

MEETING DATE: 08/25/08

AGENDA ITEM: Consideration of Terminate Design-Build Contract with Fast-Track Construction Corporation for Police Firing Range Rehabilitation Project, P-832

ATTACHMENTS

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physical or mental disability, sexual orientation, or any other status protected by law. Design-Builder shall by means of contract provisions take steps to see to it that this obligation is extended to the other members of the Design-Builder's Team.

13.18 PURCHASES WITHIN CITY

Design-Builder agrees to seek bids for the Work from businesses located within the City of Culver City with the intent to enter into contract with these businesses if such contracts can be made at competitive prices.

13.19 TAXPAYER IDENTIFICATION

Design-Builder shall provide City with a complete Request for Taxpayer identification Number and Certification, Form W-9, as issued by the Internal Revenue Service.

ARTICLE 14 TERMINATION OR SUSPENSION

14.1 TERMINATION BY CITY FOR DESIGN-BUILDER DEFAULT

14.1.1 Notice of Default. Without limitation to any of the City's other rights or remedies at law or in equity, the City shall have the right to terminate the Design-Build Contract in the event of any of the following: (1) the Design-Builder is adjudged bankrupt; (2) the Design-Builder makes a general assignment for the benefit of its creditors; (3) a receiver is appointed on account of the Design-Builder's insolvency; or (4) the Design-Builder fails or refuses to perform any obligation set forth in the Design-Build Contract, the General Conditions or the other Contract Documents and fails to cure such default in the manner required hereafter.

14.1.2 Opportunity to Cure. The Design-Builder shall cure any default in performance of its obligations under the Contract Documents within seven (7) Days after service of written notice of such default from the City or the Construction Manager; provided, however, that if the breach cannot reasonably be cured within such time then the Design-Builder shall commence to cure the breach within three (3) working days after service of such written notice and shall diligently and shall thereafter continuously prosecute such cure to completion within a reasonable time, which shall in no event be a period of time longer than twenty (20) Days after service by the City of such written notice.

14.1.3 City's Rights and Remedies. In the event that the Design-Builder fails to cure any breach of the Design-Build Contract within the applicable time periods set forth in Paragraph 14.1.2, above, then the City may pursue any remedies available under law or equity, including, without limitation, the following:

.1 Delete Work. The City may, without terminating the Design-Build Contract, delete certain portions of the Work, reserving to itself all rights to recover Losses related thereto.

.2 Perform and Withhold. The City may, without terminating the Design-Build Contract, engage others to perform the Work or portion of the Work that has not been performed by the Design-Builder and withhold the cost thereof to the City from future payments to the Design-Builder, reserving to itself all rights to recover all Losses related thereto.

.3 Suspension. The City may, without terminating the Design-Build Contract and reserving to itself all rights to recover Losses related thereto, suspend all or any portion of the Design-Build Contract or the Work for as long a period of time as the City determines, in its sole discretion, appropriate, in which event the City shall, notwithstanding the provisions of Section 14.2 below, have no obligation to adjust the Contract Price or Contract Time. Thereafter, if the City directs the Design-Builder to resume the Work, the City shall have no liability to the Design-Builder for adjustment to the Contract Price or Contract Time or for any Losses incurred by the Design-Builder in resuming the Work.



.4 Terminate the Design-Build Contract. The City may terminate all or any part of the Design-Build Contract for cause, reserving to itself all rights to recover Losses related thereto and, without liability for so doing, take possession of and utilize in completing the Work such materials, equipment, appliances, tools, plant and other property belonging to the Design-Builder as may be on the Site of the Work and necessary or convenient therefor.

