

APPROVED

REPORT OF GENERAL MANAGER

NOV 01 2006

NO. 06-324

DATE November 1, 2006

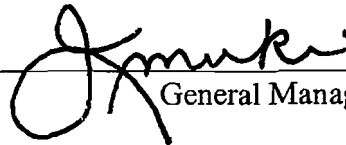
BOARD OF RECREATION  
and PARK COMMISSIONERS

C.D. 7

BOARD OF RECREATION AND PARK COMMISSIONERS

SUBJECT: TOBIAS AVENUE PARK (PRJ#1351A) (W.O. #E170937F) - CONTRACT NO. 3134 - RELEASE AND PROJECT CLOSEOUT AGREEMENT

J. Combs	_____	J. Kolb	_____
H. Fujita	_____	F. Mok	_____
S. Huntley	_____	K. Regan	_____
B. Jensen	_____	M. Shull	<u>MS</u>

  
 \_\_\_\_\_  
 General Manager

Approved \_\_\_\_\_

Disapproved \_\_\_\_\_

Withdrawn \_\_\_\_\_

RECOMMENDATION:

That the Board:

1. Rescind the Board's previous action on September 6, 2006 approving the Mutual Release and Closeout Settlement Agreement per Board Report No. 06-250;
2. Authorize the Department's Chief Accounting Employee to transfer the portion of the payment specified in the attached Release and Project Closeout Agreement as being for "delay in release of the retention" in the amount of \$3,237.42 as follows:  
  
 From: Fund 302, Department 88, Account 1010, Salaries General - \$3,237.42  
  
 To: Fund 302, Department 88, Account 3040, Contractual Services - \$3,237.42
3. Authorize the Department's Chief Accounting Employee to appropriate and expend \$30,914.32 from Quimby and up to \$3,237.42 from the Contractual Services Account to fund the agreement payment;
4. Direct the Board Secretary to transmit the attached Release and Project Closeout Agreement to the Mayor in accordance with Executive Directive No. 3 and to request expedited approval to execute the agreement and transmit the same to the City Attorney for review as to form; and,

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5. Upon receipt of necessary approvals, authorize the Board President and Board Secretary to execute the agreement.

### SUMMARY:

On October 6, 2004, the Board awarded a construction contract to Ryco Construction, Inc., in the amount of \$780,594 (Board Report No. 04-290) for the construction of a new neighborhood park, located at 9122 Tobias Avenue, including a play structure, two half-sized basketball courts, shade structures, picnic tables, security lighting, planting, irrigation, and associated park furnishing. The Notice to Proceed; however, was not issued by the Department until January 19, 2005. The delay in the issuance of the Notice to Proceed involved resolution of an issue regarding a 20-foot by 161-foot strip of land located in the eastern portion of the southern boundary of the project site which was determined to be an undedicated alley. As permission to utilize the alley for park development from the underlying fee owner of the alley could not be obtained, the 20-foot by 161-foot strip of land was eventually excluded from the project boundary via a change order, and the Notice to Proceed was issued on January 19, 2005.

The Bureau of Engineering (BOE) was the construction manager for the project. Construction of the project is 100% complete, and on May 3, 2006, (Board Report No. 06-103) the Board accepted the project. As of that date, seven change orders had been issued for a total of \$28,759.81, or approximately 3.8% of the original contract amount.

The project was completed by the contractor on November 16, 2005, and the Department took beneficial occupancy of the project on that date. The contractor submitted a "Request for Payment" claim to the Bureau of Engineering on February 1, 2006. However, due to the delay claim filed by the contractor alleging that costs were incurred as a result of the delayed construction start (i.e., issuance of the Notice to Proceed), the project was not immediately closed out, and the project was not accepted by the Board until May 3, 2006. Per a BOE letter dated April 5, 2005, it was determined that the contractor may be entitled to costs incurred during the time between the contract execution date of November 9, 2004, and the issuance of the Notice to Proceed date of January 19, 2005. Due to the pending resolution of the claim, Board Report No. 06-103 accepting the project, recommended that \$65,000 in project funds be held in reserve for the settlement of the claim.

