

OAKLAND UNIFIED SCHOOL DISTRICT
Office of the Board of Education

September 27, 2011

TO: Board of Education

FROM: Tony Smith, Ph. D, Superintendent,
Timothy White, Assistant Superintendent, Facilities Planning &
Management

SUBJECT: Resolution attesting to futility of bidding changes to Claremont
Middle School Summer Modernization Projects

ACTION REQUESTED:

Approval by Board of Education of Resolution 1112-0063 – Attesting to Futility of Bidding Changes To Claremont Middle School Summer Modernization Projects.

DISCUSSION

On April 19, 2011 the Board of Education approved an Award of Bid and Construction Contract between the District and Rodan Builders, Inc., (“Rodan”) for the latter to provide installation of new energy efficient HVAC units in Building A, B and C and installation of new TPO roofing on Building A, B and C in conjunction with the Claremont Middle School Tunnel Air Grant Project (“Rodan Project”) for the period commencing April 28, 2011 and ending August 7, 2011 in the amount of \$1,438,000.00 (“Rodan Contract Price”).

On May 25, 2011 the Board of Education approved an Award of Bid and Construction Contract between the District and River View Construction, Inc., (“River View”) for the latter to provide landscape improvements including installation of redwood trees, trash enclosures, bike racks, removing and replacing trees and shrubs; installation of underground rainwater catchments in conjunction with the Claremont Middle School Landscaping Project (“River View Project”) for the period commencing May 26, 2011 and ending August 12, 2011 in the amount of \$704,000.00 (“River View Contract Price”).

On or about June 26, 2011 the District suffered damage as a result of a rain and water intrusion incident occurring on the Rodan Project site from a severe summer storm and

allegedly caused by Rodan's failure to adequately protect its work. The District is still in the process of completing its own investigations to ascertain the full extent of damage, and have placed Rodan's insurance carriers on notice of the dispute. The water intrusion and resulting damage into areas impacted by the Rodan Project required that significant and unforeseeable remedial work be completed before the start of school on August 29, 2011 ("Remedial Work").

In order that the work of the Rodan Project, including the Remedial Work, be completed, the District deems it appropriate and cost efficient to have River View complete the Remedial Work as a change order to the River View Project, due to the fact that the Remedial Work cannot be reasonably completed by Rodan, who is at capacity performing the Rodan Project work or to another contractor secured by public bid because both the River View and Rodan Projects are approaching 100% completion and it would be incongruous, futile, and unavailing for the following reasons:

1. The Remedial Work, if done by another contractor, would cause overwhelming coordination conflicts with respect to the remaining scope ("Remaining Scope") of both Rodan and River View Projects given the limited site access and accelerated construction schedule; and,
2. The Remedial Work is so integral to the Remaining Scope that another contractor secured through public bidding would be unable to familiarize itself enough to avoid significant delay and costs of delay.

While pursuant to Public Contract Code section 20118.4, a school district is required to competitively bid any change or alteration to a contract that has a value over ten percent (10%) of the original contract price, California law provides that "[w]here competitive proposals work an incongruity and are unavailing as affecting the final result or where they do not produce any advantage...the statute requiring competitive bidding does not apply." (*Hiller v. City of Los Angeles* (1961) 197 Cal. App. 2d 685, 694.)

FISCAL IMPACT:

The District is still in the process of completing its own investigations to ascertain the full extent of damage, and have placed Rodan's insurance carriers on notice of the dispute. Facilities staff will issue a back charge / deductive change order to the Rodan Contract to pay for the River View Change Order No. 1 based upon the certainty that there is a "good faith dispute" as to the proper protection of Rodan's work in advance of the June 26, 2011 storm. In addition, actual out of pocket expenses incurred by the District though additional staff time, including consultant and legal services will be aggressively pursued.

RECOMMENDATION:

Approval by Board of Education of Resolution 1112-0063 – Attesting to Futility of Bidding Changes To Claremont Middle School Summer Modernization Projects.