.5 Invoke the Performance Bond. The City may, with or without terminating the Design-Build Contract and reserving to itself all rights to recover Losses related thereto and all rights under the Performance Bond and Payment Bond, exercise its rights under the Performance Bond. Without limitation to the foregoing, in the case of termination of the Design-Build Contract, if the Surety on the Performance Bond fails, within seven (7) Days after service by the City to Surety of written demand, to give the City written notice of its intention to take over and perform the Design-Build Contract or does not commence performance of the Work within fifteen (15) Days from date of service of such notice of demand by the City on Surety, the City may take over the Work and prosecute same to Final Completion by any means it may deem expedient at the expense of the Design-Builder and Surety.

.6 Rights Cumulative. All of the City's rights and remedies under the Contract Documents are cumulative, and shall be in addition to those rights and remedies available in law or in equity. Designation in the Contract Documents of certain breaches as "material" or as affording the City the right to terminate shall not be construed as implying that other breaches not so designated are not material nor shall such designations be construed as limiting the City's right to terminate or the exercise of its rights or remedies for default to only material breaches. The City shall determine whether there has been noncompliance with the Contract Documents so as to warrant exercise by the City of its rights and remedies for default. No termination or action taken by the City after termination shall prejudice any other rights or remedies of the City provided by law or equity or by the Contract Documents upon such termination, and the City may proceed against the Design-Builder to recover all Losses suffered by the City.

14.1.4 Payment to Design-Builder. Design-Builder shall be entitled to receive, at such times as provided for in this Paragraph 14.1.4, an amount based upon the Construction Manager's determination, in good faith, of the percentage of Work completed at the Site (including, without limitation, any completed or incomplete Work located off-Site that the City, in its sole discretion, requests be delivered to the Site after such termination) in accordance with the Contract Documents as of the date of termination less any amount previously paid by City to Design-Builder and after deduction by City for any Losses paid, incurred or threatened as a result of the Design-Builder's default or City's termination. Upon termination by City, all further payments shall be withheld by City and no further amount shall be payable by City on account of the Contract Sum until the later of either: (1) Final Completion of the Work; or (2) all Claims have been resolved or finally adjudged by a court or by binding arbitration conducted in accordance with the Contract Documents.

14.1.5 Damages to City. If the Losses paid, incurred or threatened as a result of the Design-Builder's default or the City's termination exceed the amount withheld, the Design-Builder shall be liable to the City for the difference and shall promptly remit same to the City.

14.1.6 Delays by Sureties. Without limitation to any of the City's other rights or remedies at law or in equity, the City has the right to suspend the performance by any Surety in the event of any of the following: (1) failure of Surety to begin the non-design portions of the Work within a reasonable time in such manner as to ensure full compliance with the Contract Documents within the Contract Time; (2) abandonment of the Work; (3) if at any time the District is of the good faith opinion the completion of the non-design portion of the Work is unnecessarily or unreasonably delayed; (4) violation of any terms of the Design-Build Contract or other Contract Documents pertaining to the non-design portions of the Work; (5) failure to perform the non-design portions of the Work according to the Design-Build Contract or the other Contract Documents; or (6) failure to follow instructions of the City for performance of the non-design portions of the Work within the Contract Time. The City will serve notice of such failure upon the Surety, and in the event the Surety neglects or refuses to cure the breach within the time specified in such notice, the City shall have the power to suspend or terminate the performance, or any part thereof, of Surety.

14.1.7 Design-Builder Obligations. Upon receipt of a notice of termination for default, the Design-Builder shall, unless the notice states otherwise, perform each of the obligations set forth in Parts .1 through .8 of Paragraph 14.3.2, below..



14.1.8 Conversion. In the event of termination for cause by the City that is adjudged by a court or by binding arbitration conducted in accordance with the Contract Documents to have been wrongful, the City shall pay the Design-Builder as its sole compensation, the sums provided for in Paragraph 14.3.3, below. The Design-Builder agrees to accept such sums as its sole and exclusive compensation and agrees to waive any right to recovery of any other compensation or Loss, including, but not limited to, loss of anticipated profits, loss of revenue, lost opportunity or other consequential, direct, indirect or incidental damages, of any kind.

