



AGENDA REPORT
SAN CLEMENTE CITY COUNCIL MEETING
 Meeting Date: December 4, 2012

Agenda Item 607
Approvals:
 City Manager [Signature]
 Dept. Head [Signature]
 Attorney [Signature]
 Finance _____

Department: Community Development / Building Division
Prepared By: Mike Jorgensen, Building Official [Signature]

Subject: ***SETTLEMENT AGREEMENT AND MUTUAL RELEASE RELATED TO THE CONSTRUCTION OF THE DOWNTOWN FIRE STATION AND SENIOR CENTER***

Summary: Background
 An agreement with Gamut Construction Company, Inc. was executed July 7, 2009 to construct the New Downtown Fire Station and Senior Center located at 121 / 117 Avenida Victoria. Unfortunately, the contractor experienced internal company problems and was unable to maintain the necessary construction progress to remain on schedule.

Construction was interrupted when Gamut Construction notified the City of San Clemente on June 18, 2010 that they were unable to complete their contractual obligations. The bonding company was immediately notified of this default by the contractor. The bonding surety, Fidelity and Deposit Company of Maryland quickly responded to fulfill their obligation of the bonds.

A Takeover Agreement between the City and Fidelity and Deposit Company of Maryland was authorized by the City Council July 20, 2010 to complete the construction of the New Downtown Fire Station and Senior Center and the surety retained Tutor Perini Corporation as the completion contractor to replace Gamut Construction.

Construction of the Downtown Fire Station and Senior Center located at 117 / 121 Avenida Victoria was completed in the fall of 2011, and the building was occupied by the Orange County Fire Authority and Age Well Senior Services on September 28, 2011.

A number of disputed issues including those related to liquidated damages due to contractor delays, unresolved change order credits, and contractor extended overhead costs have kept the City from releasing the construction payments held in retention to the bonding company. Final payment of \$493,425.36 to the surety/contractor is still held by the City in retention.

In June 2012, Fidelity and Deposit Company of Maryland filed a claim against the City in an attempt to force the release of payments retained by the City. The City and the surety have been cooperating to resolve contractual issues associated with the construction project. Final construction payment details for this project remained unresolved until recently. A Settlement Agreement and Mutual Release has been negotiated and are presented for City Council approval.

Project Closeout Chronology:

January 6, 2012 - City sent closeout letter to Surety/Contractor

(The City's position in this letter proposed for the City to retain all \$493,425.36 of the contractor payments held retention.)

March 8, 2012 - Surety/Contractor responded to City's letter

(The surety disagreed with the City's position and their initial response letter indicated that they should receive all the funds held in retention.)

May 4, 2012 - City proposed alternate closeout settlement

(The City reevaluated the delays in question and recommended a compromise solution in an attempt to avoid a lengthy and costly settlement process. This City proposal recommended releasing approximately \$161,375 to the surety as final payment.)

June 7, 2012 - Surety responded with alternative settlement proposal

(The surety proposed an alternative proposal in which the surety would receive \$375,000 and the City would keep the remaining \$118,425 balance of the contractor payments held in retention.)

July 23, 2012 - City proposes a compromise to release \$306,500 of the \$493,425.36 held in retention.

August 13, 2012 - Surety indicates willingness to settle for \$355,000 of the \$493,425.36 held in retention.

August 14, 2012 – City Council authorizes City Attorney to prepare a settlement agreement based upon the \$355,000 offer from the surety.

Final Construction (Contractor/Surety) Payments:

Construction Contract	\$4,297,128.00
Change Order No's 1 through 143	\$ 637,125.59
	\$4,934,253.59
<u>Retained by City via settlement</u>	<u>-\$ 138,425.36</u>
	\$4,795,828.23

Total Project Costs (i.e. hard and soft costs including design, project management, and construction):

(See Attachment "B" for detailed breakdown of expenses)

Fire Station	\$4,118,228.28
<u>Senior Center</u>	<u>\$2,465,984.85</u>
	\$6,584,213.13

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The Settlement Agreement and Mutual Release (Attachment "A") culminates months of work reaching a mutually acceptable settlement and release of matters related to construction of the Downtown Fire Station and Senior Center.

Project expenditures were funded from both the Public Facilities Construction Fund, Public Safety Construction, Account No. 030-818-45300-000-15502 and the Developers Improvement Fund, Account No. 037-867-45300-000-15503. The multi-year design and construction project was completed within the project funding authorized by the City Council.

