



Agenda Report

20-1001

Agenda Date: 10/13/2020

REPORT TO COUNCIL AND AUTHORITIES

SUBJECT

Report from the Stadium Authority on Its Concerns Regarding the Stadium Manager's Request to Execute an Agreement with LCPtracker, Inc. [Board Pillar: Ensure Compliance with Measure J and Manage Levi's Stadium]

BACKGROUND

On September 17, 2019, the Stadium Authority Board (Board) approved the introduction of Ordinance No. 2005, which rescinded the Executive Director's delegated purchasing authority and requires all contracts or agreements to acquire supplies, materials, equipment and services to require Board approval by amending Chapter 17.30 of the Santa Clara City Code. On October 8, 2019, the Board adopted Ordinance No. 2005, which became effective on November 8, 2019. As a result of the Board's revocation of the Executive Director's authority to procure goods and services on behalf of the Stadium Authority as of November 8, 2019, the Stadium Manager must now seek approval from the Board and demonstrate that the Stadium Manager has properly and legally procured goods and services before contracts may be executed.

LCPtracker, Inc. (LCPtracker) is software for certified payroll reporting, construction site compliance management, and workforce reporting: these are key elements of reporting to the Department of Industrial Relations for compliance with state worker wage laws (e.g., prevailing wage). The City has a current agreement with LCPtracker and these services have helped with management of prevailing wage agreements and tracking of contractors' certified payroll. Due to the significant number of projects and services that require prevailing wage at Levi's Stadium, Stadium Authority understands the need for the Stadium Manager entering into an agreement with LCPtracker for similar services. It is unknown which system(s) (if any) was/were used prior, since Stadium Manager has always been required to demonstrate compliance with State and local contract laws.

DISCUSSION

The Stadium Manager requests the Stadium Authority Board's approval of an agreement pursuant to the Board's action on November 8, 2019. In the Management Agreement's Recitals, it states: *E. The Stadium Manager is an organization whose principals have substantial experience and expertise in the management and operation of public assembly facilities.* This single Stadium Manager request serves as a good case study exemplifying the Stadium Manager's:

- Mismanagement of public contracts;
- Unexplained uses of public funds;
- Demonstrated strong evidence of non-compliance with prevailing wage law;
- Unwillingness to uphold transparency laws, e.g., Brown Act or Public Records Act;
- Unwillingness to disclose actions to the Board;

- Inadequate budget planning and lack of fiscal transparency; and,
- Overall lack of knowledge with managing a public facility.

Stadium Manager is requesting approval to execute an agreement with LCPtracker for certified payroll tracking software services and has submitted an agenda report outlining their request for the Board's approval. The initial term of the agreement is for one year and the agreement is renewed annually on an automatic basis unless either party provides notice. The cost of services for the first year is \$13,180, as represented in the report, and the Stadium Manager is requesting authority for a total not-to-exceed amount of \$25,000 for the agreement.

Below is a timeline of the various correspondence and discussions that occurred between the Stadium Authority and Stadium Manager regarding the LCPtracker agreement. Copies of the referenced written correspondence and meeting agendas are attached to this report:

May 5, 2020: Stadium Manager notified the Stadium Authority that it was prepared to enter into an agreement with LCPtracker to provide certified payroll tracking and related services (Attachment 1). The Stadium Manager also provided an agenda report and a copy of the agreement for the Board's review and consideration.

May 12, 2020: Executive Director Santana responded to the Stadium Manager's letter restating support for "piggybacking" from City agreements and asked that the Stadium Manager submit a revised LCPtracker agenda report (Attachment 2).

May 21, 2020 Monthly Meeting: Stadium Manager added the LCPtracker agreement to the May 21, 2020 meeting agenda (Attachment 3). During the meeting, Executive Director explained concerns with the quality of information in the agreement and provided clarification that the Stadium Manager could "piggyback" on the City's existing LCPtracker agreement as it is a common practice in the public sector, which is to apply another public agency's negotiated terms and pricing with the approval of the vendor and enter into a separate agreement. Stadium Manager thanked staff for providing more clarification and said that their team would review piggybacking the agreement and provide more information to the Stadium Authority. There was confusion that "piggybacking" meant that the Stadium Manager could use the City's open agreement, which is not allowed. A separate agreement is always required.