14.1.9 Substantial Performance Waived. The legal doctrine that a Design-Builder may recover for substantial performance of a building contract is to have no application to the Design-Build Contract. All defaults by the Design-Builder, whether occurring before or after the Work is Substantially Completed, shall be deemed material and shall give rise to the right of the City to terminate the Design-Build Contract under the provisions of this Section 14.1.

14.1.10 Cross-Default, Set Off. The Design-Builder agrees that a breach of any other agreement between the Design-Builder and the City pertaining to the Project or any other project will be and constitute a material breach under the Design-Build Contract, thereby enabling the City to assert all its rights and remedies hereunder including, but not limited to, a specific right of set-off by the City against any amounts otherwise payable to the Design-Builder under the Design-Build Contract or any other agreement between the Design-Builder and the City. The City reserves the right to set-off any and all amounts determined to be Losses incurred by the City due to Design-Builder's performance or non-performance of the Work against amounts due, or that will become due, to Design-Builder under the Design-Build Contract or any other agreement between the City and Design-Builder.

14.2 SUSPENSION BY CITY FOR CONVENIENCE

14.2.1 Suspension Order. The City may, at any time and from time to time, without cause, order the Design-Builder, in writing, to suspend, delay or interrupt performance of the Work, in whole or in part. Upon receipt of such suspension order, the Design-Builder shall comply with its terms and take all reasonable steps to minimize costs allocable to the Work covered by the suspension order during the period of the Work stoppage.

14.2.2 Resumption. If a suspension order issued by the City pursuant to this Section 14.2 is canceled or expires, the Design-Builder shall resume and continue with the Work. A Change Order will be issued adjusting the Contract Price and/or the Contract Time, respectively, for additional Costs of Work of Extra Work and for compensation permitted to the Design-Builder by Section 4.4 of the Design-Build Contract for Compensable Delay necessarily caused by such suspension; provided, however, that no such adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Design-Builder or any of the Subcontractors or Subconsultants is responsible; or

.2 that an adjustment to the Contract Price on account thereof is made or denied under another provision of the Contract Documents.

14.2.3 Suspension Order Required. The provisions of this Section 14.2 shall not apply if a suspension order is not issued by the City pursuant to this Section 14.2 or if the suspension is ordered pursuant to Section 2.2, above or Paragraphs 14.1.3.3 or 14.1.5, above. A suspension order shall not be required to stop the Work as permitted or required under any other provision of the Contract Documents.

14.3 TERMINATION BY CITY WITHOUT CAUSE

14.3.1 Right to Terminate for Convenience. Without limitation upon any of the City's other rights or remedies at law or in equity, the City shall have the option, at its sole discretion and without cause, to terminate the Design-Build Contract, in whole or in part, by giving fourteen (14) Days' written notice to the Design-Builder as provided herein.

14.3.2 Design-Builder Obligations. Upon receipt of notice of termination without cause pursuant to Section 14.3, the Design-Builder shall, unless such notice directs otherwise, do the following:



- .1 immediately discontinue performance of the Work to the extent specified in the notice;
- .2 take actions necessary, or that the City or the Construction Manager may direct, for the protection and preservation of the Work;
- .3 place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of such portion of its obligations as is not discontinued;
- .4 provide to the City, in writing no later than two (2) Days after receipt of the notice of termination, a complete list all subcontracts, purchase orders and contracts that are outstanding, including any change orders, amendments and modifications thereto, status of payments and balance owing, the status of performance and claims by the Subcontractors and Subconsultants, together with such other information as the City may determine necessary in order to decide whether to accept assignment of the subcontract, purchase order or contract;
- .5 promptly: (1) assign to the City those subcontracts, purchase orders or contracts, or portions thereof, that the City elects to accept by assignment; and (2) cancel, on the most favorable terms reasonably possible, all subcontracts, purchase orders or contracts, or portions thereof, that the City does not elect to accept by assignment;
- .6 not terminate any insurance required by the Contract Documents; thereafter continue only such performance as may be directed by City or as necessary to preserve and protect the Work already completed or in progress and to protect materials and equipment on the Site or in transit thereto; and
- .7 at the written request and option of City, exercised in its sole discretion, transfer title and deliver to the City any completed items of Work that have not been previously delivered to the Site and any partially completed items of Work that the Design-Builder or any other member of the Design-Builder's Team has specifically produced or acquired for the Project.

