

OVERSIGHT BOARD RESOLUTION NUMBER OB-2014-71

A RESOLUTION OF THE OVERSIGHT BOARD FOR THE CITY OF SAN DIEGO REDEVELOPMENT SUCCESSOR AGENCY AUTHORIZING AN INCREASE IN FUNDING FOR CONSTRUCTION COSTS AND THE AWARD OF A CONSTRUCTION CONTRACT WITH AN INCREASED BUDGET IN CONNECTION WITH THE HORTON PLAZA IMPROVEMENT PROJECT, AS REQUIRED BY THE EXISTING OWNER PARTICIPATION AGREEMENT FOR THE HORTON PLAZA RETAIL CENTER

WHEREAS, the former Redevelopment Agency of the City of San Diego (Former RDA) administered the implementation of various redevelopment projects, programs, and activities within designated redevelopment project areas throughout the City of San Diego; and

WHEREAS, in accordance with Assembly Bill x1 26 (AB 26), the Former RDA dissolved as of February 1, 2012, at which time the City of San Diego, solely in its capacity as the designated successor agency to the Former RDA (Successor Agency), assumed the Former RDA's assets and obligations; and

WHEREAS, the Successor Agency is required to administer the winding down of the Former RDA's operations and to ensure compliance with the Former RDA's obligations in accordance with AB 26, as subsequently amended (Dissolution Laws); and

WHEREAS, the Oversight Board, the San Diego County Auditor-Controller (County Auditor), the State Controller, and the State Department of Finance (DOF) possess certain rights and obligations under the Dissolution Laws with respect to the Successor Agency's administration of the Former RDA's operations; and

WHEREAS, the Dissolution Laws require the Successor Agency to prepare on a forward-looking basis, and to submit for approval by the Oversight Board and the DOF, a Recognized Obligation Payment Schedule (ROPS) identifying payments owed by the Successor Agency to third parties toward enforceable obligations during each upcoming six-month period; and

WHEREAS, under the Dissolution Laws, the County Auditor administers and makes semi-annual distributions of monies from the Redevelopment Property Tax Trust Fund (RPTTF), which is comprised of incremental property taxes generated in the City's redevelopment project areas; and

WHEREAS, in January 2011, after months of extensive negotiations that commenced long before any proposal for the statewide elimination of redevelopment, Horton Land, LLC, Horton Plaza Venture, LLC, and Horton Plaza LP (collectively, Original Developer), on the one hand, and the Former RDA, on the other hand, executed an Owner Participation Agreement (OPA) with respect to the Horton Plaza Retail Center (Retail Center) located in the Horton Plaza Redevelopment Project Area in downtown San Diego; and

WHEREAS, Horton Plaza LLC (Developer) has assumed the Original Developer's rights and obligations under the OPA, and the Successor Agency has assumed the Former RDA's rights and obligations under the OPA; and

WHEREAS, in accordance with the OPA, the Developer has demolished the former Robinsons-May department store building located on a parcel at the north end of the Retail Center (Sales Parcel), completed preliminary grading work on the Sales Parcel, and transferred ownership of the Sales Parcel to the Successor Agency; and

WHEREAS, Sections 501 and 502 of the OPA require the Successor Agency to complete the construction of a new urban plaza and related improvements on the Sales Parcel and the adjacent historic park property owned by the City (Project) in accordance with a design process that must involve the input of a design team comprised of interested stakeholders and must utilize high-caliber design standards specified in the Preliminary Design Guidelines included as Attachment No. 8 to the OPA; and

WHEREAS, upon completion of the Project, the OPA requires the Developer to operate and maintain the urban plaza for a period of 25 years and to program numerous community-serving events at the urban plaza, which is at a prominent downtown location and was previously an underutilized site in a deteriorated condition; and

WHEREAS, with the exception of certain demolition and site preparation work already completed by the Developer at the Project site, Sections 501 and 502 of the OPA obligate the Successor Agency to pay all of the design and construction costs of the Project, originally estimated in early 2011 to include a minimum of \$8 million in hard construction costs; and

WHEREAS, the OPA does not qualify, condition, or limit the Successor Agency's funding obligation for the hard construction costs in the event that such costs exceed \$8 million as a result of the design process and the competitive bidding process for construction work; and

WHEREAS, Civic San Diego (CivicSD), formerly known as Centre City Development Corporation, engaged the urban design and landscape architecture firm of Walker Macy and sub-consultants to gather public and stakeholder input and develop more specific designs for the Project, consistent with the high-caliber design standards outlined in the OPA; and

WHEREAS, based on the nearly-completed design of the Project in late 2012, the total remaining costs for design and construction of the Project were estimated to be \$12,734,083, including \$11,708,912 in hard construction costs; and