It should be noted that a construction funding cost sharing agreement to pay for the construction of the Senior Center was executed between the City and Age Well Senior Services (previously known as South County Senior Services) in February 2008. Reaching agreement on closeout issues allows the final construction funding obligation of Age Well Senior Services to be established. (See Attachment "C" for details)

Recommended

Action:

STAFF RECOMMENDS THAT the City Council

1. Approve and authorize the mayor to execute the Settlement Agreement and Mutual Release between Fidelity and Deposit Company of Maryland and the City of San Clemente related to the construction of the downtown fire station and senior center.
2. Authorize staff to release final construction payment held in retention in accordance with the Settlement Agreement.

Fiscal Impact:

Results in City retaining \$138,425.36 of the final payment to the contractor currently held in retention.

Attachments:

Attachment A – Settlement Agreement and Mutual Release
 Attachment B – Summary of Final Project Costs (Design & Construction)
 Attachment C – Outstanding Age Well Funding Obligation

Notification:

Marilyn Ditty w/ Age Well Senior Services

Attachment "A"

Attachment "A"

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SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (hereafter the "Agreement") is entered into by and between the City of San Clemente ("City") and Fidelity and Deposit Company of Maryland ("F&D"); ~~District~~ and F&D referred to herein collectively as "Parties" and individually as "Party." This Agreement shall be effective on and after the date on which it is signed by all the Parties (hereafter the "Effective Date").

RECITALS

This Agreement is made with reference to the following facts:

A. On or about July 8, 2009, City and Gamut Construction Company, Inc. (hereafter "Gamut"), as direct contractor, entered into a written contract (hereafter "Bonded Contract") for the construction of the Downtown Fire Station & Senior Center, 117 and 121 Avenida Victoria in San Clemente, CA 92672-4154 (hereafter the "Project"). The original Project contract price was \$4,297,128.00.

B. As required by law and according to the terms of the Bonded Contract, Gamut and F&D made, executed, and delivered to the City a Performance Bond and a Payment Bond, identified as bonds no. 08748951 (the "Bonds"), each in the penal sum of \$4,297,128.00.

C. On June 18, 2010, Gamut delivered to City a voluntary letter of default in response to which City formally requested F&D to undertake completion of the Project pursuant to its obligation under the Performance Bond.

D. F&D responded to City's demand by tendering Tutor Perini as the completion contractor. A Takeover Agreement was fully executed on July 19, 2010 and Tutor Perini mobilized on August 2, 2010. The terms of Takeover Agreement provided, inter alia, that the work was to be completed in accordance with the provisions of Bonded Contract subject to agreed-upon modifications. It further provided that F&D is entitled to receive any and all unpaid contract balances.

E. Tutor Perini's performance of the work, pursuant to the terms of the Takeover Agreement, including City's design documents, necessitated design clarification and substantially increased the scope of work required by City.

F. A dispute arose over the respective rights, obligations, and liabilities of the Parties relating to the Bonded Contract, the Bonds, Takeover Agreement, and the Project. F&D claims to entitlement to extra compensation for additional work and delays which F&D contends were caused by City; City claims a right to liquidated damages and back charges against the earned contract funds (hereafter "Disputed Claims & Counterclaims").

G. In June 2012, F&D submitted a Government Code Claim to City pursuant to Government Code §§900, 910, et seq. City rejected F&D's Government Code Claim (hereafter "Affirmative Claim").

H. Following extensive settlement discussions between the Parties, City and F&D desire to resolve all disputes between them and hereby agree as follows:

AGREEMENT

1. Incorporation of Recitals. Paragraphs A through H of the Recitals are incorporated as though fully set forth herein.

2. Reconciliation of Contract Balance & Prevailing Wage Withhold.

2.1 In exchange for the promises, conditions and covenants set forth in this Agreement, City shall pay to F&D, subject to the authorized withhold identified in paragraphs 2.2 and 2.3, below, the sum of Three Hundred Fifty-Five Thousand and 00/100 dollars (\$355,000.00), representing the negotiated earned contract funds on the Project (hereafter the "Settlement Payment"). F&D hereby agrees that the foregoing payment is the total sum it is entitled to receive as payment for its completion of the Project.

2.2 City shall be entitled to withhold from the Settlement Payment the total amount of One Hundred Thirteen Thousand Five Hundred Eighteen Dollars and 17/100 (\$113,518.17) (hereafter "Withhold Amount") in accordance with its statutory obligations pursuant to the Civil Wage and Penalty Assessment, dated August 10, 2012, issued by the Division of Labor Standards Enforcement (hereafter "Prevailing Wage Assessment").

2.3 City shall release the Withhold Amount to F&D within fifteen (15) days of its receipt of a Release of Civil Wage and Penalty Assessment by the DLSE, in whole or part, or upon receipt of, and in accordance with, a final order that it no longer subject to judicial review pursuant to Labor Code §1727. Any release of the Withhold Amount pursuant to Release of Civil Wage and Penalty Assessment shall be limited to the reduction of the Prevailing Wage Assessment as specified in the Release of Civil Wage and Penalty Assessment.

