

Meeting Date: 1/12/2016

Report Type: Consent

Report ID: 2015-00800

Title: Change in the Construction Retainage for the Entertainment and Sports Center Project

Location: Downtown Plaza, District 4

Recommendation: Pass a Motion: 1) authorizing the City Manager or his designee to execute the second amendment to the Arena Finance and Funding Agreement (AFFA), which establishes a process for the early release of retainage and which sets forth the process for the City's final release of retainage for the Entertainment and Sports Project (Golden 1 Center) based on satisfaction of specific City terms and conditions set forth in the amendment.

Contact: Desmond Parrington, ESC Project Manager, (916) 808-5044, Office of the City Manager

Presenter: None

Department: City Manager

Division: Executive Office

Dept ID: 02001011

Attachments:

1-Description/Analysis

2-Background

3-AFFA 2nd Amendment

City Attorney Review

Approved as to Form

Jeffrey L. Massey

1/6/2016 5:46:51 PM

Approvals/Acknowledgements

Department Director or Designee: John Dangberg - 1/5/2016 1:52:48 PM

Description/Analysis

Issue Detail: Staff is requesting that the City Council authorize the City Manager or his designee to amend the AFFA in order to establish a process for: 1) early retainage releases; and 2) the process for the final release of retainage held for the Golden 1 Center (formerly known as the Entertainment and Sports Center). The amendment sets forth specific conditions for the release of retainage (refer to Exhibit A).

Policy Considerations: The recommendation in this report is consistent with the project goals adopted by Council on October 29, 2013. Furthermore, the recommendation is also consistent with the Economic Development goals and policies of the City's 2035 General Plan, which includes policies supporting small business.

Economic Impact: Not applicable.

Environmental Considerations: The actions in this report do not have any potential for significant effect on the environment and are exempt under CEQA Guidelines section 15061(b)(3).

Sustainability: Not applicable.

Commission/Committee Action: Not applicable.

Rationale for Recommendation: Given that more than half of the work for the Golden 1 Center has been completed by ArenaCo and its subcontractors, Council has the ability to reduce or waive the retainage requirement. It is typical for large sports facility projects to allow for early retainage releases and staff believes a process for the early release of retainage is warranted. In addition, Council has encouraged ArenaCo to use small subcontractors and suppliers in the project. The release of retainage will help those businesses that might not otherwise be able to get a loan to cover their operating expenses during the period the retainage is withheld from their payment. In addition, specific conditions need to be established in the AFFA governing the final release of the City's remaining retainage at the completion of the Golden 1 Center.

Financial Considerations: There is no impact to the General Fund. The City previously committed to providing \$223,130,100 for the Golden 1 Center project. This action has the potential to reduce the amount of retainage held by the City from five percent to two percent of the City's contribution as set forth in the AFFA second amendment. No new funding is involved.

Local Business Enterprise (LBE): Not applicable.

In the case of the Golden 1 Center project, the purpose of retainage is to provide the City with leverage to ensure that ArenaCo fulfills its development and construction obligations set forth in the Arena Design and Construction Agreement (ADACA). Under state regulations governing public works projects, the City is required to retain five percent of progress payments until final completion and acceptance of the project. This requirement was included in Section 6.1(A) of the AFFA (refer to Additional Information section on the following page). The City's financial investment in the project is \$223,130,100 as set forth in the AFFA. Based on the current requirements, the amount of City funds to be retained at completion is \$11,156,505.

However, once 50 percent of the work has been completed and provided that the City Council finds that satisfactory progress has been made on the project, the City Council has the ability to reduce or waive the five percent retainage requirement per Section 9203(a) of the Public Contracts Code. Given that over 60 percent of the work on the Golden 1 Center is complete and given the satisfactory progress to date, staff is recommending that Council approve the second amendment to the AFFA that would establish 1) a process for early releases of retainage and 2) a separate process for the final release of retainage based on the conditions included in the amendment.

The proposed change to the AFFA would potentially reduce the amount retained to no less than two percent (\$4,462,602) of the City's overall cash contribution (\$223,130,100) to the project. As set forth in the proposed second amendment, the City would allow for early releases of retainage under the following circumstances:

1. If a subcontractor or supplier has satisfactorily completed its work then its full retainage may be released by the City if requested by ArenaCo and the necessary conditions are met.
2. If a subcontractor or supplier has satisfactorily completed over half of its work and remains working on the project, no more than half of their retainage may be released by the City if requested by ArenaCo and the necessary conditions are met.

