



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Matt Cano  
Ragan Henninger  
Jim Shannon

**SUBJECT:** SEE BELOW

**DATE:** October 1, 2021

Approved

Date

10/01/21

**COUNCIL DISTRICT: 3**

## REPLACEMENT

**SUBJECT: CONSTRUCTION OF THE EMERGENCY INTERIM HOUSING AT THE  
POLICE ADMINISTRATION BUILDING PARKING LOT E**

## REASON FOR REPLACEMENT

The original memorandum has been updated to make modifications to clarify the City's contractual relationship with Devcon Construction, Inc.

## RECOMMENDATION

- (a) Adopt a resolution that does the following:
- (1) Determines the City can award a contract to Devcon Construction, Inc. to construct the emergency interim housing at the Police Administration Building Parking E Lot ("Project") without a competitive procurement under the "idle act" exception in Section 1217(i)(6) of the City of San José Charter;
  - (2) Authorizes the City Manager to negotiate and execute a construction agreement not to exceed \$6,000,000 with Devcon Construction, Inc. to construct the Project consistent with the requirements of this memorandum and Chapter 5.09 of the San José Municipal Code;
  - (3) Authorizes establishing a construction contingency for the Project equal to five percent (5%) of the construction contract amount not to exceed \$300,000;
  - (4) Authorizes the City Manager to negotiate and execute an agreement with Destination: HOME to accept a \$1,000,000 grant to be used for the construction of the Project; and
  - (5) Reaffirms its April 7, 2020 emergency order and declaration of a continued shelter crisis in the City of San José, pursuant to and in accordance with the provisions of California Government Code Sections 8634 and 8698 et seq.

(b) Adopt the following Appropriation Ordinance and Funding Sources Resolution  
Amendments in the Multi-Source Housing Fund:

- 1) Increase the estimate for Other Revenue by \$1,000,000;
- 2) Establish an Emergency Shelters appropriation to the Housing Department in the amount of \$3,000,000;
- 3) Increase the Bridge Housing Communities appropriation to the Housing Department by \$1,000,00; and
- 4) Decrease the City Housing Authority Reserve by \$3,000,000.

**OUTCOME**

The City Council's approval of the recommendation will allow the City to proceed with constructing an Emergency Interim Housing Community (EIHC) at the Police Administration Building E Lot site on an expedited timeline.

**BACKGROUND**

Over the past year and a half the City has constructed three emergency interim housing communities at Monterey and Bernal, Rue Ferrari and 101, and Evans Lane. These communities provide temporary housing for more than 300 unhoused residents in the City of San José. The City constructed these communities using a combination of State funding through the Homeless Housing, Assistance and Prevention Program (HHAP) and local funding.

On June 29, 2020, Governor Newsom signed Assembly Bill 83 (Committee on Budget, Chapter 15, Statutes of 2020), establishing round two of HHAP funding (HHAP-2). HHAP-2 is a \$300 million block grant program to provide jurisdictions with flexibility to use funds to meet their emergency housing needs.

On January 12, 2021, the City Council approved the proposed expenditure plan for the HHAP - 2, which outlined a \$500,000 funding source for construction of a fourth emergency interim housing project. City Council directed staff to explore the overflow parking lot (E Lot) adjacent to the San José Police Department as a potential site for the project.

After analyzing the feasibility of the project at this site, Housing and Public Works staff have moved ahead with plans to construct a fourth emergency interim housing project on E Lot ("Project"). The City entered into a service order with ELS Architecture and Urban Design to design the Project. As outlined in the Cost Summary section of this memo, the Project will use City funding sources to pay for the estimated \$1,400,000 project delivery costs of this project, including the \$640,143 consultant fee for preparing the design documents. The City is currently finalizing the design documents, which will include the placement of up to 14 prefabricated housing units to house up to 76 persons, parking for residents and staff vehicles, staffing offices, a security office, security fencing, shared kitchen and laundry facilities, recreational community

space, restrooms within communal buildings, outdoor common areas, dedicated dog run and smoking area.

In addition to the HHAP funding, the City has also received a \$1,000,000 grant from Destination: Home, a local non-profit organization in Santa Clara County for construction of the Project. The conditions of the Destination: Home grant are outlined in the analysis of this memorandum. Finally, the Project also utilizes resources from the American Rescue Plan Fund and Housing Authority Litigation Award Settlement funds. SHP Foundation (Sand Hill) is proposing to donate prefabricated housing units to the Project for the construction of the Project as discussed further below.