WHEREAS, on November 20, 2012, the Oversight Board adopted Resolution No. OB-2012-35 (2012 Resolution), authorizing the Successor Agency or its agent, CivicSD, to solicit bids and award a contract to the lowest responsible bidder for construction of the Project in order to fulfill the obligations under the OPA, using up to \$10,982,141 in ROPS funds, and further authorizing the Successor Agency or its agent, CivicSD, to enter into contracts and make expenditures, using up to \$1,025,171 in ROPS funds, for additional work related to the Project,

including the acquisition of furniture, fixtures, and equipment and the completion of services for design, permitting, and construction administration, management, and inspection; and

WHEREAS, on January 28, 2013, the DOF issued a letter approving the 2012 Resolution, and on January 14, 2014, the DOF issued another letter at the Successor Agency's request, confirming that the OPA is an enforceable obligation and authorizing the Developer's transfer of the Sales Parcel to the Successor Agency and the Developer's prepayment and termination of a historical Payment Agreement as required by the OPA; and

WHEREAS, consistent with the 2012 Resolution, CivicSD has explored the availability of non-ROPS funding sources (such as grants or philanthropic donations) to offset an initial budget shortfall of \$726,771 that had been identified at the time of adoption of the 2012 Resolution, but it is presently uncertain whether any solid financial commitments will be secured to offset the initial budget shortfall; and

WHEREAS, in compliance with the 2012 Resolution, the Project was advertised through a competitive bidding process on March 12, 2014, and bids were received and opened on May 14, 2014; and

WHEREAS, the lowest responsible, qualified bidder has been determined to be Echo Pacific Construction, Inc. (Echo Pacific), with a submitted bid of \$14,456,555 that substantially exceeds the construction contract budget previously approved in the 2012 Resolution; and

WHEREAS, CivicSD staff has recommended including an increased contingency in the construction contract budget of 10 percent (instead of the previously required 8 percent) to reflect the upward trend in construction industry costs; and

WHEREAS, the recent outcome of the competitive bidding process and the escalation of the contingency amount have increased the total estimated design and construction costs for the

Project to \$16,927,382, including \$15,902,211 for the modified construction contract budget (i.e., the bid of \$14,456,555, plus a 10 percent contingency of \$1,445,656); and

WHEREAS, as a result of the substantial increase in estimated construction costs and the present uncertainty regarding financial commitments from non-ROPS funding sources to offset the initial budget shortfall of \$726,771, the total current budget shortfall for the Project is \$4,920,070; and

WHEREAS, the Successor Agency will need to obtain the additional funding of \$4,920,070 from the RPTTF through the existing line item 198 of the ROPS because no other ROPS funding source is known to be available, in that the Horton Plaza Redevelopment Project Area does not have any outstanding bond proceeds that could be used for the Project and no additional funds are available under the Payment Agreement that the parties terminated in early 2014 consistent with the provisions of the OPA; and

WHEREAS, California Health and Safety Code section 34177(a) requires the Successor Agency to continue to make payments due for enforceable obligations, and California Health and Safety Code section 34177(c) requires the Successor Agency to perform obligations required pursuant to any enforceable obligation; and

WHEREAS, the DOF has confirmed the OPA as an enforceable obligation, and the Successor Agency is therefore obligated under both the OPA and the Dissolution Laws to pay all of the hard construction costs for the Project in accordance with the design standards and process mandated by Sections 501 and 502 of the OPA; and

WHEREAS, if additional RPTTF monies for construction of the Project are not allowed in the ROPS, then the Successor Agency will be unable to fulfill its unconditional funding obligation under the OPA, and the Successor Agency may be declared in default of the OPA and

may be liable to the Developer for substantial monetary damages in the millions of dollars for breach of contract, as well as substantial legal expenses; and

WHEREAS, the potential monetary damages include the cost of the Developer's completed work for building demolition and preliminary grading, as well as the Developer's loss of business income associated with the completed demolition of the former Robinsons-May department store building and the completed eviction or relocation of tenants; and

WHEREAS, it is in the best interests of the local taxing entities to ensure that the Successor Agency fulfills its contractual and legal obligation to fund the actual construction costs for the Project, thereby avoiding the significant exposure associated with potential litigation and monetary damages payable to the Developer.

NOW, THEREFORE, BE IT RESOLVED by the Oversight Board as follows:

1. The Successor Agency is authorized to expend an increase of up to \$4,920,070 in the construction costs for the Project, as identified in the ROPS, bringing the total design and construction costs for the Project to an amount not to exceed \$16,927,382.

2. The Successor Agency or its agent, CivicSD, is authorized to award the construction contract for the Project to Echo Pacific, the lowest responsible, qualified bidder, within a modified budget of \$15,902,211, which includes the bid of \$14,456,555, plus a 10 percent contingency of \$1,445,656, utilizing the construction contract template included as Attachment G to the Staff Report dated July 16, 2014 accompanying this Resolution.

**PASSED AND ADOPTED** by the Oversight Board at a duly noticed meeting of the Oversight Board held on July 21, 2014.

  
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Chair, Oversight Board