



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: April 27, 2014 REPORT NO: 15-049
ATTENTION: Honorable Council President and Members of the City Council
SUBJECT: Operating and Management Agreement between the City Of San Diego and Downtown San Diego Partnership for the Renewed Downtown Property and Business Improvement District

REQUESTED ACTION:

Contingent upon Renewal of the Downtown Property and Business Improvement District (scheduled for May 11/12, 2015)

At the first meeting (requested date May 11/12, 2015)

1. Introduce the ordinance authorizing the 10 year Operating and Management Agreement between the City and the Downtown San Diego Partnership for the Downtown Property and Business Improvement District (PBID) with the term of the Operating Agreement to be July 1, 2015 through June 30, 2025.
2. Set June 1, 2015 as the noticed public hearing date for considering the Adoption of the ordinance.
3. Direct staff to notice the meeting at which Council will consider the Adoption of the ordinance pursuant to City Charter Section 99.

At the second meeting (requested date June 1, 2015)

4. Adopt the ordinance authorizing the 10-year Operating and Management Agreement between the City and the Downtown San Diego Partnership for the Downtown Property and Business Improvement District (PBID) with the term of the Operating Agreement to be July 1, 2015 through June 30, 2025.

STAFF RECOMMENDATION:

Approve requested actions.

SUMMARY:

The City presently has an Operating and Management Agreement with the Downtown San Diego Partnership (Partnership) for the Downtown Property and Improvement District (PBID) which will end on June 30, 2015. The PBID was originally formed in February of 2000 and the City

entered into an agreement with the Partnership at that time for operation and management of the PBID.

When the PBID was renewed in 2005 for a 10-year term pursuant to the Property and Business Improvement District Law of 1994, the City also executed a new agreement for continued operation and management. This agreement was subsequently amended in 2012 when a new zone called the Commercial Marketing District Zone Overlay (CMD) Zone was established within the PBID.

Now, the City is considering renewal of the PBID for another 10-year term. The Partnership in conjunction with interested property owners prepared a new Management District Plan (Plan) for the proposed renewed PBID and conducted a petition drive to demonstrate sufficient support for the City to move forward with conducting a ballot procedure on the renewal and proposed levy of assessments as described in the Plan. Ballots are due to the City at or before the completion of the public hearing scheduled for May 11, 2015. If the tabulation of ballots indicates that there is not a majority protest, then the Council may renew the PBID by adopting a resolution.

If the PBID is renewed, staff is proposing that the City enter into an Operating and Management Agreement (Agreement) with the Partnership to continue implementing activities and improvements for the term of the PBID. Over the previous and current operating and management agreements, the Partnership has developed extensive experience in managing a PBID; retained and trained staff to implement the associated management district plans; acquired resources for program implementation and enhanced PBID management; and developed relationships with property owners and caused the formation of neighborhood committees to provide input on activities and improvements called out in those plans.

The Plan indicates that the proposed Owners' Association is the Partnership. If the PBID is renewed, then resources and expertise of the Partnership will enable it to implement the proposed Plan immediately. The Mayor's designee has certified that a competitive process solicitation would not produce an advantage and would delay the provision of services should the PBID be renewed since no other entity has these same resources and relationships and experience in managing a San Diego PBID. Notwithstanding the Partnership's unique qualifications, pursuant to the Plan, the Partnership may also seek additional guidance on implementation of the clean and safe program by contracting with a non-profit organization with specific board composition representing PBID property owners and stakeholders.

In proposing to enter into a new Agreement with the Partnership, staff in collaboration with representatives of the Partnership reviewed the existing agreement and considered requests from the Partnership to modify certain provisions to promote flexibility and efficiency in performing the required services. Other changes were incorporated to better reflect current management practices and to be consistent with other assessment district processes.