The conditions for the early release of retainage include such requirements as follows:

- Approval of the work by ArenaCo.
- Approval of the work by the architect and engineer.
- No inspection issues; no outstanding claims.
- Payrolls are complete and certified by the project's labor compliance officer.
- All relevant conditions of approval have been satisfied.

The complete listing of all the conditions is set out in the second amendment to the AFFA, which is included in this staff report. Even with the process for early retention release, in no event will the City grant an early release once the amount of City retainage reaches \$4,462,602.

The final release of City retainage would be made upon completion of the project and would be subject to the following conditions. These conditions are described in more detail in the second amendment.

- Construction punch list items have been satisfactorily addressed;
- All relevant conditions of project approval have been satisfied;
- All EIR conditions and Mitigation Monitoring Plan measures have been completed;
- All quality control issues have been addressed;
- Lien waivers have been received from the Arena Contractor, subcontractors and suppliers;
- No outstanding unpaid change orders or claims from the Arena Contractor or any subcontractors or suppliers;
- All outstanding debts have been paid or satisfactory arrangements made for payment;
- All insurance required to remain in force after final payment is currently in effect;
- All labor compliance requirements have been satisfied and all payrolls for the work have been submitted and certified; and
- The surety responsible for the payment and performance bonds has consented to the release.

Staff believes it is appropriate in some circumstances to reduce the retainage amount. For example, withholding the retainage puts a burden on small subcontractors and suppliers. Since only 95% of their expenses are paid for, they have to wait until the entire project is completed to receive full payment even if they completed their work in the early phases of the project. While ArenaCo, subject to the approval of its lender, has the ability to release retainage early for subcontractors and suppliers that have completed their work, the City currently does not. Withholding the five percent until the end of the project runs contrary to the Council's desire to encourage small business participation in the project. The City's consultants have confirmed that early retainage

releases are typical of a sports facilities project. Furthermore, given the satisfactory nature of the progress that the project made, the current level of retainage is viewed by staff as in excess of what is needed to ensure that any construction issues are adequately addressed by ArenaCo prior to final completion and acceptance of the project.

Additional Information:

There are two requirements governing retainage for the Golden 1 Center project – the Arena Finance and Funding Agreement and the California Public Contracts Code. The relevant sections of those requirements are listed below. The conditions governing the early release of retainage are set forth in the second amendment to the AFFA which is attached to this report.

Under Section 9203 (a) of the Public Contracts Code it states that:

Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars (\$5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.

Under Section 6.1(A) of the AFFA it states that:

With respect to Project Costs to be fully or partially funded by the City pursuant to Section 4.2(B) or (C), ArenaCo may from time to time (but no more frequently than once each calendar month) submit to the City and Escrow Agent a request for disbursement of funds (a "Disbursement Request"), for the payment of Project Costs to be funded pursuant to Section 4.2(B) or (C) that were actually incurred and not previously funded from the City Account, less a five percent (5%) retainage (the "Retainage"); provided that, to the extent that a retainage actually withheld under a construction contract (including, without limitation, the Contractor Agreement) is not included within a

Disbursement Request, such retainage shall reduce the Retainage hereunder.

SECOND AMENDMENT TO ARENA FINANCE AND FUNDING AGREEMENT

This SECOND AMENDMENT TO THE ARENA FINANCE AND FUNDING AGREEMENT (this "Amendment"), dated as of January __, 2016, for reference, is between the CITY OF SACRAMENTO, a California municipal corporation (the "City"), and SACRAMENTO DOWNTOWN ARENA LLC, a Delaware limited-liability company ("ArenaCo"). The City and ArenaCo are sometimes referred to in this Amendment as the "Parties."

Background

The Parties entered into an Arena Finance and Funding Agreement dated as of May 20, 2014 (City Agreement No. 2014-0511; the "Original Agreement") as amended by that a First Amendment to the Arena Finance and Funding Agreement (the "First Amendment") dated as of July 22, 2014 (collectively, the "Agreement"). Capitalized terms not defined in this Amendment have the meanings given then in the Agreement.

Under the Agreement and Section 9203 of the California Public Contract Code, the City retains five percent (5%) of its progress payments as Retainage until final completion and acceptance of the Arena. ArenaCo would like the City to release some of its Retainage early to help facilitate the early release some of ArenaCo's retainage to pay off subcontractors and material and equipment suppliers who have performed Work.