Stadium Authority did not receive any follow up information from the Stadium Manager regarding the status of the agreement or agenda report for four months, until September 2020.

September 17, 2020 Quarterly Meeting: Stadium Manager accused Stadium Authority staff of failing to process their request for the LCPtracker agreement (Attachment 4). Stadium Authority clarified that since May 2020, based on our meeting notes, the Stadium Manager was to follow up with the Stadium Authority with how it would like to proceed and that they were to provide additional information. This was the reason for inaction on the part of the Stadium Authority during the time. Stadium Authority also mentioned that Stadium Manager had been silent on the matter for four months, despite noted that there had been several monthly meetings since May without any mention of the LCPtracker agreement. Stadium Authority also asked the Stadium Manager to provide an explanation about the request to issue a \$25,000 agreement when the contract value was \$13,180 and that should have been clarified in the report. Stadium Manager had a different understanding

about the May 2020 discussion and Stadium Authority replied that Stadium Manager did not need to let four months pass without mentioning their concerns, if this was important to the Stadium Manager it could have been placed on agendas and/or addressed within the four months. Stadium Authority stated that it would take the item to a next meeting as submitted in May 2020. In accordance with the Board's direction on August 25, 2020 to prepare minutes for all future Stadium Authority and Stadium Manager staff meetings, the minutes for this meeting are included in Attachment 4.

September 18 - October 7, 2020 Emails: Stadium Authority staff and the Stadium Manager exchanged four emails regarding the Stadium Authority's request for more information pertaining to the agreement and agenda report (Attachment 5). Compliance Manager Larry MacNeill makes several statements about Stadium Authority "failing" to implement the accounting system for a stand-alone accounting system (Financial Management System). *(Note: As a separate matter on the Stadium Authority Board Agenda, the Stadium Authority is requesting approval for the procurement of the stand-alone accounting system.)*

Further, an accounting system and certified payroll reporting system to comply with prevailing wage laws are systems that the Stadium Manager should have had in place six years ago as part of its compliance with provisions in the Management Agreement. Section 2.4 "Pre-Opening Obligations" which requires several advanced efforts that the Stadium Manager shall take, including: *requiring procedures and systems for accounts payable, receivable, etc.; computer hardware and software needs and requirements; and, perform obligations in conformity with the standard to which an operator of a comparable multi-purpose public sports, public assembly, exhibit and entertainment facility would operate.*

Stadium Authority concerns with the Stadium Manager's request are as follow:

1. Stadium Manager's request for a \$25,000 contract for services priced at \$13,180 (authorization for expenditure of 90% above contract value).

Stadium Manager's report requests \$25,000 expenditure of public funds, but the agreement cost is \$13,180, as reflected in their report. Stadium Manager's request is 90% higher than the actual contract cost, and without any documented explanation in the agreement for how the additional public funds will be expended.

As a common practice, a contract contingency is generally established in the range of 5-10% of the contract value for unanticipated expenditures to implement the contracted project or services. For this contract, it would be common to set aside a contract contingency in the amount of \$659 to \$1,318. A request for 90% above contract value, without any support for the use of public funds, is not permitted and unusual.

2. Mathematical/Typographical Errors in the Agenda Report or Agreement

There are uncorrected mathematical/typographical errors between:

- a) Cost of services outlined under Section 6.1 Services Licensed & Price of the LCPtracker Agreement (C, H-2, and W) and Exhibit A: Schedule One
- b) Stadium Manager's agenda report

Stadium Manager states in the report that the start-up fee is priced at \$5,950 and that services for year one total \$13,180. However, Exhibit A: Schedule One prices the start-up fee at \$7,950 and the total cost of services at \$15,180. Stadium Manager has not provided the correct value of the contract, nor corrected its documentation. The breakdown of the services and costs are outlined below:

Table 1: Break down of LCPtracker Costs from Agreement

Services Under Exhibit A: Schedule One	Costs
C: Start Up Fee	\$7,950
H-2: Bulk Project License Fee for Construction Cost Up to \$10M	\$6,700 w/ 10% discount = \$6,030
W: Flat Rate Travel Fee	\$1,200
Total Cost of Services	\$15,180

3. Undocumented Scope of Work

When asked to provide more information about the \$25,000 public fund expenditure request, the Stadium Manager explained in a September 24 email,

While the contingency amount would allow for the costs associated with the potential integration of the software with the accounting system eventually selected by the SCSA, we have no interest in wasting our time jumping through your bureaucratic hoops. -- Compliance Manager Larry MacNeil

The agreement for the accounting system does not include pricing or a scope of work for LCPtracker integration. When conferring with the Stadium Authority procurement review team for the Financial Management System (aka accounting system) RFP process, the integration of both systems was not part of prior conversations. Compliance Manager MacNeil was an evaluator for the Financial Management System RFP process and should be aware that it was not included as part of the procurement scope of work.

The LCPtracker agreement also does not contain any language and pricing for the integration services with the accounting system. Compliance Manager only recently stated that the request is for software integration with the accounting system and included as part of Exhibit A: Schedule One, Item V: Development and customization of services. There is no mention of this scope of work in Section 6.1 of the agreement, which outlines the actual services for the agreement. The section referred to is for customization which is configuration, tailoring, and adjustments for an agency's software preferences. Integration scope of work, in this case, is to make sure that two systems work together and successfully interface with one another. The integration scope of work should be very clearly outlined as part of this public contract.

Mr. MacNeil's response reflects a consummate lack of understanding of proper purchasing documentation. Even if the reason for the extremely unusual 90% is to provide for a possible integration, a brief description in both the contract and the draft report would not be considered a "bureaucratic hoop"; rather, such transparency in documentation is required to prevent waste of public funds and possibilities for kick-backs.

4. Undefined Extension of Agreement

Under Provision B in Exhibit A: Schedule Two of the LCPtracker agreement, the agreement renews annually, on an automatic basis each year on the anniversary date of this contract, unless either party gives timely written notice that it does not want such renewal.

While authority for extension options are a common feature in public contracts, under the current Stadium Authority Board direction and City Code, the agreement should reflect options with the appropriate funding for Board approval. Specifically, Chapter 17.30 in the Santa Clara City Code states the following:

Any of the Executive Director's authority may be delegated to contractors with the Stadium Authority; provided, that the contract delegating such authority is approved by the Stadium Authority Board and the procurement performed by the **contractor is within the limits of a budget approved by the Stadium Authority Board for the year in which the contract is awarded.** [Section 17.30.010]

(a) **"Contract amount" means the value of the entire contract, including any option...**and
(2) in the case of multi-year contracts covering years for which a budget has not yet been adopted **shall not include amounts due in subsequent years that are conditioned on approval of the appropriate year's budget.** [Section 17.30.020]

5. Inappropriate Removal of Provisions Requiring Compliance with Brown Act, Public Records Act, and Other Applicable Federal or State Laws

City/Stadium Authority staff provided a copy of its agreement with LCPtracker to facilitate the Stadium Manager's "piggybacking" of the agreement. In review of the Stadium Manager's proposed agreement, references of the requirement to comply with California's Ralph M. Brown Act, Public Records, and other applicable federal and state laws that were present in the City's agreement with LCPtracker have been removed from Sections 7.2 and 10.2. Specifically, the language in the City's agreement reads:

Section 7.2 - Subject to the provisions of the California Ralph M. Brown Act and the Public Records Act, and any other federal or state laws that may apply, LCPtracker's Client promises that it will not disseminate, distribute, share, copy send, or in any other manner of communicate, and that it will never allow anyone else to disseminate, distribute, share, copy, send, or in any other manner of communicate, Confidential Information to anyone other than someone who absolutely must have such Confidential Information in order for the service defined in Section 6.1 to operate.

Section 10.2 - Subject to the provisions of the California Ralph M. Brown Act and the Public Records Act, and any other federal or state laws that may apply, LCPtracker's client agrees not to publish, give, share, disclose, or in any other way provide LCPtracker's proprietary information to anyone. LCPtracker's client further agrees to take all reasonable steps necessary to prevent the publication, giving, sharing, disclosure, or any other provision of its proprietary information to anyone.