Also, Council previously provided direction to authorize the Mayor to hold back funding as needed, in the event of litigation and such language has been included in the proposed Agreement without specifying set amounts or percentages. Staff will develop a written proposal, in collaboration with the Partnership, which will balance the needs for services to PBID property

owners with the City's desire to minimize its exposure should a suit be filed. But if a suit is filed, then there will likely be a need for PBID assessments to be deployed to defend the PBID and perhaps the Owners' Association. Pursuant to the Plan, in the event of a legal challenge against the District and/or the Owners' Association, up to three percent (3%) of the annual assessment collected may be used for non-budgeted costs of defending the District and/or the Owners' Association. If more than three percent (3%) is needed then that additional expenditure must be approved by the City Council. The goal of this arrangement is to balance the need for immediate funding of litigation expenses but to also obtain Council input for longer term defense that proves more costly. Under either scenario, if the City expends funds for defense then the City will be repaid first.

The proposed Agreement also clarifies that the use of PBID funds for other claims or litigation is permissible except that PBID funds may not be used to sue the City; nor may they be used to bring claims against others or defend the Owners' Association unless such claims or defense directly involve providing the Plan activities and improvements.

One of the changes between the proposed Agreement and prior agreements is the specified contingency percentage. Prior agreements called for a minimum of five percent (5%) but now, pursuant to the Plan, an annual contingency amount of three percent (3%) is required, though the means of making that contingency available at year end is specified in the Agreement. Staff has incorporated language into the Agreement to balance between the desire to make as much funding available as possible for Plan implementation and the need to cover possible delinquent payments. Specifically, contingency funds will be retained by the City cumulatively, as needed, to meet the average delinquency rate over the last three years plus one percent (1%). The Partnership may also establish a program reserve, in addition to the City held contingency, to account for unexpected costs or revenues.

The change in contingency percentage may further impact the PBID fund at the City. Property tax payments are typically made to the County in December and April each year and are then made available to the City in January and May. The City presently provides a working advance and then provides monthly reimbursements. A similar arrangement is proposed for the new Agreement but the amount of the advance will be around \$1 million higher (given the larger PBID budget) and so the City will likely have to continue to front funds while waiting to receive assessments collected by the County. The City may choose to assess itself for City properties in the PBID at the beginning of each fiscal year so as to provide in initial influx of cash into the City's PBID fund. Should the PBID be renewed then any funds remaining from the existing district will be transferred to the renewed district which will also bolster the immediately available funds and reduce the reliance on City funds. However, these remaining funds may only be spent to benefit the parcels in the prior district and could not be used for proposed CEP services. In general, the funding arrangement will provide for timely implementation of services and the City will be made whole at the end of each fiscal year.

The City shall continue to recover administration costs and per the Agreement is entitled to retain \$150,000 annually for City administration. During the fifth year, the City's administration amount may be subject to an increase of up to one-and-one-half-percent (1.5%) effective for the remaining five years, subject to approval by the Owners' Association and City Council. To the

extent that City administration funding is not utilized by the City, nor reserved with the contingency for delinquencies, then it may be budgeted for expenditure by the Partnership in a subsequent fiscal year.

Another change to the proposed Agreement from the current version is with regards to safety hazards where the City shall only require “reasonable efforts” by the Partnership to promptly barricade the affected public property, where reasonable under the circumstances, and to make “reasonable efforts” to report such conditions to the City or other appropriate agency. State law, (California Streets and Highway Code Sections 5610-5618), requires owners of property fronting a public street to maintain sidewalks in a safe condition for use by members of the public, except where the unsafe condition is caused by someone other than property owner. However, the City through Council Policy 200-12, has assumed responsibility to repair sidewalk damage caused by water main breaks, grade subsidence, heat expansion, and street trees within the parkway that were planted or maintained by others. Further, the City recently completed a citywide sidewalk condition assessment from February 10, 2014 through April 2015, which included downtown, and that the City is aware of the conditions as of the date of the assessment. So, the language change more reasonably reflects the liability regarding existing safety hazards. However, Agreement also makes clear that the Partnership will still be responsible for work it performs or causes to be performed in the right-of-way and any hazards related to or caused by such work.

