



## Legislation Text

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**File #:** 11-1399, **Version:** 5

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Community Development Agency, Environmental Management Division, recommending the Board consider the following:

- 1) Approve and authorize the Director to sign Amendments to Change Orders 1, 9, 13, 14, 29, and 33 to Public Works Contract No.013-PW-09/10-BOS (138-C1199) with Sukut, Construction, Inc. for a combined reduction of \$112,222.62 and reallocate funds to Change Order 36 (\$80,222.62) and remaining funds (\$32,000) to another contract associated with the Meyers Landfill closure project;
- 2) Approve and authorize the Director to sign Amendment 2 to Change Order 36 increasing the amount \$80,222.62 for a not to exceed amount of \$511,413.98 for additional erosion and repair work required post closure but prior to Forest Service certification that the Remedial Action is complete;
- 3) Approve and authorize the Director to sign Change Order 38 decreasing bid schedule Item No. 7, 20 and 23 in the combined amount of \$18,000 and reallocate funds to another contract associated with the Meyers Landfill closure project resulting in a cumulative net decrease of \$50,000 in the total not to exceed amount of \$8,136,074.84 with Sukut Construction, Inc, thereby establishing a new not to exceed amount of \$8,086,074.84 (see attached Change Order Summary), to be effective March 25, 2014, and in so doing find that it is in the public interest to waive competitive bidding for the work described therein;
- 4) Approve and Authorize the Chair to sign the First Amendment to the Sukut Construction Agreement (Public Works Contract No. 013 PW 09/10 BOS), Article 6, Final Payment, paragraph one, to omitting, “; and (3) after the Forest Service approves the Completion Report”;
- 5) Accept the Affidavit of Payment and Contractor Certification submitted by Sukut to the County;
- 6) Accept the final Certificate for Payment issued by Geosyntec Consultants, Inc., the County’s Construction Quality Assurance Consultant;
- 7) Approve and authorize the Director to sign the Notice of Completion (Notice of Acceptance) certifying that the Work required by Sukut (Public Works Contract No. 013 PW 09/10 BOS) has been completed. The Notice of Completion shall be recorded upon authorization by the Board Chair; and

8) Authorize the release of all funds held in retention to Sukut, Inc. pursuant to Public Works Contract No. 013 PW 09/10 BOS.

**Funding:** General Fund Contingency Appropriation/Non General Fund Insurance.

### **Fiscal Impact/Change to Net County Cost**

Through the continuing Comprehensive Environmental Response, Compensation and Liability Act

(CERCLA) litigation, the County has contributed money for site investigation obtained from the County's insurance carriers, Third Party Settlements, and closure grant funding from CalRecycle (formerly the California Integrated Waste Management Board). In previous actions the Board of Supervisors approved General Fund contingencies in the amount of \$6,313,156 to the Meyers Landfill special revenue fund. This funding was appropriated as a temporary loan from other General Fund budget appropriations in FY 2012-13 until it can be recovered from the United States Forest Service (USFS) or ERRG (USFS engineering firm responsible for the closure design). Failure to pay back this temporary loan may adversely impact other services provided by General Fund appropriations.

The County is therefore preparing for court proceedings to take place in 2014.

## **Background**

It was originally anticipated that the Meyers landfill closure construction would be completed within the 2010 construction season; however, due to the large number of issues, errors and omissions associated with the Final (100 %) Remedial Design provided to the County by the USFS, the project required three construction seasons to complete.

On August 24, 2010, the Board authorized the Director of Environmental Management to execute Change Order 1 with a not to exceed amount of \$317,250 (Legistar File 10-0940) to accommodate changes made by ERRG to the Final (100%) Remedial Design. Subsequent to the issuance of the revised design in August 2010, additional unanticipated issues were encountered that were not included in the original design or the revised design. The cumulative effect of the numerous issues encountered not only resulted in a very significant increase in the cost of the project, but also resulted in a significant increase in the project duration.

Since construction could not be completed in 2010, the site required extensive winterization to protect over 20 acres from erosion due to winter storms over the 2010/2011 wet weather season. As a result of additional work required due to the issues, errors and omissions with both the original Final (100%) Remedial Design, the revised design, and early heavy winter storms that damaged the site, on December 14, 2010, the Board authorized the Director of Environmental Management to amend Change Order 1 and execute Change Orders 10 through 15, for a total not to exceed amount of \$1,822,220.15 (Legistar File 10-1291).

Due to heavy storm activity in South Lake Tahoe over the course of the 2010/2011 wet weather season, the Meyers Landfill site incurred significant erosion damage requiring the contractor to mobilize multiple times to the site to repair eroded slopes, damaged storm water best management practices (BMPs), and to install additional BMPs. On April 12, 2011 Environmental Management returned to the Board to amend Change Order 15 to increase the amount from \$225,000 to \$1,000,000 to cover the costs of this additional winterization and site maintenance work (Legistar File 11-0210).