2.4 Subject to paragraphs 2.2 and 2.3, above, payment of the Settlement Payment shall be made payable to the Fidelity and Deposit Company of Maryland and remitted within fifteen (15) days of the City Council's approval and full execution of this Agreement by the Parties. Payment shall be sent to the attention of: John C. Downes, Senior Claims Counsel, Fidelity and Deposit Company of Maryland, Post Office Box 968037, Schaumburg, IL 60196. Any authorized payments of the Withhold Amount shall be remitted to the same addressee within fifteen (15) days of City's receipt of the Release of Civil Wage and Penalty Assessment or final order, as applicable.

3. Mutual Release. In consideration of the Settlement Payment set forth above, City and F&D, including their respective representatives, attorneys, successors, predecessors, affiliates, assignees, assignors, joint venturers, partners, parents or affiliated entities, subsidiaries, agents, employees, officers, directors, shareholders, owners (hereafter included in the defined term "Parties"), do hereby release, remise and forever discharge each other from any and all claims, liens, demands, obligations, actions, causes of actions, damages, liabilities, losses, costs or expenses, of any nature whatsoever, known or unknown, past, present or future, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, which the Parties or any of them, have had, now have or may hereafter have against each other, which arise out of or relate

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to the Bonded Contract, the Bonds, the Takeover Agreement, the Project, Disputed Claims & Counterclaims, and the Affirmative Claim (hereafter "Released Claims").

4. Waiver of Future Claims. With the exception of the rights afforded the Parties under this Agreement, this Agreement is a full and final release by and between City and F&D as set forth herein. With respect to those matters covered by the above releases, the parties hereto, for themselves and the related parties, expressly waive any right or claim of any right to assert hereafter that any released matters have which arise out of or relate to the Released Claims, through ignorance, oversight or error, been omitted from the terms of this Agreement and expressly waive any right or claim of right they may have under the provisions of California Civil Code §1542, which they understand provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor."

5. Exception to Release and Waiver. The release and waiver provided in Sections 3 and 4 of this Agreement do not apply to any obligations of F & D to complete any warranty work on the Project required by the Bonded Contract.

6. Fees and Costs. The parties to this Agreement agree to be responsible for their own attorneys' fees and costs incurred with respect to the matters set forth herein. Provided, however, that if any party to this Agreement commences any proceeding, at law or in equity, against the other party, which proceeding relates to the enforcement of this Agreement or the performance of their respective duties and obligations under this Agreement, the non-prevailing party in such proceeding shall pay to the prevailing party the prevailing party's reasonable attorneys' fees and other legal fees, expert and consultant fees and other costs and expenses incurred in connection with such proceeding and those incurred in connection with the enforcement of any resulting judgment or order. Such post judgment right to receive attorneys' fees and other legal fees, expert and consultant fees and other costs and expenses shall be specifically provided in such judgment or order.

7. Representations and Warranties. Each party represents and warrants to the other party that they are the sole owners of the matters set forth herein and that they have not sold, transferred, conveyed, assigned or hypothecated any of those matters and that this Agreement as so executed constitutes a legal, valid and binding contractual obligation enforceable against each party.

8. Understanding of Agreement. Each Party hereto affirms and acknowledges that each has both read this Agreement and has had an opportunity to have the Agreement fully explained by counsel of choice, that each fully understands and appreciates the words and terms used in this Agreement and their effect, that this is a full and final compromise, release and settlement of the matters set forth herein, and that each signs this Agreement of his or her own free will. Each Party, or his or her respective attorneys, have carefully and fully reviewed and revised, or have had an opportunity to revise, the Agreement. Accordingly, the normal rule of construction that

any ambiguities are to be resolved against the drafting party shall not be utilized in the interpretation of any of this Agreement.

9. Execution of All Documents. The parties to this Agreement agree to execute any and all documents necessary to effectuate the terms, conditions, purposes and aims of this Agreement.

10. Counterpart Signatures. This Agreement may be executed in any number of counterparts and by electronic or facsimile signature, with the same effect as if all parties have signed the same document, and each such executed counterpart shall be deemed to be an original instrument. All such executed counterparts together shall constitute one and the same instrument and a true and correct copy of the signed Agreement may be used in lieu of the original.

11. Benefit of Agreement. Each and every term of this Agreement is binding upon and inures to the benefit of City and F&D, their successors and assigns and shall bind and inure to the benefit of those persons and entities described in Paragraph 3 above, which persons are intended to be beneficiaries of this Agreement.

12. Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

13. No Admission. This Agreement is the settlement of a disputed claim, and is not an admission of liability by any party hereto.