In a letter dated July 18, 2006, BOE determined that Ryco is entitled to \$30,914.32 for increased cost of materials and increased cost for the substitution of the fencing and landscaping subcontractors (approved per Board Report No. 05-82) attributed to the delay in issuing the Notice to Proceed. Public Contracts Code Section 7107(f) provides that retention payments not made within 60 days of completion (beneficial occupancy) of the project are subject to a 2% per month interest payment. As the Department took beneficial occupancy of the project in November 2005, but did not release the

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retention until May 2006, the contractor is owed four months of interest on the retention not released, totaling \$3,237.42; therefore, the total settlement amount, including the interest cost due to the delay in releasing retention is \$34,151.74

Adequate funds remain in the project account from Fund 302, Account No. 460K to pay for this proposed Release and Project Closeout Agreement. The interest payment cannot be paid from Quimby so it is being allocated from a different source.

FISCAL IMPACT STATEMENT:

The Quimby budget for the Tobias Avenue Park will fund the \$30,914.32 required for the Proposed Release and Project Closeout Agreement.

The interest portion, up to \$3,237.42, will be funded from the salary savings in the operating budget. Because of the Department's vacant position, salary savings has accumulated in the Salaries General account and can be transferred to the Contractual Services Account to cover the interest portion of the project.

Prepared by Alice Gong, Project Manager, and reviewed by Neil Drucker, Program Manger, Recreational and Cultural Facilities Program; and by Bradley M. Smith, P.E., Chief Deputy City Engineer, Bureau of Engineering.

## RELEASE AND PROJECT CLOSEOUT AGREEMENT

1. This Release and Project Closeout Agreement (the "Agreement") is entered into by, between, and among RYCO CONSTRUCTION, INC. ("RYCO"), and the CITY OF LOS ANGELES, a municipal corporation, acting by and through its BOARD OF RECREATION AND PARK COMMISSIONERS (the "CITY"), who are also sometimes referred to hereinafter as the "Parties" and/or individually as a "Party."
2. RYCO was the general contractor on a public work of improvement commonly known as TOBIAS AVENUE PARK (PRJ#1351A) (W.O. #E179937F) (hereinafter the "Project").
3. The CITY was and is the Owner of the Project and entered into a contract with RYCO for the Project bearing Contract No. 3134 ("Contract").
4. The City accepted the project and released the construction contract retention on May 3, 2006. Several claims submitted by RYCO were outstanding at that time and the Parties now desire to make and receive a mutually agreed upon final payment thereon. In exchange for final payment of the claims mutually agreed upon by the Parties to be valid, RYCO hereinafter agrees to release CITY from all future claims regarding the Project.
5. The Parties wish to fully, finally and completely resolve and settle all past, present and future claims by RYCO, known and unknown between them regarding the Contract and the Project, as more fully described herein below.
6. The CITY agrees, for the consideration, promises and covenants set forth herein, to make to RYCO a one-time aggregate payment of Thirty Thousand, Nine Hundred Fourteen Dollars and Thirty Two Cents (\$34,517.74), consisting of \$24,591.00 of increased subcontractor costs, \$6,323.32 for increased material cost, and \$3,237.42 for delay in release of the retention, for all of RYCO's claims, (the "Settlement Payment"), within thirty (30) days of the full execution of this Agreement by all Parties hereto. If the Settlement Payment described herein is not made within the time stated, the Settlement Payment shall bear interest at the rate of 10% per annum, and the interest shall be paid by the CITY.
7. In consideration for the promises, agreements, Settlement Payment and other considerations set forth in this Agreement, which the Parties each represent and warrant are good and sufficient consideration, and except for the rights and obligations established in this Agreement and/or excluded from the waivers and releases of this Agreement, RYCO and, as applicable, its subcontractors, sub-subcontractors and any others who may claim by, through and/or under RYCO, and its surety on any labor and material/performance bond, do hereby forever discharge, release and waive as to CITY, and CITY's officers, agents, and successors in interest, any and all claims, demands, actions, causes of action, rights of indemnity (legal and equitable), obligations, costs, expenses, attorneys' fees, expert witness

and consultant fees, damages, interest, penalties, losses and liabilities of whatever nature, character or kind, whether known or unknown, suspected or unsuspected, matured or contingent, which concern or relate in any way to the Contract and Project (hereinafter the "Released Matters").