The USFS provided another revised construction design in April 2011. It was anticipated at that time that the closure construction would be completed during 2011. Unfortunately, due to unanticipated site conditions and additional issues with the revised design, the USFS provided additional design changes in July 2011, and finally a revised grading plan in August 2011. The unanticipated site conditions and design changes resulted in increasing both the project cost and duration.

On December 13, 2011, the Board authorized the Director of the Environmental Management Department to sign retroactive Change Orders 17 - 32 and retroactive amendments to Change Orders 9 and 14 with Sukut for a combined increase in the amount of \$1,288,401.74 for the total not to exceed amount of \$7,154,832.84 to be effective July 1, 2011. (Legistar File 11-1399)

On April 17, 2012, the Board authorized the Director of Environmental Management to sign Change Orders 33, 34, 35, Amendment 1 to Change Order 13, Amendment 2 to Change Order 14, and Amendment 1 to Change Order 32 with Sukut for a combined increase in the amount \$1,160,000 for a total not to exceed amount \$8,314,832.84. (Legistar File 11-1399, Version 2)

On December 18, 2012, the Board authorized the Director of Environmental Management to sign Amendment 1 to Change Order 35 extending the term of the contract to December 31, 2013; and sign Amendment 2 to Change Order 13 reallocating funds within the change order and decreasing the total dollar amount by \$250,000; and sign Change Order 36 for a not to exceed amount of \$250,000 for additional erosion repair work required post closure but prior to USFS certification that the Remedial Action is complete (Legistar File 11-1399, Version 3) resulting in no net increase in the total not to exceed contract amount of \$8,314,832.84.

On May 7, 2013, the Board authorized the Director of Environmental Management to sign amendments to Change Order s 1, 11-13, 15, 22, 27, 28 and 30-33 for a combined reduction \$368,207.61 and reallocate said funds to Change Order 36 (\$181,191.36), Change Order 37 (\$8,258.25) and remaining funds (\$178,758) to other contracts associated with the Meyers Landfill closure project resulting in a decreased not to exceed contract with Sukut in the amount of \$8,136,074.84 (Legistar File 11-1399, Version 4).

### **Reason for Recommendation**

The Meyers Landfill cap construction was completed early in the 2012 construction season. The site was hydroseeded and then irrigated for over two (2) months in an effort to establish a vegetative cover that would meet the specified requirements of the USFS. Once the vegetative specification is met, the construction completion certification process is initiated, which entails the submittal of a construction completion certification report (Report) prepared by the County's Supervising Engineer for the project, Bryan A. Stirrat & Associates, Inc. (BAS) and submitted to the USFS on behalf of the County. While most of the Meyers Landfill did meet the required vegetative specification, the entire site did not, thereby delaying the submission of the construction completion report to the USFS until the full establishment of vegetation could be achieved in the summer of 2013.

The USFS has advised the County that the County is responsible for the Operation, Maintenance and Monitoring (OM&M) of the site during the interim period between construction completion and USFS certification that the Remedial Action has been completed. Pursuant to the Partial Consent Decree between the County and the United States of America (USFS), the County is also responsible for the OM&M of the site once the USFS determines the Remedial Action has been completed and approves the Report.

During the 2012/2013 winter storms, the site incurred erosion and significant damage to poorly designed surface water control and conveyance features which required repair and reconstruction during the 2013 construction season. More work by the construction contractor, Sukut, was required during the 2013 construction season than anticipated due in part to the USFS requesting additional modifications to the surface water control features. The 2013 construction repair work required

engineering oversight by BAS. In addition, during the summer of 2013 all repair areas and those areas that did not meet the vegetative specification in 2012 were once again hydroseeded and the entire landfill cap irrigated for the remainder of the construction season.

Items 1), 2) and 3) executing these Change Order Amendments will allow for existing contract funds to be reallocated to pay for work required by the USFS and performed by Sukut as well as the required engineering oversight by BAS.

Public Contract Code section 20137 requires that changes to public works contracts exceeding ten percent of the original contract amount be let by competitive bidding. However, a well recognized exception to that requirement applies when the nature of the subject of the contract is such that competitive proposals would be unavailing or would not produce an advantage, and the advertisement for competitive bids would thus be undesirable, impractical, or impossible. (Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal.App.3d 631, 635-636.) The courts developed this exception to assure that the competitive bidding requirement is applied reasonably with reference to the public interest and its underlying purposes, including eliminating favoritism and corruption, preventing waste, and obtaining the best economic result for the public. (Id. at p. 636) Accordingly, where competitive proposals work an incongruity and are unavailing as affecting the final result, or where competitive proposals do not produce any advantage, or where it is practically impossible to obtain what is required and to observe such form, competitive bidding is not applicable. (Ibid.)

