

**CITY OF SAN ANTONIO
CITY ATTORNEY'S OFFICE
INTERDEPARTMENTAL CORRESPONDENCE**

ITEM NO. 28

TO: Mayor and City Council

FROM: Andrew Martin, City Attorney

COPIES TO: Jelynn Burley, Assistant City Manager; Roland Lozano, Assistant to the City Manager

SUBJECT: Settlement of Clark/JT Construction Claim on behalf of Subcontractors Todd-Ford and Lewis & Lambert on the Henry B. Gonzalez Convention Center Expansion Project

DATE: September 2, 2004

SUMMARY AND RECOMMENDATION

This ordinance approves the terms and conditions and authorizes the execution of: 1) a Field Alteration in the amount of \$3,125,000 with Clark/JT Construction Co., a Joint Venture, on behalf of Todd-Ford, Inc. and Lewis & Lambert, subcontractors on the Henry B. Gonzalez Convention Center Expansion Project; and 2) additional documents which may be necessary to close out the contract with Clark/JT Construction; and provides for payment.

Staff recommends approval.

BACKGROUND

In May 1997, the City of San Antonio entered into \$105.1M Construction Contract with Clark Construction/JT Construction Co., a Joint Venture ("Clark/JT"), for work on the Henry B. Gonzalez Convention Center Expansion Project Phase IB - New Construction and Renovation (the "Project"). Clark subsequently entered into a Subcontract Agreement with Todd-Ford, Inc. for the installation of the plumbing and HVAC portion of the Project and Todd-Ford subsequently entered into an agreement with Lewis & Lambert for ductwork fabrication and installation of this work on this phase of the project.

Clark/JT first submitted a claim to the City in the amount of \$4.8M for labor inefficiencies and additional compensation for the installation of alleged extra work in the form of steel supports for piping and mechanical equipment for and on behalf of Todd-Ford and Lewis & Lambert. The claim was reviewed by 3D/I, the City's construction manager for the Project, and based on their conclusions, the City rejected this Claim in its entirety in March 2003. This action was based on the City's prior payment of \$578,964 to Todd-Ford for delay, overtime, and acceleration in its work on the waste and vent piping, which amount represented 4.7% of their original contract, as well as the fact that the City has previously compensated Clark in the amount of \$2.7M for delay, resequencing and inefficiency claims of all trades, except Todd-Ford and Honeywell. This \$2.7M was 3% of the original contract value of all affected trades.

At the direction of City Council, staff and 3D/I, with the assistance of outside counsel, attempted to settle this initial claim by participating in mediation before Steve Nelson, a lawyer with a background in economics and construction. This first mediation was adjourned after the parties were unable to reach a compromise and Todd-Ford was advised by the mediator to reevaluate its claim, while also recommending to the City that it reappraise its position if Todd-Ford revised its claim.

In keeping with the mediator's advice, Todd-Ford hired a new attorney and developed a new analysis, with a different expert, resulting in a new claim amount of \$8.7 Million. The expert recalculated the damages using a more scientific and legally acceptable methodology, called the Measured Mile Approach. Analysis of this new claim led City staff, with City Council concurrence, to offer \$1.5 million to Todd-Ford to settle its revised claim, which offer was rejected.

As agreed to by City Council, the parties scheduled a session before a panel of arbitrators in June 2004. However, because the parties were progressing towards a settlement, the hearing before the Panel was continued, and staff, based on City Council direction, instead participated in a resolution process called mediation/arbitration. This hybrid alternative dispute resolution process provides the parties with an opportunity to settle their dispute with some guidance by a mediator who, if necessary, then assumes the role of an arbitrator who ultimately makes an award which is binding on the parties. Based on City Council direction, the City agreed as a condition to participating in this process, to pay no less than \$2.6M and Todd-Ford agreed to seek no more than \$3.6M during this process.

Once again using Steve Nelson, this mediation/arbitration hearing occurred on August 9, 2004. The parties attempted to settle, however, because they were unable to reach a negotiated settlement, Mr. Nelson assumed the role of an arbitrator. All sides presented additional factual and expert evidence to him. And after consideration of the parties' positions, Mr. Nelson awarded \$3,125,000 to Clark/JT on behalf of Todd-Ford and Lewis & Lambert.

POLICY ANALYSIS

The recovery by Todd-Ford is one third of their revised \$8.7 million claim. In addition, despite the fact that the arbitrator's award exceeds the City offer of \$2.6M by \$500,000 the City prevailed on numerous issues, including our position that neither Todd-Ford or Lewis & Lambert were entitled to consultant fees, attorneys fees, interest on change orders or sums requested in connection with a structural steel claim or the City's Owner Controlled Insurance Program utilized on the Project.

FINANCIAL ANALYSIS

The \$3,125,000 award will be funded from proceeds of the 1996 Hotel Occupancy Tax Revenue Bond Sale and paid out of Capital Projects Fund 47 – "Convention Center Expansion Project." This expenditure does not impact the General Fund.

COORDINATION

This action was coordinated with the City Manager's Office and the Public Works and Finance Departments.



Andrew Martin
City Attorney

Approved:



Terry M. Brechtel
City Manager