ATTACHMENTS:

Resolution No. 1112-0063 - ATTESTING TO FUTILITY OF BIDDING CHANGES TO CLAREMONT MIDDLE SCHOOL SUMMER MODERNIZATION PROJECTS

**BOARD OF EDUCATION OF THE
OAKLAND UNIFIED SCHOOL DISTRICT
RESOLUTION NO. 1112-0063
ATTESTING TO FUTILITY OF BIDDING CHANGES
TO CLAREMONT MIDDLE SCHOOL SUMMER MODERNIZATION PROJECTS**

WHEREAS, on April 19, 2011 the Board of Education of the Oakland Unified School District (“District”) approved an Award of Bid and Construction Contract between the District and Rodan Builders, Inc., Burlingame, CA, (“Rodan”) for the latter, as the lowest responsive, responsible bidder, to provide installation of new energy efficient HVAC units in Building A, B and C and installation of new TPO roofing on Building A, B and C in conjunction with the Claremont Middle School Tunnel Air Grant Project (“Rodan Project”) for the period commencing April 28, 2011 and ending August 7, 2011 in the amount of \$1,438,000.00 (“Rodan Contract Price”);

WHEREAS, on May 25, 2011 the Board of Education of the Oakland Unified School District (“District”) approved an Award of Bid and Construction Contract between the District and River View Construction, Inc., West Sacramento, CA, (“River View”) for the latter as the lowest responsive, responsible bidder, to provide landscape improvements including installation of redwood trees, trash enclosures, bike racks, removing and replacing trees and shrubs; installation of underground rainwater catchments in conjunction with the Claremont Middle School Landscaping Project (“River View Project”) for the period commencing May 26, 2011 and ending August 12, 2011 in the amount of \$704,000.00 (“River View Contract Price”);

WHEREAS, on or about June 26, 2011 the District suffered damage as a result of a rain and water intrusion incident occurring on the Rodan Project site from a severe summer storm and allegedly caused by Rodan’s failure to adequately protect its work. The District is still in the process of completing its own investigations to ascertain the full extent of damage, and have placed Rodan’s insurance carriers on notice of the dispute;

WHEREAS, the water intrusion and resulting damage into areas impacted by the Rodan Project required that significant and unforeseeable remedial work be completed before the start of school on August 29, 2011 (“Remedial Work”);

WHEREAS, in order that the work of the Rodan Project, including the Remedial Work, be completed, the District, through its Board of Education, deems it appropriate to have River View complete the Remedial Work as a change order to the River View Project;

WHEREAS, the Remedial Work cannot be reasonably completed by Rodan, who is at capacity performing the Rodan Project work or another contractor secured by publicly bidding because both the River View and Rodan Projects are approaching 100% completion and it would be incongruous, futile, and unavailing for the following reasons:

1. The Remedial Work, if done by another contractor, would cause overwhelming coordination conflicts with respect to the remaining scope (“Remaining Scope”) of both Rodan and River View Projects given the limited site access and accelerated construction schedule;

2. The Remedial Work is so integral to the Remaining Scope that another contractor secured through public bidding would be unable to familiarize itself enough to avoid significant delay and costs of delay;

WHEREAS, while pursuant to Public Contract Code section 20118.4, a school district is required to competitively bid any change or alteration to a contract that has a value over ten percent (10%) of the original contract price, California law provides that “[w]here competitive proposals work an incongruity and are unavailing as affecting the final result or where they do not produce any advantage...the statute requiring competitive bidding does not apply.” (*Hiller v. City of Los Angeles* (1961) 197 Cal. App. 2d 685, 694.)

NOW THEREFORE, the Board of Education of the Oakland Unified School District hereby resolves, determines, and finds the following:

- 1) That the foregoing recitals are true, including specifically:
 - a. The Remedial Work, if done by another contractor other than River View, would cause overwhelming coordination conflicts given the limited site access and accelerated construction schedule;
 - b. The Remedial Work is so integral to the Remaining Scope of both the Rodan Project and River View Projects that another contractor secured through public bidding would be unable to familiarize itself enough or mobilize sufficiently to avoid significant delay and costs of delay;
- 2) That, based on the foregoing, it would be incongruous, futile, and unavailing to do the following:
 - a. Publicly bid the Remedial Work to a different contractor.
- 3) In addition, it would not produce an advantage to the District, and would produce a net burden and distinct disadvantages to the District, to do the following:
 - a. Publicly bid the Remedial Work to a different contractor;
- 4) That the District’s Board of Education hereby consents to change orders to the River View Contract Price necessitated by the Remedial Work without further advertising for or inviting of bids, and to take all steps and perform all actions necessary to execute and implement such change orders, including the payment to River View for such change orders.

PASSED AND ADOPTED by the Board of Education of the Oakland Unified School District this 27th day of September; by the following vote, to wit:

AYES:

NOES:

ABSTAINED:

ABSENT:

CERTIFICATION

I, Edgar Rakestraw, Secretary of the Board of Education of the Oakland Unified School District, Alameda County, State of California, do hereby certify that the foregoing Resolution was duly approved and adopted by the Board of Education of said district at a meeting thereof held on the 27th day of September, 2011 with a copy of such Resolution being on file in the Office of the Board of Education.

Edgar Rakestraw, Jr.