



Legislation Text

File #: 2020-0430, **Version:** 1

DATE: December 28, 2020

SUBJECT:

RESOLUTION AUTHORIZING AGREEMENT FOR AMENDMENT OF EXCLUSIVE NEGOTIATING AGREEMENT AMENDMENT NO. 1 BETWEEN THE SAN DIEGO UNIFIED PORT DISTRICT AND 1HWY1, LLC FOR THE PROPOSED REDEVELOPMENT OF 70-ACRES OF LAND AND WATER IN THE CENTRAL EMBARCADERO

EXECUTIVE SUMMARY:

On February 22, 2016, staff issued Request for Proposals 16-04ME (RFP) for the redevelopment of 70 acres of land and water situated between downtown and the Bay in the District's Central Embarcadero area (Redevelopment Site). The Redevelopment Site is bordered by the USS Midway Museum and Harbor Drive to the north, Manchester Grand Hyatt and Kettner Boulevard to the east, and San Diego Bay to the south and west. The Redevelopment Site also includes Embarcadero Marina Park North, Ruocco Park and Tuna Harbor. A location map is attached for reference (Attachment A).

Following an extensive solicitation and due diligence process at the November 8, 2016 meeting, the Board of Port Commissioners (Board) selected 1HWY1, LLC (1HWY1) as the successful proposer. On October 2, 2017, the District entered into an Exclusive Negotiating Agreement (ENA) with 1HWY1 (Attachment B). Due to the complexity of the proposed Seaport San Diego Project (Seaport Project), the District has granted various extensions to 1HWY1 over the last three years, including extensions of the submittal deadline for the project description and proforma and the negotiating period. The ENA currently expires on March 27, 2021.

Since entering the ENA, 1HWY1 has refined the details of the Seaport Project, but it continues to have the main components for a mixed-use development that could transform and revitalize the area into a world-class destination.

A project of this magnitude takes a lot of effort and time as well as coordination amongst multiple stakeholders and agencies. The Seaport Project contains various programmatic components that require further evaluation to determine consistency with the Public Trust Doctrine (Trust Doctrine). Determining whether the Seaport Project is consistent with the Trust Doctrine is an important milestone that must be satisfied before the project moves into the environmental review phase. To advance this process, in August 2020, District staff submitted 1HWY1's project description and accompanying materials to the California State Lands Commission (SLC) staff to begin the process of a Preliminary Trust Doctrine Consistency Review of the Seaport Project. Once staff receives feedback from SLC, staff will present the current project description to the Board and seek direction on next steps.

In September 2020, 1HWY1 requested that the District consider an amendment to the ENA that would allow additional time to work through the Trust Doctrine consistency process, the entitlement phase and financial feasibility. The proposed amendment is attached as Attachment C (Amendment No. 1).

Amendment No. 1 includes modifications to the following terms:

- Term - Extend to October 1, 2024 with possible additional one-year administrative extension
- Termination - Either party can terminate if the Seaport Project is not feasible or there is an uncured default by the non-terminating party.
- Submittals - By December 31, 2021, 1HWY1 must submit certain items, including a development phasing plan and updates to project description, pro forma, organizational chart, financial strategy and market demand studies. The revised section also introduces the negotiation of a non-binding term sheet.
- Transferable Products - Clarifies that design type documents (i.e., drawings and specifications) will remain the property of 1HWY1.
- Indemnity and Release - 1HWY1 shall indemnify, defend, and hold harmless the District for third-party claims and releases District from any claims arising out of the ENA, including unknown claims. 1HWY1 also reaffirms the releases in the ENA.
- Other - Clarifying changes made to incorporate new section references, clarify definition of attorneys' fees, clarify CEQA process while fully reserving the Board's discretion to approve or disapprove the Seaport Project, its entitlements and/or condition the same, and conform the ENA as needed.

The proposed amendment to the ENA will continue to advance the Seaport Project, support 1HWY1's efforts to secure additional capital for the entitlement phase and provide the District with the ability to collect a non-refundable extension fee and receive additional protections via the new indemnity and release provisions. Therefore, staff recommends that the Board approve Amendment No. 1.

RECOMMENDATION:

Adopt resolution authorizing Amendment No. 1 between the District and 1HWY1 for the proposed redevelopment of the Redevelopment Site.

