



80721

DATE: May 10, 2016

TO: Board of Supervisors

FROM: Gary A. Graves, Chief Operating Officer
Bruce Knopf, Asset and Economic Development Director
Jeffrey D Draper, Director, Facilities and Fleet

SUBJECT: Resolution Relating to a Civic Center Master Development Agreement

RECOMMENDED ACTION

Consider recommendations relating to the planning and development of approximately 55 acres, or portions thereof, of certain real property, more or less located at or around the Santa Clara County Civic Center in San Jose. (Office of the County Executive)

Possible action:

- i. Approve exception to Board of Supervisors Policy 5.4.5.4, Length of Term of Contracts, relating to Master Development Agreement with Lowe Enterprises Real Estate Group to develop the Santa Clara County Civic Center Property.
- ii. Approve exception to Board of Supervisors Policy, Standard Contract Language, relating to Master Development Agreement with Lowe Enterprises Real Estate Group to develop the Santa Clara County Civic Center Property.
- iii. Adopt Resolution finding and determining that the approval of the Master Development Agreement (MDA) for development of the County Civic Center property, which has been reviewed and approved by County Counsel as to form and legality, is exempt from the California Environmental Quality Act (CEQA) and the development of the County Civic Center property under the terms of the MDA meets the requirements of Section 25515 et seq of the California Government Code; and, delegating authority to the County Executive, or designee, to implement and carry out the terms of the MDA, including negotiating, entering into and signing all documents necessary or required to carry out the terms of the MDA, upon approval as to form and legality by County Counsel. Delegation of authority shall expire on December 30, 2026. (4/5 Roll Call Vote)

- iv. Approve Request for Appropriation Modification No. 220 - \$3,850,000 transferring funds from the General Fund Contingency Reserve to the Facilities and Fleet Capital Project budget, 263-CP12002. (4/5 Roll Call Vote)

FISCAL IMPLICATIONS

Approval of the recommended action to approve the MDA would result in an increase in General Fund FY2016-2017 expenditures in the amount of \$3,850,000:

Source: MDA Exhibit C and Section 12.04(B)(1)	Phase A	Phase B
● 3rd Party Master Planning Consultants	\$ 1,184,500	\$ 65,000
● 3rd Party Due Diligence Consultants	\$ 805,000	\$ 70,000
● Phases A&B Lowe Fee - Staffing	\$ 756,000	\$ 262,500
● Other Reimbursable Costs	\$ 120,000	\$ 196,000
● Contingency	\$ 105,000	\$ 34,000
Lowe Subtotal	\$ 2,970,500	\$ 627,500
● Deferred Compensation Fee (if the County terminates the MDA for convenience during, or upon completion of, Phases A&B)		\$ 252,000
TOTAL Phases A and B		\$ 3,850,000

Fiscal impact of Pre-development Phases C and D will not be known until business plans and budgets are prepared. A business plan and budget for Predevelopment Phase C will be prepared and presented to the Board in the final stages of Predevelopment Phase B. Issuance of a Notice to Proceed and progressing to Phase C will be subject to Board approval of such business plans and budgets as well as Board appropriation of funding.

CONTRACT HISTORY

- On December 4, 2012, the Santa Clara County Board of Supervisors approved Ordinance NS-300.854 authorizing the possible lease, sale, joint development or other disposition of County-owned property, where applicable, and the issuance of requests for proposals or competitive bidding in a manner prescribed by the Board of Supervisors, of approximately 55 acres (or portions thereof) of County-owned real property in the Civic Center for purposes of public, residential, commercial, industrial and/or cultural use or development.
- On April 9, 2013, the Board initiated a request for qualifications/request for proposals (RFQ/RFP) process by inviting the development community to submit their qualifications for master development of the Civic Center properties.
- On April 29, 2013, the RFQ was issued.
- On May 15, 2013, a pre-submittal conference was held at the County Government Center to answer questions about the RFQ/RFP process and requirements, which attracted 42 individuals representing developers, brokers, consultants, and sub-

consultants.