14. Non-Waiver. No breach of any provision hereof can be waived unless in writing. Waiver of any one breach of any provision hereof shall not be deemed to be a waiver of any other breach of the same or other provisions hereof.

15. No Third Party Beneficiaries. This Agreement shall inure solely to the benefit of and shall be binding on the Parties to this Agreement and to those persons and entities described in Paragraph 3 above, only. Nothing set forth in this Agreement is intended nor shall create, affect, modify or waive any rights, claims or defenses of any third party, nor create, affect, modify or waive any rights, claims or defenses of any Parties to this Agreement against any other person or entity not a party to this Agreement.

16. Entire Agreement. This Agreement constitutes the entire agreement between the Parties hereto pertaining to the Released Claims set forth herein and fully supersedes any and all other prior understandings, representations, warranties and agreements between the Parties pertaining to the same. This Agreement may be amended only by a writing executed by the Parties at the time of the amendment.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year as indicated below.

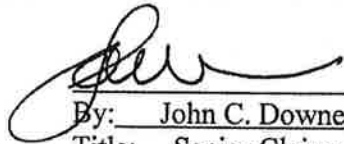
Dated: October __, 2012

CITY OF SAN CLEMENTE,
A Municipality of the State of California

By: _____
Title: _____

Dated: October 22, 2012

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a Maryland corporation



By: John C. Downes
Title: Senior Claims Counsel

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Attachment “B”

Attachment “B”

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DOWNTOWN FIRE STATION #60 & SENIOR CENTER

PROJECT COST BREAKDOWN

CONSULTANT / SERVICE	FIRE STATION	SENIOR CENTER	TOTAL COSTS
IBI Group (Architectural / Engineering Design Services)	\$525,433.30	\$355,375.00	\$880,808.30
(Contractor) Gamut Construction Co. / Fidelity & Deposit	\$2,312,179.11	\$1,573,836.20	\$3,886,015.31
Construction Contingency (15% pre-approved by City Council)	\$422,099.81	\$132,712.21	\$554,812.02
Lampert Architects, Inc. (Architectural Design Services)	\$0.00	\$28,050.00	\$28,050.00
Willdan Associates, Inc. (Construction Management)	\$395,622.57	\$150,937.87	\$546,560.44
Nagel Planning & Design (Project Management)	\$22,182.50	\$17,266.25	\$39,448.75
Borella Geology, Inc. (Geotechnical Services & inspections)	\$31,217.75	\$12,674.75	\$43,892.50
City Plan Check & Permit Fees	\$14,528.84	\$7,904.72	\$22,433.56
AT&T / SDG&E / OC Register / So. Cal Gas	\$22,931.84	\$16,183.49	\$39,115.33
J.E.T. Drilling Inc. (soil borings)	\$852.20	\$852.20	\$1,704.40
Summers/Murphy & Partn, Inc. (Review Landscape Plans)	\$2,170.00	\$790.00	\$2,960.00
Ground Penetrating Radar	\$1,500.00	\$0.00	\$1,500.00
Off-Site Construction Parking Lease	\$9,450.00	\$4,050.00	\$13,500.00
Misc (FedEx / USPS / Printing)	\$456.93	\$5.24	\$462.17
Rutan & Tucker (Legal)	\$7,311.00	\$984.00	\$8,295.00
Toal Engineering (parcel map preparation)	\$1,200.00	\$0.00	\$1,200.00
Brian Hannegan (Landscape Design)	\$2,720.00	\$0.00	\$2,720.00
Convection Oven Purchase (Sr. Center)	\$0.00	\$5,621.38	\$5,621.38
City Staff Labor & Overhead (*** NOT CHARGED TO AGE WELL SENIOR SERVICES ***)	\$135,147.43	\$14,966.54	\$150,113.97
Final Construction Payment to Surety - to be released	\$211,225.00	\$143,775.00	\$355,000.00
TOTAL HARD & SOFT COSTS (2004 to 2012)	\$4,118,228.28	\$2,465,984.85	\$6,584,213.13

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Attachment #C

Attachment #C

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AGE WELL SENIOR SERVICES ELIGIBLE EXPENSES & FINAL FUNDING OBLIGATION

SENIOR CENTER	Final Closeout Senior Center Costs
Expenditures (Eligible Expenses) paid through 11/15/2012	\$2,307,243.31
Retention Payment to be released (portion of payment assignable to Sr. Center)	\$143,775.00
Total Eligible Expenses	\$2,451,018.31
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City paid initial \$900,000	-\$900,000.00
Reimbursements already received from Age Well - Building Fund Escrow Acct	-\$520,606.30
	-\$341,200.02
	-\$269,043.91
Outstanding Age Well Obligation	\$420,168.08
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Funds still remaining in Escrow (estimated)	\$72,204.22
Funds still required to be raised by Age Well	\$347,963.86

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