FISCAL IMPACT:

1HWY1, as the "Developer" under the ENA, is responsible for all processing fees and costs associated with application for, and processing of, the proposed development and its environmental review. The proposed development is expected to generate future revenues for the District which will be evaluated as the land use and development programs are further refined. If 1HWY requests an extension that goes beyond October 1, 2024, the District has the option to collect a non-refundable extension fee in an amount to be determined at that time.

COMPASS STRATEGIC GOALS:

This agenda item supports the following Strategic Goals:

- A Port that the public understands and trusts.
- A vibrant waterfront destination where residents and visitors converge.
- A Port with comprehensive vision for Port land and water uses integrated to regional plans.

DISCUSSION:

On February 22, 2016, staff issued an RFP for the Redevelopment Site. Following an extensive solicitation and due diligence process, at the November 8, 2016 meeting the Board selected 1HWY1, LLC as the successful proposer and on May 16, 2017, the Board directed staff to enter into an exclusive negotiating agreement.

ENA

The ENA between the District and 1HWY1 commenced on October 2, 2017 and was originally set to expire on October 1, 2019. The ENA allows staff to administratively extend the negotiating period for the ENA or submittal deadlines by ninety (90) day increments for a total negotiating period not to exceed five years (i.e., October 1, 2022). Due to its complexity and size, the proposed Seaport Project has evolved since the parties entered into the ENA and timelines have shifted accordingly. As permitted under the ENA, the District has administratively granted various extensions to 1HWY1 over the last three years including extensions of the submittal deadlines for the project description and proforma (October 1, 2018 to July 29, 2019 (cumulatively)) and the negotiating period (from October 2, 2019 to September 28, 2020 (cumulatively)). On September 14, 2020, an additional 180-day extension was granted which extended the ENA's negotiating period to March 27, 2021.

Current Status of Proposed Redevelopment

A project of this magnitude takes a lot of effort and time as well as coordination amongst multiple stakeholders and agencies. The Redevelopment Site is a central location on the San Diego Bay and is key to the ultimate transformation of the waterfront. 1HWY1 has refined its project program over the last few years. On March 10, 2020, 1HWY1 submitted a project description and accompanying materials. While the proposed Seaport Project has evolved in its design and site configuration, it maintains all of the programmatic components initially included in 1HWY1's RFP submittal as well as some modifications which have improved the overall redevelopment proposal.

On August 21, 2020, District staff submitted 1HWY1's project description and accompanying materials to SLC staff to begin the process of a Preliminary Trust Doctrine Consistency Review of the Seaport Project. Determining whether the Seaport Project is consistent with the Trust Doctrine is an important milestone towards moving to the entitlement phase.

Proposed ENA Amendment Terms

Amendment No. 1 includes changes to the following key terms:

1. Term: The Negotiating Period of the ENA would be extended to October 1, 2024. The Executive Director can administratively approve an extension up to October 1, 2025 in his or her sole and absolute discretion and reserves the right to charge 1HWY1 a non-refundable extension fee at such time as the request is made by 1HWY1.

2. Termination: Amendment No. 1 would delete the ability of either party to terminate for “any or no reason”. Under the proposed amendment, in addition to being able to terminate as a result of an uncured default, the District and 1HWY1 have the right to terminate the ENA at any time if the terminating party determines in its sole and absolute discretion that the proposed development is “not feasible”. The ENA amendment includes a list of potential factors which may be considered by a terminating party, in their sole and absolute discretion, when interpreting if the proposed development is “not feasible”. Some of these factors include, but are not limited to, non-compliance with the Trust Doctrine, the Coastal Act, or other laws; financial subsidy from the District; minimum rent threshold; or an uncured default.

3. Submittals: By December 31, 2021, new submittals are now required under the ENA to further refine the proposed development prior to conducting California Environmental Quality Act (CEQA) review and to advance the parties’ negotiations of the economic terms for the definitive agreement. The submittals include a detailed narrative and exhibits for each of the programmatic components, construction information, conceptual drawings, and updates to the project description, pro forma, financial strategy, organizational chart and market demand studies. A development phasing plan is also required. Many of these items are necessary to start the CEQA analysis for the Seaport Project. Amendment No. 1 also contemplates that the District and 1HWY1 may negotiate a non-binding term sheet after submittals are complete, or earlier in the discretion of the Executive Director, or his or her designee.