- The County received two submittals prior to the response deadline, one of which withdrew prior to oral interviews.
- On August 14, 2013, the team of Lowe Enterprises and Gensler Architects (the remaining applicant), were interviewed by a panel of County representatives and received high reviews.
- On September 12, 2013, the Board authorized preparation of an Exclusive Negotiating Agreement (ENA) with Lowe Enterprises and Gensler for the redevelopment of the Civic Center Campus based on the results of the RFQ/RFP process.
- On December 10, 2013, the Board unanimously approved an ENA with Lowe Enterprises and Gensler Architects relating to the County Civic Center, which contemplated preparation of the proposed Predevelopment Facilities Agreement.
- On February 4, 2014, the Board approved the Predevelopment Facilities Agreement (PFA) with Lowe Enterprises and M. Arthur Gensler, Jr. and Associates, Inc. relating to predevelopment of the Civic Center for the period February 4, 2014 through August 3, 2015, plus two 90-day extensions.
- On January 26, 2016, the Board approved the First Amendment to the Predevelopment Facilities Agreement extending the term 90 days through April 30, 2016.
- On April 12, 2016, the Board of Supervisors approved the Second Amendment to the PFA extending the term by 30 days through May 30, 2016, or the date of final Board action on a proposed Master Development Agreement (MDA) if the MDA has been continued from a meeting prior to May 30.

REASONS FOR RECOMMENDATION

Pursuant to the terms of the Predevelopment Facilities Agreement with Lowe Enterprises, approved by the Board on February 4, 2014, as amended, Administration has negotiated the proposed MDA (Exhibit A to the Resolution) for preparation of a Master Plan and the potential subsequent development of public, residential, commercial, industrial and/or cultural uses, at the Civic Center site pursuant to California Government Code §25515 et seq. Outside counsel Bob Thompson from Sheppard Mullin, Richter & Hampton LLP, along with Tim Kelly of Keyser Marston Associates, assisted the Administration in the negotiation and drafting of the MDA.

Government Code §25515.2(a) stipulates that the MDA must be adopted by ordinance. A Public Hearing on adoption of the Ordinance was noticed on April 25, 2017 and May 2, 2016 pursuant to the requirements of Government Code Sections 25515.2 (a) and (b) [Attachment-Proof of Publication].

Resolution Findings

Pursuant to Section 25515 of Article 7.5 of Chapter 5, Part 2, Division 2, Title 3 of the California Government Code, the State Legislature has found that “...*the use of county public properties under this Article 7.5 for residential, commercial, industrial and cultural*

development constitutes a valid public purpose.” Under the terms of the Request for Qualifications / Request for Proposals (RFP/RFQ) issued April 9, 2013, the Board stated its intent to use property at the Civic Center for residential, commercial, industrial or cultural development or a combination of any of these uses with other public purposes or public buildings. Adoption of the proposed Resolution would make those findings required by Government Code Section 25515.

Section 25515.1(a) authorizes: *“the Board of Supervisors to lease for a term not to exceed 99 years...any of its real property...for purposes of cultural, residential, commercial, or industrial use or development...upon the terms and conditions determined by the Board of Supervisors.”* Furthermore, Section 25515.1(b) stipulates that *“...Prior to entering into any ...(such)...agreement the Board of Supervisors shall determine that the... lease ... development, or other contract will result in economic benefits to the County.”* The Board has determined, *“When feasible, it is more desirable to lease rather than sell County-owned property...It is the stated intent of the Board to lease, rather than sell, property.”* (Board Policy 7.8(D)).

Regarding the Section 25515.1(b) requirement for making a finding that the MDA will result in economic benefits to the County,

- (1) After completing due diligence on other similar, complex master planning and development projects (San Diego County Operations Center and ROV Building – See below),
- (2) After evaluating Best Practices for such projects (difficult as they are to compare due to their uniqueness), and
- (3) After engaging and obtaining an independent Peer Review to evaluate the business terms of the proposed MDA (discussed below),

It is apparent that the terms of the proposed MDA are not only fair and reasonable for the County, but they represent the more favorable end of the spectrum within best practices for similar projects.

Section 25515.1(b) goes on to say, *“...If the property to be used or developed is adjacent to, or a portion of, real property which is, or will be, used for other governmental activities, the Board of Supervisors shall also determine that the agreement will not interfere with the use or development of the remaining public property.”* The County will be in control of the MDA master planning process and thereby will be able to ensure that the process lays out the Civic Center site in such a way as to minimize and avoid any interference that private uses may cause to adjacent County public use.