14.3.3 Design-Builder Compensation. Following termination without cause and within thirty (30) Days after receipt of a complete and timely billing from the Design-Builder seeking payment of sums authorized by this Paragraph 14.3.3, the City shall pay to the Design-Builder as its sole and exclusive compensation for performance under the Design-Build Contract the following:

- .1 Costs of Work incurred for performance of Work up to the date of termination, not to exceed an amount that is equal to an allocable portion of the Contract Price calculated by multiplying the City's determination of the percentage of the Work properly performed by the Design-Builder as of the date of termination times the Contract Price;
- .2 plus, if construction has commenced at the time of such termination, a reasonable sum for actual, direct costs (with no additional markup, multiplier or sum for overhead or profit) for: (1) demobilizing; and (2) administering the close out of its participation in the Work (including, without limitation, all billing and accounting functions) for a period of no longer than fifteen (15) Days after receipt of the City's notice of termination;
- .3 less, sums that the City is authorized by to withhold pursuant to Section 9.5, above, or other provisions of the Contract Documents; and
- .4 less, sums previously paid by the City.

14.3.4 Exclusive Compensation. The Design-Builder agrees to accept such sums as allowed under Paragraph 14.3.3, above, as its sole and exclusive compensation and waives any claim for other compensation or Losses, including, but not limited to, loss of anticipated profits, loss of revenue, lost opportunity, or other consequential, direct, indirect, or incidental damages, of any kind.

14.3.5 Other Design-Build Team Members. The Design-Builder to see to it that provisions are included in all of contracts, purchase orders and other agreement entered into by other members of the Design-Builder's Team



permitting termination for convenience on terms that are consistent with, and that afford no greater rights of recovery for termination than are afforded to the Design-Builder under, this Section 14.3.

14.4 TERMINATION BY DESIGN-BUILDER

14.4.1 Design-Builder's Remedies. Subject to the provisions of Paragraphs 14.4.2 and 14.4.3, below, the Design-Builder may terminate the Design-Build Contract, for cause only, upon the occurrence of one of the following:

.1 the Work is stopped for one hundred sixty (160) consecutive Days, through no act or fault of the Design-Builder or any of the Subcontractors or Subconsultants, of any Tier, or any employee or agent of any of them, due to issuance of an order of a court or other Governmental Authority (other than the City) having jurisdiction or due to a declaration of a national emergency; or

.2 the Work is suspended by the Design-Builder in accordance with Section 9.7, above, for a continuous period of thirty (30) Days.

14.4.2 Notice of Intention to Terminate. If one of the reasons to terminate as described in Paragraph 14.4.1 exists, the Design-Builder may upon seven (7) Days' written notice to the Construction Manager and the City, terminate the Design-Build Contract and recover from the City only such sums as permitted under Paragraph 14.3.3, above.

14.4.3 Continuous Performance. Provided that the Design-Builder is paid undisputed sums due under the Design-Build Contract, the Design-Builder shall not stop, delay or interrupt continuous performance of the Work by reason of any dispute or disagreement with the City, including, without limitation, any disputes or disagreements over payments of money that are disputed in good faith by the City.

14.5 CONTINUING OBLIGATIONS

All obligations of the Design-Builder under the Contract Documents with respect to the Work that would survive Final Completion of the Work, including, but not limited to, all warranties, guarantees and indemnities, will apply to the portions of the Work to the extent completed by the Design-Builder prior to a termination by the City or Design-Builder.