It is the opinion of the Department and County Counsel's Office that execution of the proposed change orders meets the public's best interest standard as described above for the following reasons:

### **Partial Consent Decree**

The remedial work at the Meyers landfill site is being performed under a Partial Consent Decree (PCD) issued by the Federal Government requiring the County to perform the work necessary to remediate the site. In granting the County's Motion for Construction, Enforcement, and Modification of the PCD, the Court suspended the County's obligation to continue the remediation work at the site. However, since the construction work for the 2011 construction season had already begun at the time the Motion was granted, it was decided that it was more economically feasible to continue with the work in the hopes that the remediation could be completed in 2011. The time necessary to competitively bid the additional work would have delayed the completion of the remediation project and could have subjected the County to significant additional penalties under the PCD, including a one-time stipulated penalty of four-hundred thousand dollars (\$400,000) for a Work Takeover (paragraph 81 of the PCD), and the right of the Forest Service to receive the benefit of the County's performance guarantee up to the estimated cost to complete the project (paragraph 47 of the PCD).

### **Earlier Public Benefit**

As described above, the conditions at the Meyers landfill site have been determined by the Forest Service to constitute a threat to the public health and safety. The remediation of the contamination of the groundwater has been described by the Forest Service as of the utmost importance especially in an environmentally sensitive area such as South Lake Tahoe. The delay occasioned by having to competitively bid the additional work would have allowed the then existing conditions at the site to remain unchanged for an additional construction season. Given the short construction season in the South Lake Tahoe area, if the matter were competitively bid, the repairs and completion of the final cap would not occur until the 2014 construction season, likely increasing the costs of the project even

further.

In addition to the above reasons that demonstrate that executing the proposed change order meets the public interest as described by the California Public Contracts Code, the Department has also concluded that executing the proposed change orders likely resulted in a cost savings to the public because:

No significant potential increase to previously established bid schedule costs.

No additional Contractor insurance costs.

No administrative costs related to project advertisement.

No administrative costs related to the project award.

As described above, the issuance of the proposed change orders best serves the public interest from a public health and safety standpoint. Furthermore, procuring the work through competitive bidding would not have produced any appreciable advantage to the County or its residents.

Item 4) The current language in the Sukut Construction Agreement (Public Works Contract No. 013 PW 09/10 BOS) requires that the USFS approve the County's Remedial Action Construction Completion Report (Completion Report) for the Meyers Landfill OU-1 Remedial Action before final payment can be made by the County to Sukut. Sukut completed all work required under their contract as of October 2013. Geosyntec has certified that the OU-1 Remedial Action has been completed. The County submitted the Completion Report, prepared by BAS, to the USFS in November 2013. There is no time limit in the PCD for the USFS to provide approval of the County's Completion Report. The USFS has verbally indicated that approval would likely not be provided until sometime during the summer of 2014 at the earliest. Due to the County's ongoing litigation with the USFS regarding the OU-1 Remedial Action, it is unknown when or even if the USFS will approve the Completion Report. Authorizing the Board Chair to sign the Amendment to the Sukut Construction Agreement (Public Works Contract No. 013 PW 09/10 BOS) will allow for final payment to be made to Sukut.

Item 5) All work required under the contract with Sukut has been performed. The Affidavit of Payment (Attachment 5K and Contractor Certification (Attachment 5L) have been submitted by Sukut to the County in compliance with Article 6, Payments and Completion, of the Contract General Conditions.

Item 6) The Certificate for Payment (Attachment 5M) has been issued by Geosyntec as required under Article 6, Final Payment, of the Contract Construction Agreement.

Item 7) Since Sukut Construction has completed all required work and submitted the required Affidavit of Payment and Contractor Certification, and since Geosyntec has submitted the required Certificate of Payment, the Notice of Completion/Notice of Acceptance (Attachment 5N) should be executed and recorded in compliance with Article 6, Payments and Completion, of the Contract General Conditions.

Item 8) Pursuant to Article 6 of the Construction Agreement, once the Notice of Completion has been recorded, the County shall make the final payment of all retention money held within no more than forty-five (45) days.

**CDA Environmental Management Division Follow-up Items**

Environmental Management Division Director will execute the Amendments to Change Orders 1, 9, 13, 14, 29, 33, 36 and 38, effective March 25, 2014.

Environmental Management Division Director will sign and record the Notice of Acceptance and initiate the release of contract retention funds to Sukut.

**Clerk of the Board Follow Up Actions**

Clerk to obtain Board Chair's signature on the First Amendment to the Agreement, and provide one copy of the executed Amendment to the Environmental Management Division.

**Contact**

Steve Pedretti, Director  
Community Development Agency

**Concurrences**

County Counsel and Risk Management