As LCPtracker's agreement with the City contains these provisions, it is reasonable to conclude that the vendor agrees with these requirements for public contracts. It appears that the Stadium Manager has either initiated or allowed for the removal of these important provisions without disclosure to the Stadium Authority, which is entirely inappropriate given that this is a public contract.

Moreover, the lack of disclosure and inappropriate removal of these important provisions, constitute a violation of Section 2.2 of the First Amendment to the Management Agreement, which reads:

If the Stadium Manager desires at any time, in furtherance of the purchasing guidelines described in Paragraph 2.1 above or otherwise, **to enter into any contract on behalf of the Stadium Authority with terms or conditions that materially differ from the then approved Standard Procurement Agreements, the Stadium Manager shall obtain the Executive Director's prior approval of such terms or conditions**, which approval shall not be unreasonably withheld, conditioned, or delayed.

Stadium Authority Board should be extremely concerned that the Stadium Manager did not disclose the removal of these important provisions that require compliance with State and local laws that are common for public contracts. Had Stadium Authority staff not reviewed closely the Stadium Manager's proposed LCPtracker agreement, this would not have been discovered. Failure to request approval of these changes further indicates a failure to comply with standard public purchasing requirements, willingness to mislead the Stadium Authority with these very important provisions, and a lack of good faith. This action alone provides good cause to reject the approval of the agreement and reflects ongoing problems with the Stadium Manager to be transparent with taxpayers and Stadium Authority with how it has managed the public's business. In this case, prevailing wage compliance and reporting has been a subject matter that the Stadium Manager has produced strong evidence that it has failed to comply with the law since the opening of the Stadium.

6. Undocumented Source of Funding/Failure to Request Budget from Board

In addition to the comments in section 4 of this report, Stadium Manager did not identify a source of funding in the approved budget for the LCPtracker agreement. The FY 2020/2021 Stadium Authority Operating and Capital budget included an extensive inventory of expenditures, including the accounting system. Stadium Manager did not seek a request of public funds for LCPtracker as part of the annual budget process. When the Stadium Authority inquired about correcting and completing the report specifically for Fiscal Impact information, Stadium Manager declined to revise the agenda report (September 24 email in Attachment 5), stating that, ***"As I have previously indicated, the preparation of Board Reports is not within the scope of Stadium Manager's contract. That is the responsibility of City Staff."***

Stadium Authority disagrees fully with Stadium Manager's response. Stadium Manager is responsible for working with the Stadium Authority for developing an accurate budget for presenting to the Board for approval and its documentation should be complete: its omission of either requesting funds or disclosing its need for such system further demonstrates fiscal mismanagement. Stadium Manager is obligated to communicate with the Board accurate, complete, and legally compliant information. Stadium Manager's refusal to do so is negligent and

not reflective of the expertise that it represented it had.

7. Misunderstanding of Public Sector “Piggybacking” Procurement Practice

Stadium Manager’s agenda report includes the following misleading statement, “***Nonetheless, the Stadium Manager reached out to the Executive Director of SCSA to piggyback off the City of Santa Clara’s agreement with LCPtracker Inc. The Stadium Manager was advised to initiate their own agreement.***”

At the time that the report was submitted, it was evident to the Stadium Authority that the Stadium Manager believed that “piggybacking” meant to use the City’s contract to obtain use of LCPtracker services. Concern is that the Stadium Manager is reflecting that development of a separate agreement for the Stadium Authority as burdensome or bureaucratic, but it is simply a basic requirement as part of public contracting. Stadium Manager represented that past Administrations would allow for some work to be completed under City agreements and, at the May 21 meeting, it was explained that was an improper act and would not be continued.

Appropriately, Stadium Authority advised Stadium Manager to enter into a separate agreement in May 2020 and that the Stadium Manager could piggyback the City’s LCPtracker agreement. It does not appear that the Stadium Manager understands the use of this common public contracting process.