Consistent with Section 9203 of the California Public Contract Code, the City has determined that satisfactory progress has been made on the Arena and that the City, in light of its desire to support small businesses, would like to facilitate the early release of ArenaCo's retainage through the partial release of its own Retainage, provided certain conditions are met. Accordingly, the Parties desire to further amend the Agreement to provide a process and a set of conditions for the City's early release of a portion of its Retainage and to provide a process for release of its final Retainage release as well.

With these background facts in mind, the Parties agree as follows:

1. Addition of Section 6.4. Section 6.4 is hereby added to the Agreement to read as follows:

6.4 *Retainage Release.* At ArenaCo's written request, the City shall release the Retainage consistent with the following:

- (A) The City shall withhold at least two percent (2%) (\$4,462,602) of the City Contribution until (i) Substantial Completion occurs and (ii) when the conditions in Section 6.4(D) are met. The City shall not make any early Retainage releases that would reduce the Retainage below this amount.

- (B) Except as limited by Section 6.4(A), City may approve early releases of up to the entire portion of Retainage related to completed Work performed by each subcontractor, materials supplier and equipment supplier identified in ArenaCo's written request for early Retainage release, if ArenaCo has provided the City with close-out documentation for such completed Work that includes all of the following:
- (1) A copy of the written notice from each subcontractor, materials supplier, or equipment supplier that it has been fully paid (minus retained amounts) and has no outstanding Claims or stop notices.
 - (2) A written confirmation that no notice of lien or Claim has been received by Arena Contractor or ArenaCo.
 - (3) Written confirmation that no lien has been recorded against the Arena Land.
 - (4) Written confirmation that ArenaCo has received lien waivers from each subcontractor, materials supplier, and equipment supplier named in the request and that those waivers are available for City review and inspection.
 - (5) Written confirmation that all items entered into Arena Contractor's quality control computer system (i.e., BIM 360) have been corrected to the satisfaction of the Architect identified in Section 7 of the Design and Construction Agreement (the "Architect"), the Engineer, and a City building inspector.
 - (6) Written confirmation that the specific Work, equipment, and materials have been inspected and that there no outstanding issues.
 - (7) A letter from the Engineer stating that the specific Work has been completed and that the materials and equipment have been supplied.
 - (8) Written approval from the Architect for the Work for which Retainage release is requested.
 - (9) Written confirmation that all applicable tests have been performed and results received.
 - (10) Written confirmation that all relevant conditions of approval set forth in Resolution No. 2014-0129 that are related to the Work for which early Retainage release is requested have been completed.
 - (11) Written confirmation that all relevant requirements of the Final Environmental Impact Report described in Section 36 (definition of

“Applicable Law”) of the Design and Construction Agreement, including the Monitoring Plan, have been completed.

- (12) Written confirmation that all payrolls for the specific Work for which Retainage release is requested have been submitted and certified as complete by the project’s Labor Compliance Officer (DCM) consistent with Sections 22.1 and 22.2 of the Design and Construction Agreement.
 - (13) Any additional documentation the City deems necessary.
- (C) Except as limited by Section 6.4(A), the City may approve the early release of no more than half of the entire portion of Retainage related to uncompleted Work performed by each subcontractor, materials supplier, and equipment supplier identified in ArenaCo’s written request for early Retainage release if ArenaCo has provided the City with close-out documentation for any Work that has been completed that includes all of the following:
- (1) Written confirmation that the subcontractor has completed at least fifty percent (50%) of its entire Work or the supplier has provided at least fifty percent (50%) of all requisitioned supplies.
 - (2) Written notice from each subcontractor, materials supplier, and equipment supplier demonstrating that all invoices to date from the subcontractor or supplier have been paid (minus any retention) and that they have no outstanding Claims or stop notices.
 - (3) Written confirmation that no notice of lien or a Claim has been received by Arena Contractor or ArenaCo.
 - (4) Written confirmation that no lien has been recorded against the Arena Land.
 - (5) Written confirmation that ArenaCo has received lien waivers from each subcontractor, material supplier, and equipment supplier identified in the request for the payments made to date and that those waivers are available for the City’s review and inspection.
 - (6) Written confirmation that ArenaCo is satisfied with the specific Work performed to date and the supplies received.
 - (7) Written confirmation that the specific completed Work, equipment, and materials have been inspected and that there no outstanding issues.