8. RYCO acknowledges that RYCO is familiar with section 1542 of the California Civil Code, which provides as follows:

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

Except for the matters established by this Agreement, RYCO waives and relinquishes any and all rights and benefits RYCO may have under, and which may be conferred upon RYCO by, the provisions of Section 1542 regarding the Released Matters to the fullest extent that RYCO may lawfully waive such rights or benefits. In connection with such waiver and relinquishment, RYCO hereby acknowledges that RYCO is aware of and/or may hereafter discover claims or facts in addition to or different from those which RYCO now knows and/or believes to exist with respect to the Released Matters in this Agreement, but that RYCO intends to and hereby does fully, finally, and forever settle and release all of the disputes and differences between the parties, whether known or unknown, suspected or unsuspected, matured or contingent which concern, arise out of, or are in any way connected with the Project and the Contract. In furtherance of such intentions, the waiver and release herein given shall be and remain in effect as a full and complete release, notwithstanding the discovery or existence of any such additional different facts or claims.

9. RYCO represents and warrants that RYCO is the sole owner of all rights, title, and interests in and to all of the Released Matters settled under this Agreement and that RYCO has not heretofore assigned, transferred, or purported to assign and/or transfer to any person any matters, or portions thereof, settled and released under this Agreement.
10. The settlement, release and other matters set forth herein are in full payment of claims submitted by RYCO, and nothing contained herein shall be construed as an admission by any Party of any obligation and/or liability of any kind to any other Party.
11. This Agreement contains and embodies the entire agreement of the Parties with regard to the obligations under this Agreement and to the Released Matters covered in this Agreement, and no representations, inducements, or other agreements, oral or otherwise, not embodied herein, exist nor shall they be of any force or effect. This Agreement can only be modified or amended by a subsequent written agreement signed by the Parties hereto.

12. This Agreement is binding upon and shall inure to the benefit of the Parties, their respective agents, employees, representatives, shareholders, officers, directors, partners, divisions, corporations, subsidiaries, parents, affiliates, assigns, heirs, predecessors, and successors, past, present, and future, and all of their insure, guarantors, sureties and reinsures.
13. The Parties to this Agreement shall each be deemed to have drafted this Agreement, such that no ambiguity in this Agreement, if any, shall be construed against any Party.
14. The Parties agree to execute all such other documents and perform such other acts as are necessary to give effect to the intent and purposes of this Agreement.
15. This Agreement is entered into and shall be subject to the laws of the State of California.
16. Each Party hereto represents and warrants that it is authorized to sign this Agreement and bind the respective Party hereby and that all acts necessary to confer such authority have been duly, properly and legally taken.
17. All Parties hereto shall bear their own costs and attorneys' fees regarding the Project and the Contract through the effective date of this Agreement.

In Witness whereof, the parties hereto have caused the Release and Project Closeout Agreement to be executed:

THE CITY OF LOS ANGELES, a municipal corporation, acting by and through its Board of Recreation and Park Commissioners

Executed this \_\_\_\_\_ day  
of \_\_\_\_\_

By: \_\_\_\_\_  
President

By: \_\_\_\_\_  
Secretary

Executed this \_\_\_\_\_ day  
of \_\_\_\_\_

RYCO CONSTRUCTION, INC.

By: \_\_\_\_\_  
President

Approved as to Form:  
ROCKARD J. DELGADILLO, City  
Attorney

By: \_\_\_\_\_  
Secretary

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Sr. Asst. Attorney