Overview of Business Terms

Terms of the MDA are outlined in an Executive Summary of the MDA (Attachment). The proposed MDA lays out a roadmap for preparation of a Civic Center Master Plan and laying the groundwork for subsequent development. This is significant because it represents preparation of a comprehensive plan that would be implemented over the next decade to replace/renovate aging capital facilities at the Civic Center. At this point the County would only be committing to completion of Phases A and B which involve preparation of the

Master Plan and completion of CEQA review.

The MDA also includes the commitment that Lowe would be the developer of the first \$150 million of new County buildings during the next 7 to 10 years, depending on how long it takes to complete CEQA and the Master Plan. The County may use other developers to develop the additional buildings beyond the first \$150 million worth of projects, or the development of private use parcels that would generate revenue for the General Fund, or for the development of additional County buildings beyond the contractual 7 year term following completion of CEQA and the Master Plan.

There are clearly many uncertainties at this early stage in the project (regarding costs, scope of work of the first construction project, completion of a County financing plan, etc. All of these uncertainties have been addressed by the creation of a process that allows the Board flexibility to stop or proceed at key decision points. Approval of this MDA includes approval of a Notice to Proceed for Phases A and B only. The Board's approval (of a budget, a scope of work and a Notice to Proceed) will be required to initiate each subsequent phase.

If the County should decide to slow or terminate the process, economic provisions have been negotiated for Delay Compensation Payments (in the event of extended delay in the absence of terminating the agreement, or Deferred Compensation Payments (in the event that the county terminates the MDA for convenience) that function as liquidated damages and compensate the Developer, essentially for the cost of severance for project staff. In this way a balance has been achieved between the County's need for flexibility and the Developer's need to demobilize.

Exhibit C to the MDA describes the first scope of work that would take place under this Agreement: it includes an approved Business Plan, Budget and Schedule for Initial Predevelopment Phases A and B. Phase A involves preparation of a draft Master Plan and the Developer's performance of due diligence for the full 55 acre Civic Center area. Phase B involves completion of Entitlements (CEQA/EIR and Other Approvals) for the full site. Additional phases would only commence upon Board approval of a Predevelopment Phase Business Plan and Budget and Board appropriation of funding. The predevelopment phases following Phases A and B would be generally structured as follows:

- Phase C – Initial New County Facility Phase (contemplated to be at the Richey Site) – Preliminary Design & Engineering
- Phase D – Initial New County Facility Phase (Richey Site) – Financing & Preconstruction
- Phase E – Initial New County Facility Phase (Richey Site) – Construction of the first project

Peer Review

The Administration engaged BAE Urban Economics (BAE) to complete a peer review of the business terms of the proposed MDA (“Peer Review”). Their review is attached and concludes that the terms of the proposed MDA are reasonable based on best practices and when compared to other projects of similar scope (Attachment).

San Diego County Operations Center (COC)

In late 2005, the County of San Diego issued a request for proposals and kicked off a multi-phased project involving replacement of the San Diego County Operations Center. The County entered into an Exclusive Negotiating Agreement (ENA) with Lowe Enterprises in 2007 and then approved a Disposition and Development Agreement (DDA) in 2008 to construct six buildings, subsequently amending the DDA in 2012 to add development of a new Registrar of Voters building and parking garage to the scope of work. The total Lowe managed scope of work totaled over \$438 million and represented a County budget of \$531 million over a five-year period (Attachment).

The proposed Civic Center MDA has been modeled after many of the basic elements of this successful project, modified by both lessons learned as well as progression of best practices. As noted in the BAE's Peer Review, the terms of the proposed MDA represent a more mature agreement on similar, or more favorable, terms.

Community Outreach

In addition to mailing and emailing notice of the May 10th Public Hearing to property owners within a 1000 ft. radius and people who have expressed interest in the Civic Center project respectively, public meetings were held on April 3, 2013, September 16, 2016, and March 30, 2016 to brief neighbors, neighborhood associations, and individuals and others organizations who have expressed interest in the Civic Center project. The public comments made at the meeting of September 6, 2015, attached, represent the comments made at the outreach meetings. A copy of these comments are attached for consideration and for inclusion in the Master Planning process, Predevelopment Phases A and B.