- (8) Written confirmation that the Engineer and Architect have signed off on the Work to date.
 - (9) Written confirmation that all payrolls for the specific Work completed to date have been submitted and certified as complete by the project's Labor Compliance Officer (DCM) as required by Section 22 of the Design and Construction Agreement.
 - (10) Any additional documentation the City deems necessary.
- (D) The City shall release the final Retainage amount, which may include the two percent (2%) (\$4,462,602) of the City Contribution, once ArenaCo has satisfied all of the following conditions:
- (1) Any outstanding punch-list items related to the Work have been addressed to the City's satisfaction as set forth in Section 25 of the Design and Construction Agreement.
 - (2) ArenaCo has provided the City with written confirmation that all relevant conditions of approval as set forth in Resolution No. 2014-0129 have been satisfied.
 - (3) ArenaCo has provided the City with written confirmation that all relevant requirements of the Final Environmental Impact Report described in Section 36 (definition of "Applicable Law") of the Design and Construction Agreement, including the Monitoring Plan, have been completed.
 - (4) ArenaCo has provided the City with written confirmation that all items entered into Arena Contractor's quality control computer system (i.e., BIM 360) have been corrected to the satisfaction of the Architect, Engineer, and a City building inspector.
 - (5) ArenaCo has provided the City with all warranties, guaranties, operations and maintenance manuals, and any other documentation required by the commissioning procedures, Contractor Agreement, Design and Construction Agreement, or Arena Agreement.
 - (6) ArenaCo has provided the City with written confirmation that ArenaCo has received lien waivers from the Arena Contractor, subcontractors, and suppliers and that those waivers are available for City review and inspection.
 - (7) ArenaCo has provided the City with written confirmation that there are no outstanding unpaid change orders or Claims from the Arena Contractor or any subcontractors or suppliers.

- (8) ArenaCo has provided the City with written confirmation that payrolls, bills for materials and equipment, and any other indebtedness connected with the Work for which ArenaCo is responsible (less amounts withheld by ArenaCo or the City) have been paid or that ArenaCo has made satisfactory arrangements for payment.
 - (9) ArenaCo has provided the City with written confirmation that all insurance required to remain in force after final payment as set forth in the Arena Agreement, as it has been amended, is currently in effect.
 - (10) ArenaCo has provided the City with written confirmation that all labor compliance requirements have been satisfied and that all payrolls for the Work have been submitted and certified as complete by the project's Labor Compliance Officer (DCM) as required by Section 22 of the Design and Construction Agreement.
 - (11) ArenaCo has provided the City with written confirmation that the surety under the payment and performance bonds described in Sections 19.5 and 31.5 of the Design and Construction Agreement has consented to the release of all remaining Retainage.
- (E) City reserves the right to independently verify any of the representations made in the closeout documents. The City Retainage will be held in the City's Project Account with its Trustee. A "Claim" as used in Section 6.4 shall mean a demand for monetary compensation or damages, arising under or relating to the performance of the Design and Construction Agreement or any subcontract arising under or related to the Design and Construction Agreement. An "Engineer" as used in Section 6.4 shall mean Buehler & Buehler, Thorton-Tomasetti, or other applicable engineer involved in the design and construction of the arena.
2. All Other Terms Remain in Force. Except as provided in Section 1 above, all provisions of the Agreement are unchanged and remain in full force and effect.
 3. Effective Date. This Amendment becomes effective when the Parties have signed it, as indicated by the dates in the signature blocks below.
 4. Counterparts. The Parties may sign this Amendment in counterparts, each of which will be considered an original, but all of which will constitute the same Amendment.
 5. Entire Agreement. This Amendment sets forth the Parties' entire understanding regarding the matters set forth above and is intended to be their final, complete, and exclusive expression of those matters. It supersedes all prior or contemporaneous agreements, representations, and negotiations regarding those

matters (whether written, oral, express, or implied) and may be modified only by another document signed by the Parties.

(Signature Page Follows)

CITY OF SACRAMENTO

SACRAMENTO DOWNTOWN ARENA LLC

By: _____
John F. Shirey
City Manager

By: Sacramento Basketball Holdings LLC,
a Delaware limited liability company,
its Sole Member

Date: _____, 2016

By: _____

Name: _____

Attest
Sacramento City Clerk

Its: _____

Date: _____, 2016

By: _____

Approved as to Legal Form
Pioneer Law Group, LLP
Attorneys for ArenaCo

Approved as to Form
Sacramento City Attorney

By: _____
Matthew D. Ruyak
Assistant City Attorney

By: _____
Jeffrey K. Dorso