The current agreement includes a provision allowing for termination by the City Council, following a noticed public hearing, if City Council determined such termination was in the best interests of the City or the PBID, however, from a practical perspective the primary reasons why such a termination would ever be considered would be due to malfeasance or misappropriation of funds. Therefore, the proposed Agreement has been changed to reflect this practical perspective.

The general provisions pertaining to insurance and indemnification have been refined to reflect the City’s and Partnership’s interest in responding cooperatively to claims and fairly and equitably allocating risk between the City and Partnership and that the Partnership only be responsible for its work and while recognizing that the City has immunities and pooled self-insurance against claims for liability arising from dangerous conditions of its public property, but it is difficult for the Partnership to obtain private insurance against such claims.

There are also certain provisions which are required by the Plan to be incorporated into the Agreement. These include:

- Contractor shall comply with the City of San Diego Living Wage Ordinance starting July 1, 2015
- Members of the Board and senior management will not be able to bid for or receive contracts from the Contractor/PBID
- Each and every website for the District or Contractor shall post not more than five business days after they become available:
 - All regular meeting agendas and any non-confidential back-up materials;
 - Approved meeting minutes;
 - Contractor’s articles of incorporation or formation, including any and all amendments thereto;
 - Contractor’s bylaws, including any and all amendments thereto;

- Any annual audits or financial disclosures,
 - The Annual Report;
 - Contracts awarded in accordance with the Conflict of Interest and Procurement Policy for Nonprofit Corporations Contracting with the City of San Diego, which are \$35,000 or more, including a notation of the number of bidders for such contracts;
 - Contractor's tax returns, including any and all amendments thereto; and
 - Any and all determinations of Contractor's tax-exempt status by the Internal Revenue Service or the Franchise Tax Board.
- Contractor shall not commingle in the same bank account (i) any funds it receives under this Agreement with (ii) any other funds that Contractor may receive (except for interest earned on funds on funds deposited in the account).

FISCAL CONSIDERATIONS:

If the City enters into this new Operating and Management Agreement with the Partnership (contingent upon renewal of the PBID), then the assessments and associated revenue generated by the PBID will be made available to the Partnership to implement the PBID program as outlined in the Downtown PBID Management District Plan and subject to this Agreement.

If the PBID is renewed then estimated annual assessments starting with \$7,400,335.38 in FY16 are proposed to be levied and collected for 10 years. The annual amount will include assessments on City parcels (FY16 amount is \$498,748.06). An allocation from the Gas Tax Fund would likely continue for median maintenance (FY 2016 amount is \$19,437). The PBID Administrator will have to provide funding for the general benefit portion.

If the PBID is renewed and if a suit is filed, there may be a fiscal impact to the General Fund if funds are expended and litigation results in an adverse outcome.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

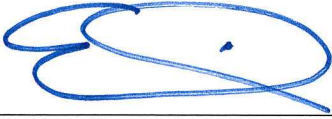
Council approved the establishment of the PBID on February 22, 2000 (Reso R-292797), a 10-year renewal on June 14, 2005 (Reso R-300533), the establishment of the Commercial Marketing District Zone (CMD) on September 25, 2012 (Reso R-307698), and the First Amendment to the Operating and Management Agreement approved September 25, 2012 which took effect October 2012 (Ordinance O-20206). PBID Budgets have been approved annually by Council (FY2015 heard July 22, 2014). A draft of the Plan was presented to ED&IR Committee July 30, 2014 as an Information Item and the Resolution of Intention was adopted by Council at the meeting of February 24, 2015 as R-309520.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

Over the last two years, DSDP held more than 150 meetings with group and individual property owners from all of the neighborhoods, and conducted an online survey which received 130 responses, in order to gather input for updates to the Plan regarding desired activities and improvements. DSDP committee and board meetings regarding PBID activities are noticed and open to the public and include opportunities for public comment.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Key stakeholders include all property owners within the boundaries of the Downtown PBID.



Erik Caldwell, Director
Economic Development



David Graham
Deputy Chief Operating Officer

Attachment 1. Operating and Management Agreement between the City of San Diego and the Renewed Downtown Property and Business Improvement District