Separately, and at the Stadium Manager’s request, Stadium Authority staff has met with the Stadium Manager’s procurement staff twice (since May 2020) to advise them of public procurement practices, provide soft copies of procurement templates and materials for the Stadium Manager to use to facilitate their procurements, and respond to procurement questions. The Stadium Authority has gone over and beyond providing resources and materials for the Stadium Manager to perform.

Stadium Authority’s concerns are completely valid and highlight how the Stadium Manager is not capable or experienced in properly procuring services on behalf of the Stadium Authority. This particular contract is also glaring evidence that the Stadium Manager has not been properly complying with State Prevailing Wage Law for the first six years of its duties as Stadium Manager. This also further confirms the Stadium Authority’s valid concerns with how the Stadium Manager has managed the public’s funds over the past years, as the Stadium Authority found these significant errors and omissions in even this low dollar-value agreement.

ENVIRONMENTAL REVIEW

The actions being considered do not constitute a “project” within the meaning of the California Environmental Quality Act (“CEQA”) pursuant to CEQA Guidelines section 15378(a) as it has no potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment or pursuant to CEQA Guidelines section 15378(b)(4) in that it is a fiscal activity that does not involve any commitment to any specific project which may result in a potential significant impact on the environment.

FISCAL IMPACT

See Section titled “Undocumented Source of Funding/Failure to Request Budget from Board.”

COORDINATION

This report has been coordinated with the Stadium Authority Counsel and Treasurer's Office. The City's Procurement Manager has also reviewed the Stadium Manager's documentation and confirmed agreement with the Stadium Authority's findings.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall Council Chambers. A complete agenda packet is available on the City's website and in the City Clerk's Office at least 72 hours prior to a Regular Meeting and 24 hours prior to a Special Meeting. A hard copy of any agenda report may be requested by contacting the City Clerk's Office at (408) 615-2220, email clerk@santaclaraca.gov <<mailto:clerk@santaclaraca.gov>> or at the public information desk at any City of Santa Clara public library.

ALTERNATIVES

1. Accept the Stadium Authority's report on its concerns regarding the Stadium Manager's request to execute an agreement with LCPtracker;
2. Reject the Stadium Authority's report on its concerns regarding the Stadium Manager's request to execute an agreement with LCPtracker and approve Stadium Manager's report as submitted;
3. Deny Stadium Manager's request to execute the LCPtracker agreement because of its failure to correct the following errors:
 - (a) Request for \$25,000 contract for services priced at \$13,180 (authorization for expenditure of 90% above contract value);
 - (b) Mathematical/typographical errors in the agenda report or agreement;
 - (c) Undocumented scope of work;
 - (d) Undefined extension of agreement;
 - (e) Inappropriate removal of provisions requiring compliance with Brown Act, Public Records Act, and other applicable federal or state laws;
 - (f) Undocumented source of funding/failure to request budget from Board; and
 - (g) Misunderstanding of public sector "piggybacking" procurement practice; or
4. Any other action taken by the Stadium Authority Board.

RECOMMENDATION

1. Accept the Stadium Authority's report on its concerns regarding the Stadium Manager's request to execute an Agreement with LCPtracker; and
3. Deny Stadium Manager's request to execute the LCPtracker agreement because of its failure to correct the following errors:
 - (a) Request for \$25,000 contract for services priced at \$13,180 (authorization for expenditure of 90% above contract value);
 - (b) Mathematical/typographical errors in the agenda report or agreement;
 - (c) Undocumented scope of work;
 - (d) Undefined extension of agreement;
 - (e) Inappropriate removal of provisions requiring compliance with Brown Act, Public Records Act,

and other applicable federal or state laws;

(f) Undocumented source of funding/failure to request budget from Board; and

(g) Misunderstanding of public sector “piggybacking” procurement practice.

Prepared by: Christine Jung, Assistant to the City Manager (Executive Director)

Reviewed by: Deanna J. Santana, Executive Director

ATTACHMENTS

1. May 5, 2020 Letter
2. May 12, 2020 Letter
3. May 21, 2020 Monthly Meeting Agenda
4. September 17, 2020 Quarterly Meeting Minutes
5. September 18 - October 7, 2020 Emails