## **ANALYSIS**

### **A. Donation of Prefabricated Structures by Sand Hill.**

The SHP Foundation (Sand Hill) is a private Christian foundation established in 1995 under Internal Revenue Code Section 501(c)(3). Its mission is to serve the poor and needy in the community by providing low-cost housing solutions, health care and education, often in partnership with other Christian organizations.

Sand Hill intends to donate to the Project a total of 16 prefabricated modular structures to house up to 76 individuals, plus two separate modular buildings for use as shared common areas, including kitchen space, office space, and dining space. The 16 units are already fabricated and ordered by Sand Hill and meet the City's design requirements.

Sand Hill has a history of partnering with Devcon Construction on some of its larger charitable projects. Sand Hill will provide the prefabricated units directly to Devcon Construction and at no cost to the City.

Sand Hill's proposed donation is significant. The units have a value of approximately \$6,050,000. The City does not presently have the funding to construct the Project without the donation.

### **B. Construction Contract with Devcon.**

Staff recommends authorizing the City Manager to negotiate and execute an agreement with Devcon to construct the Project. Authorizing the City Manager to negotiate and execute a construction contract with Devcon will allow staff to move seamlessly from design to construction as quickly as possible.

Devcon has previously worked on several City projects and is considered by staff to be a responsible contractor with qualifications needed to construct the Project within budget and on

schedule. Most recently, Devcon has contracted with Sharks Ice, LLC to construct the Solar4America Ice Centre expansion project.

### **1. Project Description**

The Project, as outlined in the agreement, consists of the construction of emergency housing improvements on the project site including placement of prefabricated emergency housing units for up to 76 individuals, parking for residents and staff, staffing offices, a security office, fencing, kitchen and laundry facilities, recreational community space, outdoor common areas, and miscellaneous site amenities. Devcon will be provided construction documents, plans, specifications, and associated supplemental documents prepared and approved by the City.

### **2. Compensation**

The City will pay Devcon a lump-sum amount not to exceed \$6,000,000 to construct the Project in accordance with the City's design documents. The final compensation amount will be finalized and documented in the agreement as the construction documents are closer to completion. The current estimates are based off of the 35% design document package as provided by ELS. The final lump-sum amount will reflect Devcon constructing the Project for a reduction in its normal profit margin, as well as Sand Hill's donation of the prefabricated units.

The current engineer's estimate to construct the entire Project without considering the donation of prefabricated units by Sand Hill or the reduction in profit markup by Devcon is \$13,112,936. Accordingly, the City's lump-sum payment to Devcon of up to \$6,000,000 represents a significant reduction in the cost of the Project to the City. The City will also maintain a separate, City-controlled construction contingency of approximately 5% (not to exceed \$300,000) of the construction agreement amount, to pay for any unanticipated changes to the Project during construction.

The City's funding will be from the American Rescue Plan Fund, the Multi-Source Housing Fund, the Homeless Housing Assistance and Prevention Fund (454), and a grant from Destination: Home.

Similar to other construction contracts, Devcon must submit an application for progress payment as well as applicable certified payroll records each month to the City for review and approval. The City will withhold from each progress payment five percent (5%) as retention, to be released not later than thirty (30) calendar days after final acceptance.

### **3. Idle Act Exception to Bidding.**

The San José City Charter generally requires the City to competitively procure construction contracts over \$650,000. However, the City Charter also sets forth several exceptions to this general requirement. One exception is Section 1217(i)(6) of the City Charter, which provides an exception if the solicitation of bids would be an "idle act." San Jose Municipal Code Section

27.46.020 states that “idle act” “means that soliciting bids would not provide any significant value or benefit to the City considered in the context of the purpose and goals of Public Bidding.”

Under the current circumstances, City staff has concluded that soliciting bids for the Project would not provide any significant value or benefit to the City. Soliciting bids would not result in the City being able to construct the Project for less than the amount it is paying Devcon. As discussed above, the City’s current engineer’s estimate for constructing the Project is \$13,112,936. However, because the City is receiving the donated units through Devcon and Devcon’s reduction in profit margin the City is expecting to pay Devcon less than 50% percent of the engineer’s estimate to construct the Project. It is unreasonable to conclude that soliciting bids would lead to the City obtaining a lower price for constructing the Project.

This application of the “idle act” exception is consistent with the City’s past practice regarding the exception.

For the above reasons, staff recommends the City Council determine that the City can award a construction contract to Devcon for the Project under the “idle act” exception.