CEQA

Based on the administrative record as a whole, the Board's approval of the MDA is not subject to CEQA (California Public Resources Code §§21000 et seq.) and the State CEQA Guidelines (California Code of Regulations §§15000-15387) because Board action in approving the MDA is not a "project" as defined in CEQA Guidelines Section 15378 and therefore will not result in a physical change in the environment pursuant to CEQA Guidelines Section 15060(c)(2).

In a separate action before the Board on May 24, 2016, a contract will be considered for approval to engage a CEQA consultant, David J. Powers and Associates, Inc., to prepare an Environmental Impact Report (EIR) for projects contemplated under the MDA, including the master plan, all of which will return to the Board for approval.

Exception to Board Policy Regarding Length of Term, as found at

<http://www.sccgov.org/sites/bos/Legislation/BOS-Policy-Manual/Documents/BOSPolicyCHAP5.pdf>

The Office of County-wide Contracts Management has approved an exception to Board Policy 5.4.5.4, the regarding a contract term in excess of more than five (5) years (Attachment - Pre-approval Authorization Form).

Reasons for Modification of Form of Agreement and Standard Services/Procurement Contract Language, as found at

<http://www.sccgov.org/sites/bos/Legislation/BOS-Policy-Manual/Documents/BOSPolicyCHAP5.pdf>

There are two instances in the proposed MDA, Sections 15.39 and 15.40, where the proposed MDA includes non-standard contract language. Board Policy 5.4.5.3 acknowledges that the form of an agreement will vary depending on the type of transaction.

1. With regard to Section 15.40, the MDA has taken as its basis those standard contract provisions that are incorporated into Service Agreements and Procurement Contracts, with edits appropriate to a major, capital construction project, or edits necessary to conform to the standard language to other terms of the MDA.

For example, the form of a standard Service Agreement includes the County mandatory contract provision for “Budget Contingency,” which states that the agreement shall be contingent upon appropriation of sufficient funding, and if funding is reduced or deleted the County has the option to terminate the Agreement *with no liability* to the County (emphasis added).

The MDA complies with the requirement for being contingent on appropriation of sufficient funding, and no modification of standard language is needed: the MDA stipulates that the developer must provide, and the County must approve, a Phase Budget, and the parties acknowledge that both the County’s issuance of a Notice to Proceed and the Developer’s incurring expenses under any such Pre-development Phase or Construction Phase is contingent upon the County having appropriated sufficient funding to cover the approved Phase Budget.

However, with respect to the requirement to be able to reduce or deleting funding with no liability to the County, there are two relevant factors that distinguish the MDA from a typical Service Agreement or Procurement Contract and which provide the basis for a request for deviation from standard contract language:

- a) Termination for Convenience. The standard Service Agreement allows the possibility of incorporating alternate termination language. The MDA does include such language in the form of a Termination for Convenience provision, which involves payment of a specified amount (the Deferred Compensation Payment) as liquidated damages. It is necessary to modify the standard “no liability to the County” language for consistency with this termination provision.

Generally speaking, the Deferred Compensation Payment applies during Predevelopment Phases A-D only, and it was based on Lowe’s need to cover staff severance costs. It would be equal to four times the then monthly payment to Lowe for either the Lowe staffing charge or the monthly Development Management Fee payment, as applicable.

- b) The second factor is that major capital construction contracts are different from Service Agreements in that the MDA represents a complex, capital project whereby design and construction will occur over multiple fiscal years. Once the County has

both appropriated funding and issued a Notice to Proceed, private parties (Lowe, the Contractor, and Subcontractors) begin expending substantial sums upon reliance on the issuance of the Notice to Proceed. The County's normal budgeting process has developed fiscal systems to address this issue, and as a result, once the Board appropriates funding for a capital project and the funds are encumbered, they automatically roll over to subsequent fiscal years as part of the normal County Budget approval process. Section 15.40 of the MDA has been modified to reflect this fiscal process and preserve the Developers right to be compensated from such funds for work subsequently completed pursuant to a properly issued Notice to Proceed.

