



CITY COUNCIL AGENDA REPORT

MEETING DATE: OCTOBER 21, 2008

ITEM NUMBER:

SUBJECT: COSTA MESA POLICE FACILITY EXPANSION AND RENOVATION PROJECT - CITY PROJECT NO. 06-08

DATE: OCTOBER 9, 2008

FROM: PUBLIC SERVICES DEPARTMENT/ENGINEERING DIVISION

PRESENTATION BY: PETER NAGHAVI, DIRECTOR, DEPARTMENT OF PUBLIC SERVICES

FOR FURTHER INFORMATION CONTACT: ERNESTO MUÑOZ, CITY ENGINEER, (714) 754-5335

RECOMMENDATION:

1. Approve the reduction of retention funds withheld from the general contractor USS Cal Builders, Inc. to five (5) percent of the contract price.

BACKGROUND:

On September 19, 2006, the City contracted with USS Cal Builders, Inc. to construct the Police Facility Expansion and Renovation Project. The project has been under construction since October 2006 and is currently 85 percent complete.

The City's construction contracts require that ten (10) percent of all payments to a contractor during the course of the project be withheld. Retention is withheld to resolve any claims that may be received against the contractor by subcontractors and material suppliers. Withheld money becomes a financial loss to contractors if a job is abandoned, and the retained funds can help the agency pay for the cost to finish the work.

The City's construction contracts require that retention monies be released to the contractor 35 days after the Notice of Completion is filed provided no claims have been received.

ANALYSIS:

Retention proceeds represent a percentage of the amount of a contract that is withheld from each progress payment made by the City to the contractor. By withholding the maximum amount (10 percent) of the contract proceeds, the City maintains a degree of financial control over the project.

California law allows Cities to reduce the amount of retention withheld once a contract is more than 50 percent complete, and satisfactory progress is being made by the contractor. By reducing the retention rate from 10 to 5 percent, the City still maintains a level of financial control over the project. The incentive for the City to reduce the retention is to allow the contractor access to funds already earned to continue to pay subcontractors and suppliers that have already finished their work, which has been accepted by the City. This benefits the City by enabling the contractor and its subcontractor to maintain healthy cash flows and solvency through the duration of a project.

In addition to retaining a portion of the contractor's earnings, the City has added protection by continuing to hold the contractor's performance and payment bonds. Bonding, and retention of a portion of the contractor's earnings, is adequate to ensure satisfactory completion of the project, and the necessary means to resolve any potential claims for goods and services already provided.

Staff has observed that the contractor is making satisfactory progress on this contract and is currently on schedule to complete the project by Spring 2009. All work performed to date has been deemed satisfactory; therefore, the contractor's request to reduce the rate of retention from 10 to 5 percent is not unreasonable and should be considered for approval.

Based on current progress payments made to date, the 10 percent retention amount being held by the City is \$1,756,000. Reducing the retention amount from 10 to 5 percent will reduce the current amount of contract proceeds being withheld by the City to \$878,000, and by the completion of the project the amount would be approximately \$1,000,000. In light of the contractor's satisfactory progress on this project (85 percent complete), and since there are currently no Stop Notices on file, staff supports the action to reduce the retention rate from 10 to 5 percent. The proposed level of retention will continue to provide the City ample funding to leverage against the contractor to complete the project and resolve any potential claims.

The City's bidding documents are silent regarding reduction of retention withholding amounts. This action is provided for within the Public Contract Code Section 10261 which allows a reduction of retention after more than 50 percent of the contract work has been completed. However, the City Council must approve this action due to the absence of authority in the contract documents.

ALTERNATIVES CONSIDERED:

The alternative to this Council action would be to continue withholding 10 percent retention from all progress payments made to the contractor, or to revise the withholding to lesser amount between 5 and 10 percent. Although this is not prohibited, staff does not recommend this alternative as it is not within the spirit of the Code.

FISCAL REVIEW:

There is no fiscal impact to the City on this item since the funds under retention are earned revenues to the contractor. Based on the progress of this project, and staff's expectations for its completion, there is a low risk that retention of over 5 percent of the contract amount may be necessary. However, if claims were to arise before final completion of the project, the City has the additional option to tender claims through the performance and payment bonds held for the contract, in addition to the retention funds held.

Further, Public Contract Code Section 7107(c) allows a public agency to withhold an amount up to 150 percent of the value of any disputed work from the final payment as additional leverage with the contractor to complete the work and resolve the disputes expeditiously. These controls will provide the City with maximum resources that could potentially be required if the contractor's progress were to stall or any potential disputes were to arise.

LEGAL REVIEW:

The City's discretion to reduce retention to 5 percent of the contract price is consistent with and allowed by Public Contract Code Section 10261.

CONCLUSION:

It is recommended that the City Council approve the reduction of retention being withheld from progress payments due to USS Cal Builders, Inc. to five (5) percent of the contract price. Due to the 85 percent completion status of the project and the contractor's satisfactory performance to date, the withholding of the maximum amount of 10 percent retention is no longer necessary at this stage of the project.

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