4. Transferable Products: Modifications to the transferable products section have been made such that all design type documents will remain the property of 1HWY1, but District would still receive studies, reports, and other similar types of due diligence materials. The District would not be prohibited from disclosing and providing copies of the documents to a third party that are the property of 1HWY1 if the District determines, in its sole and absolute discretion, that such disclosure and/or production is required under the California Public Records Act and other laws.

5. Indemnity (Third Party Claims): An indemnity provision has been included which requires that 1HWY1 indemnify, hold harmless, and defend the District for third party claims arising out of 1HWY1’s performance, the ENA, amendments to the ENA, permits or approvals, extensions of the submittal deadlines or Negotiating Period, or alleged non-compliance with CEQA or the National Environmental Policy Act for the ENA, amendments to the ENA, the proposed development, property, or related actions. 1HWY1 would pay for costs and expenses incurred by the District in such defense.

6. Release of Claims: 1HWY1 has agreed to reaffirm all the releases and waivers of 1HWY1, as the “Developer” under the ENA. 1HWY1 will also release the District from any claims arising out of the ENA, including unknown claims.

7. Other: The ENA amendment also includes clarifications to the attorneys’ fees and CEQA sections,

changes to incorporate new section references, and other conforming changes to the ENA.

CONCLUSION

Staff recommends that the Board approve Amendment No. 1 to continue to advance the Seaport Project and support 1HWY1 in their efforts to secure additional capital for the entitlement phase and provide the District with the ability to collect a non-refundable extension fee and receive additional protections via the new indemnity and release provisions.

General Counsel's Comments:

The General Counsel's Office has reviewed this agenda sheet as presented to it and Amendment No. 1 as attached in Attachment C and approves each as to form and legality.

Environmental Review:

The proposed Board action, including without limitation, a resolution authorizing an amendment to an exclusive negotiating agreement, does not constitute a "project" under the definition set forth in California Environmental Quality Act (CEQA) Guidelines Sections 15352 and 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the District adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Any project developed as a result of the proposed Board action that requires the District or the Board's discretionary approval resulting in a physical change to the environment will be analyzed in accordance with CEQA prior to such approval. CEQA review may result in the District, in its sole and absolute discretion, requiring implementation of mitigation measures, adopting an alternative, including without limitation, a "no project alternative" or adopting a Statement of Overriding Consideration, if required. The proposed Board action in no way limits the exercise of this discretion. Additionally, Section 14 of the ENA, as amended, among other items, acknowledges that an approval or adoption of the Seaport Project has not occurred and reserves the Board's sole and absolute discretion to (i) prepare, adopt, or disapprove the CEQA analysis for the Seaport Project and any and all discretionary actions for the Seaport Project; (ii) adopt, condition or disapprove any and all projects on the project site; (iii) adopt any and all feasible mitigation measures; and (iv) modify the Seaport Project, adopt a CEQA alternative to the same, including the "no project" alternative and adopt or refuse to adopt a Statement of Overriding Considerations, if applicable. Therefore, no further CEQA review is required.

The proposed Board action complies with Sections 21 and 35 of the Port Act, which allow the Board to pass resolutions and to do all acts necessary and convenient for the exercise of its powers. Additionally, no project approval has occurred, and the Seaport Project is undergoing a Preliminary Trust Doctrine Consistency Review by SLC staff. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action is consistent with the Public Trust Doctrine.

The proposed Board action does not allow for "development," as defined in Section 30106 of the California Coastal Act, or "new development," pursuant to Section 1.a. of the District's Coastal Development Permit (CDP) Regulations because it will not result in, without limitation, a physical change, change in use or increase the intensity of uses. Therefore, issuance of a Coastal Development Permit or exclusion is not required. However, development within the District requires

processing under the District's CDP Regulations. Future development, as defined in Section 30106 of the Coastal Act, will remain subject to its own independent review pursuant to the District's certified CDP Regulations, PMP, and Chapters 3 and 8 of the Coastal Act. The proposed Board action in no way limits the exercise of the District's discretion under the District's CDP Regulations. Therefore, issuance of a CDP or exclusion is not required at this time.

Equal Opportunity Program:

A Small Business Enterprise (SBE) Participation Plan including SBE goals for design/construction and leasing/operations will be submitted prior to entering into a Definitive Agreement (as defined in the ENA).

PREPARED BY:

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Attachment(s):

Attachment A: Location Map

Attachment B: ENA between 1HWY1 and District

Attachment C: Amendment No. 1 to ENA