- 2) Section 15.39 Availability of Funding, is the County's standard contract language from procurement contracts, and says that County's obligation for payment of any contract beyond the current fiscal year end is contingent upon the availability of funding and upon appropriation for payment to the Developer, and that the County will have no legal liability for payment beyond June 30 of the calendar year. The issue of availability of funding and of funding appropriation regarding capital projects is addressed above. Section 15.39 of the proposed MDA includes language similar to that which was inserted into Section 15.40: that is, the Availability of Funding provision shall not be deemed to impair the Developer's ability to receive either (a) payment for Work performed pursuant to a Notice to Proceed, or (b) the Termination Payment including the Deferred Compensation Fee, or (c) the Delayed Compensation Fee.

Reasons for Request for Delegation of Authority

Delegations of authority are generally discouraged except under specific circumstances when there is a documented need. Toward the end of Predevelopment Phase D, Lowe will propose a Guaranteed Maximum Price (GMP) for constructing the Initial Phase of New County Facilities, and the Board will need to consider and approve such GMP as well as approving an associated Financing Plan, prepared by the Finance Agency in order to approve issuance of a Notice to Proceed with the construction, Phase E. MDA Section 1.02(RR) –GMP states “Upon agreement on a Guaranteed Maximum Price, the Guaranteed Maximum Price and its basis shall be set forth in a supplement to this Agreement which shall not be deemed an amendment of this Agreement, but instead a statement of contractual confirmation.” That is, the Board's approval of a GMP is intended to be an implementing action within the confines of the MDA.

There are two ways in which the Board could take action on a GMP: Since the MDA will have been approved through the ordinance process, if the GMP approval were considered to be an amendment, then the Board would need to follow the time table and procedure for adoption of ordinances, which would add an additional 45 days to the normal Board approval process (involving a second reading of the ordinance and 30 days for the ordinance to take effect). However, if the Board were to delegate to the County Executive the authority to bring a proposed GMP to the Board for approval as an implementing action, a supplement to and contemplated by the MDA, then the Board could take action on the GMP a under the regular agenda process and save having to build an extra 45 days into the process.

Likewise there may be many other similar actions that the County Executive might need to bring to the Board for action, such as approval of business plans and budgets for Predevelopment Phases C and D, or changes to Board approved NCF Phase Schedules. Board consideration and approval of these matters is essential and it is intended that such decisions be taken by the Board and not delegated. However, each such action effectively produces a Board approved document that becomes contractually part of the MDA, and could be interpreted as an amendment that would otherwise require Board approval through the ordinance approval process.

Therefore, given the many implementing actions that will be required, some appropriate to staff decision making and some that will require Board action, the Administration recommends that the Board approve a delegation of authority to the County Executive, or his designee, “to take all actions necessary to implement and carry out the terms of the Master Development Agreement including, but not limited to, negotiating, entering into and executing change orders, supplements or amendments to the Master Development Agreement or other agreements or documents.”

Next Steps

Following approval of the MDA, the Administration will continue to work with the County’s consultant, Anderson Brule Architects, Inc. to prepare a Law and Justice Center Service Delivery Model, Operational Plan, Program Development and Conceptual Operational diagram layout. In approximately 12 -15 months, the Administration will bring this work product as well as Master Plan site options, prepared by Gensler / Lowe to the Board for review and feedback. This will provide the material needed for preparation of a Basis of Design and the Board’s consideration of the direction and general scope of work for the first phase, the Initial Phase of New County Facilities on Site A, the Richey Site.

It bears repeating, that at that point, moving forward with the Predevelopment Phase C for the Initial Phase of New County Facilities would be dependent upon Board approval of: CEQA; the Master Plan; a Business Plan and Budget for Predevelopment Phase C, an appropriation of funding to cover the work involved in Predevelopment Phase C, and, finally, the issuance of a Notice to Proceed for Predevelopment Phase C.

