 2011, the City declared Gonzales in default of the contract and made demand upon Great American Insurance Company (Surety), the bonding company for Gonzales, to perform and complete the Project. Subsequently, on November 22, 2011, Gonzales filed a claim against the former Redevelopment Agency, which was denied by the City in a written response on January 10, 2012.

Following a series of meetings between the City, Surety, and Gonzales, and in an attempt to complete the Project in a timely and cost-effective manner, the parties agreed to allow Gonzales to continue work on the Project. However, on June 14, 2012, Gonzales filed a lawsuit against the Successor Agency, alleging breach of contract among various other causes of action. Subsequently, on October 4, 2012, the City of Long Beach, as Successor to the Redevelopment Agency of the City of Long Beach, sent a letter to Gonzales declaring it in default of the terms of the contract and demanding corrective action. Finally, in a letter dated November 8, 2012, the Successor Agency terminated its contract with Gonzales.

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In an attempt to preserve the work completed and expedite completion of the Project, staff and the City Attorney negotiated the terms of a Takeover Agreement between the Successor Agency and Surety. The Takeover Agreement details how Surety will complete the Project and includes the following terms:

- The existing contract, except where modified by the Takeover Agreement, remains in full force and effect.
- Surety will arrange for the completion of the Project by a competent and qualified contractor approved by the Successor Agency and shall meet the qualification requirements of the original contract.
- Successor Agency shall pay Surety, or its designee, all remaining contract amounts, according to the terms and conditions of the contract, and in accordance with the payment terms established in the contract.
- The new contractor will be a subcontractor to Surety, and no contractual obligation will exist between the Successor Agency and the new contractor. However, all Project activities shall be coordinated with the Successor Agency's representative.
- Surety shall, to the extent provided in the contract, and as required by the performance bond, defend and indemnify the Successor Agency against acts and omissions of the new contractor. Surety shall require the new contractor to complete the Project, including correction of defective work.

Contemporaneously with the Takeover Agreement, in consideration of the desire by all parties to avoid the inconvenience, expense, and uncertainty of further litigation of their disputes, a Settlement Agreement was proposed. The Settlement Agreement details the compromise and settlement of claims between all parties relating to the Project, including any of the facts, circumstances, and transactions upon which the Gonzales lawsuit is based.

The Settlement Agreement outlines the following terms:

- The existing contract, except where modified by the Settlement Agreement, remains in full force and effect.
- The adjusted completion date for the Project is August 31, 2013.
- The Successor Agency waives any claim for liquidated damages or any other damages through the adjusted completion date. If the Project is not substantially complete by the adjusted completion date, then the Successor Agency shall be entitled to assert any and all damages provided in the contract.
- Within 15 days of the effective date of the Settlement Agreement, the Successor Agency shall remit payment to Surety in the amount of \$717,546.32 for payments withheld due to stop notices. Additionally, the Successor Agency shall make a one-

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- time payment by issuance of a change order to Surety in the amount of \$1,500,000. This amount is in full satisfaction of any and all claims against the City by Gonzales, Surety or any other involved party, and settles all change order requests received to date, except for those change orders where work has not commenced, or which will be negotiated separately as provided in the Settlement Agreement. Surety also agrees to immediately assign a completion contractor and forego a lengthy competitive bidding process.
- Upon full performance of the terms in the Settlement Agreement, the Gonzales lawsuit shall be dismissed in its entirety.

On December 18, 2012, the Successor Agency approved staff's recommendation for the City Manager to execute the Settlement and Takeover Agreements. On January 7, 2013, the Oversight Board adopted a resolution approving the decision of the Successor Agency to approve and authorize the City Manager to execute the Agreements. Pursuant to Health and Safety Code Section 34179 (h), the Successor Agency transmitted the approved resolution to the State of California Department of Finance (DOF) for review. On February 25, 2013, the DOF objected to the action and returned the resolution for reconsideration, citing the following reasons:

- 1) Health and Safety Code Section 34163 (c) prohibits the Agency from amending or modifying existing agreements, obligations, or commitments with any entity, for any purpose.
- 2) Health and Safety Code Section 34177.3 prohibits the Agency from creating new enforceable obligations.

Successor Agency staff has delivered written notice to the DOF, disputing its determination. However, in order to move forward with the Settlement and Takeover Agreements and complete the construction of Fire Station 12, staff is requesting that the City Council authorize the City Manager to execute these Agreements on behalf of the City of Long Beach. With this authorization, the City of Long Beach shall replace the Successor Agency as party to the Agreements and shall assume all rights and obligations of the Successor Agency thereunder. This action shall not prohibit the Successor Agency from pursuing any legal action it may have against the DOF.

This matter was reviewed by Deputy City Attorney Richard Anthony on March 12, 2013 and by Budget Management Officer Victoria Bell on March 18, 2013.

TIMING CONSIDERATIONS

City Council action is requested on April 2, 2013, in order to allow execution of the Takeover Agreement and the Settlement Agreement, and to allow the Project to be completed at the earliest possible date.

FISCAL IMPACT

Upon execution of the Settlement Agreement, the Surety will receive \$2,217,546.32, which includes \$717,546.32 approved by the DOF on the Enforceable Obligation Payment Schedule and subsequent Recognized Obligation Payment Schedule for the construction of Fire Station 12. In addition, the Successor Agency will use another \$1,000,000 in property taxes received as part of Recognized Obligation Payment Schedule III for the purpose of paying the Settlement Agreement. This \$1,717,546.32 has already been appropriated in SA 270 in the Department of Development Services.

The gap between the settlement agreement and the immediate available funds is \$500,000. The funding of the \$500,000 is proposed to come from the sweep of the Redevelopment/Successor Agency fund balances (received in the General Fund in Fiscal Year 2013). It may be possible to recoup the \$500,000 by resubmitting to the DOF or through legal action. Although it is not likely, if the \$1,000,000 already approved is ever denied in the future, it could also be resubmitted to the DOF or potentially recouped by legal action.

The proposed settlement will eliminate the potential cost of defending the City against future litigation of this matter and the potential of a higher settlement amount.

SUGGESTED ACTION:

Approve recommendation.

Respectfully submitted,



AMY J. BODEK, AICP
DIRECTOR OF DEVELOPMENT SERVICES

AJB:RMZ:DLH

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APPROVED:



PATRICK H. WEST
CITY MANAGER