#### **4. No Project Labor Agreement**

The City will require Devcon to comply with State prevailing wage and labor requirements. However, the construction contract will not include a project labor agreement. The City’s project labor agreement applies to projects “for which the City sends out the initial solicitation of a bid or proposal” for a construction project “awarded” by the City. Because the City is not soliciting bids or proposals for the project the project labor agreement does not apply. Moreover, application is not appropriate under the circumstances given the “donation” aspect of this Project.

#### **5. Other Material Terms and Conditions of Contract**

In addition to the provisions mentioned above, the construction contract would require Devcon to provide payment and performance bonds, as is required in other construction contracts. It would also require Devcon to provide standard insurance (including builder’s at-risk insurance), licensing, as well as site security and superintendence during construction.

At Devcon’s request, the contract would limit Devcon’s indemnity obligation “to the extent” of Devcon’s negligent or intentional act. This means that an “indemnity” situation could result in the City and Devcon having a dispute over comparative fault. This is a relatively modest limit on indemnity to which the City does not typically agree. However, staff believes the unique circumstances of this project justify agreeing to the limit. Accordingly, staff recommends moving forward with a construction agreement containing this limit on indemnity.

At Devcon’s request, the contract would also include a provision in which each party would waive its right to seek consequential damages against the other party. Although this is not a limit

on damages to which the City typically agrees, staff recommends accepting the limit given the circumstances of this project.

Similar to other public construction projects, changes to the project will need to be approved by the City and contractor and an agreed upon cost will need to be finalized prior to commencing the work.

## **6. Destination: Home Donor Agreement**

Destination: Home is a non-profit focused on bringing stakeholders together to address the common goal of ending homelessness in Silicon Valley. Destination: Home has agreed to provide the City of San José Housing Department with a \$1,000,000 grant for the E Lot emergency interim housing site. The agreement will begin in fall 2021 and terminate at the end of June 30, 2024. As part of the donor agreement, the Housing Department will comply with agreement requirements including:

- Provide quarterly and annual reporting on grant-specific outcomes and metrics both during construction and operations over the course of the grant term;
- Coordinate with the Lived Experience Advisory Board (LEAB), a group of leaders who have experienced homelessness, on site design, operations, and community engagement;
- Track and evaluate cost and time as they pertain to site design, operation, service, and community engagement;
- Utilize Housing First principles as a guide for project implementation.

### *Conflict of Interest*

Jacky Morales-Ferrand, Director of the Housing Department, serves as an uncompensated member of the board of directors for Destination: Home SV, a California non-profit corporation. She has not participated in the selection of City of San José for funding and will not participate in the making of any contract or grant agreement.

## **7. Emergency Order and Shelter Crisis Declaration**

On April 7, 2020, the City Council adopted Resolution No. 79466 suspending certain City requirements under its emergency powers and declaring a shelter crisis<sup>1</sup> to facilitate the expansion of shelters and interim emergency housing as authorized by the City Manager during the COVID-19 emergency. Given the ongoing COVID-19 emergency as well as the continued shelter crisis, the City Council should reaffirm its April 7, 2020 action.

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<sup>1</sup> <https://sanjose.legistar.com/LegislationDetail.aspx?ID=4400681&GUID=6A59B0FD-8F0C-40FB-A180-0915F927E635&Options=&Search=>

## **CONCLUSION**

The design documents are currently at the 65% design stage. It is anticipated that the construction documents will be complete and the agreement with Devcon will be finalized and executed by the end of October 2021. Authorizing the City Manager to execute the agreement will allow staff to move seamlessly from design completion to construction as quickly as possible. Staff finds the terms of the construction agreement between Devcon and the City to be reasonable and similar to construction contracts used on typical capital projects. Utilizing this partnership between Sand Hill, Devcon, and the City will allow the City to continue a previously successful project delivery model to build much needed housing facilities for unhoused individuals, on an expedited schedule.

## **EVALUATION AND FOLLOW-UP**

As a condition of receiving the State grant funds, the City is required to provide annual reports to the State regarding types of services, expenditures, and demographics of those served, until all funds have been expended or by June 30, 2026.

## **CLIMATE SMART SAN JOSE**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

## **PUBLIC OUTREACH**

Consistent with other emergency interim housing sites, a virtual meeting was held on August 2, from 6:30-8:00pm, in coordination with the Council Office and Mayor's Office to ensure participation from a range of community stakeholders.

## **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office.

## **COMMISSION RECOMMENDATION/INPUT**

No commission recommendation or input is associated with this action.