CHILD IMPACT

The recommended action has the possibility of creating a positive impact on Every Child Safe, Every Child Health, Every Child Successful in Learning and Every Child Successful in Life indicators. Continued negotiation of a potential MDA would support the County’s investment in the planning for and development of the Civic Center. This process is intended to promote efficiency of government, by ensuring that any new development meets the need of this community. Children in the community are positively impacted when the provision of direct services has the support of appropriate, safe and efficient infrastructure.

SENIOR IMPACT

The recommended action has the possibility of having a positive impact on seniors. Seniors in the community are positively impacted when the provision of direct services has the support of appropriate, safe and efficient infrastructure.

SUSTAINABILITY IMPLICATIONS

The recommended action would have positive sustainability implications. The County's investment in modernization of facilities and energy conservation and energy efficiency projects results in the reduction of greenhouse gas emissions and reduces the cost of government. This provides for a healthier environment and social equity through the provision of services.

BACKGROUND

In 2011, the City of San Jose conveyed to the County several buildings and parking lots at the San Jose City Hall Complex in lieu of repaying its outstanding debts to the County. At that time, the County was in the process of negotiating a no-cost Public Benefit Transfer of the former Private George L. Richey U. S. Army Reserve Site to the County for law enforcement and emergency management uses, a proposal approved by the U. S. Department of Housing and Urban Development by letter on September 13, 2011.

The addition of these properties to the County's longstanding property holdings in the Civic Center area created an opportunity to evaluate alternative uses of the properties with an eye toward consolidating government functions, promoting private development, maximizing land value, generating revenue, and minimizing environmental impacts.

CONSEQUENCES OF NEGATIVE ACTION

The Predevelopment Facilities Agreement will terminate on May 30, 2016 and the County would not have entered into an MDA with Lowe enterprises for master planning and potential public and private development of the Civic Center.

STEPS FOLLOWING APPROVAL

Mail executed copies of the MDA to:

1. Lowe Enterprises Real Estate Group
595 Market Street, Suite 2550
San Francisco, California 94105
Attn: Mr. Alan Chamorro
Senior Vice President
2. Sheppard, Mullin, Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
Attn: Robert A. Thompson

LINKS:

- **Linked To: 80636 : Approve Second Amendment to Predevelopment Facilities Agreement (PFA) with Lowe Enterprises Real Estate Group and M. Arthur Gensler, Jr. and Associates, Inc., relating to potential future development of the Civic Center,**

extending the term of the Agreement for a one-month period through May 30, 2016 or the date of final Board action on a proposed Master Development Agreement (MDA) if the MDA has been continued from a meeting prior to May 30, that has been reviewed and approved by County Counsel as to form and legality.

- **Linked From:** 80418 : Public Hearing to consider an ordinance authorizing a contract agreement for the development of the Santa Clara County Civic Center approximately 55 acres (or portions thereof) of certain real property, more or less located at or around the Santa Clara County Civic Center in San Jose, California, with Santa Clara Valley Transit Authority's Guadalupe Maintenance Division to the north, State Route 87 to the west, North First Street to the east, and Mission Street to the south.
- **Linked To:** 69755 : Consider recommendations relating to an Exclusive Negotiating Agreement (ENA) with Lowe Enterprises Real Estate Group (Lowe) and M. Arthur Gensler, Jr. and Associates, Inc., (Gensler) for the future development of the Civic Center. (Facilities and Fleet)

ATTACHMENTS:

- Ordinance Amending Chapter I Division 421 (PDF)
- Resolution Regarding Approval of Civic Center MDA (PDF)
- Exhibit A to Resolution: Master Development Agreement Lowe Enterprises (PDF)
- Preapproval Form From 5- Year Term Limit (PDF)
- Peer Review, BAE Urban Economics (PDF)
- 2016-05-10 80418 Public Hearing Notice Rev 2016-04-21 (PDF)
- Budget Summary for Phases A & B (PDF)
- EXECUTIVE SUMMARY MDA Deal Points (PDF)
- F85 #220 (PDF)
- Proof of Publication May 10, 2016 Public Hearing (PDF)
- Civic Center Master Plan Community Comments Sept 16, 2015 (PDF)
- San Diego Project Abstract_COC-ROV (PDF)
- May 10, 2016 Board Presentation (PDF)
- May 2016 Board Presentation_v12 (PDF)