**COST SUMMARY/IMPLICATIONS**

1. AMOUNT OF RECOMMENDATION/COST OF PROJECT:

Project Delivery	\$1,400,000
Construction (not to exceed)	\$6,000,000
Contingency (not to exceed)	\$300,000
<b>Total Project Costs</b>	<b>\$7,700,000</b>

2. PROJECT EXPENDITURES TO DATE:

Project Delivery	\$173,026
Environmental Review	\$23,345
<b>Total Project Expenditures</b>	<b>\$196,371</b>

3. COST ELEMENTS OF AGREEMENT/CONTRACT:

The cost elements of the agreement, as outlined in the analysis of this memo, include mobilization, SWPPP implementation, site preparation, grading and drainage, paving, fencing, electrical, planting and irrigation, 16 prefabricated modular/factory built structures to house up to 76 individuals and two separate prefabricated modular buildings for use as shared common areas, including kitchen space, office space, and dining space. The contract is currently estimated at an amount not to exceed \$6,000,000, based on the 35% design documents. This estimate will be refined further as the City negotiates with Devcon and the final contract amount will be outlined in the construction contract.

4. SOURCE OF FUNDING:

- **American Rescue Plan Fund:** \$2,500,000
- **Multi-Source Housing Fund:** Housing Authority Litigation Award Settlement funds \$3,000,000; Destination: HOME grant \$1,000,000
- **Homeless Housing, Assistance, and Prevention Fund:** \$500,000

5. FISCAL IMPACT:

Ongoing operations for the Project will be funded through a variety of Housing Department funding sources, which may vary on a year-to-year basis as a permanent ongoing funding source has not been identified. The estimated annual operating costs for the facility are estimated at \$2.8 million, the first year of which will be paid using the State's Permanent Local Housing Allocation (SB 2) funds.



**BUDGET REFERENCE**

The table below identifies the fund and appropriations to fund the contract recommended as part of this memo and remaining project costs, including project delivery, construction, and contingency costs.

Fund #	Appn #	Appn Name	Current Total Appn	Rec. Budget Action	Amt for Contract	2021-2022 Adopted Operating Budget Page*	Last Budget Action (Date, Ord. No.)
402	217P	Emergency Housing – Emergency Housing Construction and Operation	\$2,500,000	\$0	\$2,500,000	X-7	06/22/21 Ord No. 30621
448	R130	Other Revenue	\$200,000	\$1,000,000	\$0	X-75	06/22/21 Res. No. 80109
448	205F	Bridge Housing Communities	\$1,700,000	\$1,000,000	\$1,000,000	X-76	06/22/21 Ord No. 30621
448	8497	City Housing Authority Reserve	\$5,878,502	(3,000,000)	\$0	X-77	06/22/21 Ord No. 30621
448	209X	Emergency Shelters	\$0	\$3,000,000	\$3,000,000	N/A	N/A
454	209X	Emergency Shelters	\$10,423,992	\$0	\$500,000	X-53	06/22/21 Ord No. 30621

\*The 2021-2022 Adopted Operating Budget was approved on June 15, 2021 and adopted on June 22, 2021 by the City Council.

HONORABLE MAYOR AND CITY COUNCIL

October 1, 2021

**Subject: Construction of the Emergency Interim Housing at the Police Administration Building Parking Lot E**

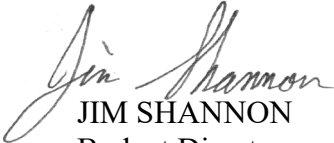
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**CEQA**

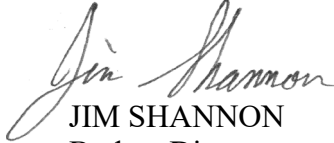
Addendum to the Bridge Housing Communities Project Negative Declaration (Resolution No. 78926), File No. PP18-081, for the Lot E Site, File No. ER21-088.

/s/  
MATT CANO  
Director, Public Works Department

/s/  
RAGAN HENNINGER  
Deputy Director, Housing Department

  
JIM SHANNON  
Budget Director

I hereby certify that there will be available for appropriation in the Multi-Source Housing Fund in the Fiscal Year 2021-2022 monies in excess of those heretofore appropriated therefrom, said excess being at least \$1,000,000.

  
JIM SHANNON  
Budget Director

For questions, please contact Matt Cano, Director, at [matt.cano@sanjoseca.gov](mailto:matt.cano@sanjoseca.gov).