



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** June 6, 2023  
**TO:** Paul Buddenhagen, Executive Director  
**FROM:** Pedro Jimenez, Assistant City Manager  
**SUBJECT:** Resolution Of The City Of Emeryville As Successor Agency To The Emeryville Redevelopment Agency Approving The Plans And Specifications For The FMW Site Demolition And Excavation Project, Project No. 23 EPW003, Prepared In Accordance With The Final Feasibility Study / Remedial Action Plan, As Approved By The California Environmental Protection Agency, Department Of Toxic Substances Control On April 12, 2023, Delegating Authority To The City Engineer To Make And Approve Any Changes Or Revisions To The Remediation Project Plans And Specifications As May Subsequently Be Desired Or Required, And Authorizing Staff To Solicit Bids From Contractors Prequalified To Bid The Remediation Project (CEQA Determination: Consideration Of The Initial Study / Mitigated Negative Declaration Prepared And Approved By DTSC)

## RECOMMENDATION

Staff recommends that the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency ("**Successor Agency**") adopt the attached resolution approving the plans and specifications for the remediation of the former Marchant/Whitney Tool Site located at 5679 Horton Street, Emeryville, and identified herein as the FMW Site Demolition And Excavation Project, Project No. 23 EPW003, which have been prepared consistent with the preferred remedial alternative set forth in the Final Feasibility Study/Remedial Action Plan ("**FS/RAP**"), dated April 2023, and approved by the California Environmental Protection Agency, Department of Toxic Substances Control ("**DTSC**") on April 12, 2023 (the "**Project**"). The resolution provides for the delegation of authority to the City Engineer to make and approve any changes or revisions to the plans and specifications as may subsequently be desired or required.

The resolution also authorizes staff to solicit bids from the contractors that have been prequalified to bid on the FMW Site Demolition And Excavation Project, Project No. 23 EPW003, in accordance with Resolution No. SA07-23, adopted by the Successor Agency on March 21, 2023.

Finally, as a responsible agency under the provisions of the California Environmental Quality Act ("**CEQA**"), the resolution includes a finding that the Successor Agency has considered the environmental effects of the Project as shown in the Initial Study/Mitigated Negative Declaration ("**IS/MND**") approved by DTSC, as lead agency, on April 12, 2023;

accordingly, staff is directed to file a Notice of Determination in accordance with CEQA Guidelines Section 15075.

## BACKGROUND

The former Emeryville Redevelopment Agency (“**Redevelopment Agency**”) acquired the former Marchant/Whitney Tool Site located at 5679 Horton Street, Emeryville (“**FMW Site**”), in 1999 primarily to facilitate the extension of Horton Street from 53<sup>rd</sup> Street to Haruff Street, as well as the connection with Stanford Avenue, as said roadways are currently configured. Thereafter, the Redevelopment Agency allowed the City to utilize the balance of the FMW Site as a corporation yard for the operations of the Public Works Department. The City’s use of the FMW Site was discontinued in 2012 because of concerns regarding impacts of hazardous substances contamination in soil and groundwater to indoor air within the building on the FMW Site.

The Redevelopment Agency was dissolved effective February 1, 2012, pursuant to the provisions of the Redevelopment Dissolution Act, and all assets and liabilities of the Redevelopment Agency transferred by law to the Successor Agency. Prior to its dissolution, the Redevelopment Agency had embarked on activities to investigate the source of off-site contamination impacting South Bayfront Site B (“**Site B**”). The settlement agreement between the Redevelopment Agency and Chevron Corporation resolving the Redevelopment Agency’s claims against Chevron for contamination at Site B obligated the Redevelopment Agency to perform or cause others to perform the remediation of contamination migrating to Site B from off-site sources. The obligations of the Redevelopment Agency set forth in the Settlement Agreement with Chevron are considered an enforceable obligation of the Successor Agency in accordance with the provisions of the Dissolution Act. After the dissolution of the Redevelopment Agency, the Successor Agency continued the investigation of the source of off-site contamination impacting Site B, which revealed the FMW Site as a significant contributor to groundwater contamination at Site B. Accordingly, the Successor Agency set about to fulfill its obligations under the Settlement Agreement with Chevron to “perform or cause to be performed” the remediation of contamination migrating to Site B from the FMW Site.

In July 2015, and continuing thereafter, the Successor Agency and City provided notice to the former owners and operators of the FMW Site, pursuant to the Polanco Redevelopment Act and Gatto Act, respectively, of the presence of contamination at the FMW Site. The notice also informed the parties that they are responsible for the presence of the contamination and provided these responsible parties the opportunity to prepare a remedial cleanup plan and to implement the cleanup. None of the responsible parties responded. Accordingly, litigation was instituted against these responsible parties to recover costs incurred by the Redevelopment Agency, Successor Agency and City to remediate the FMW Site.

In spring 2017, the Successor Agency, under the oversight of DTSC, was preparing to approve a cleanup plan for the FMW Site with the goal of commencing remedial activities

in fall 2017. Up to then, the costs of investigative activities at the FMW Site had been paid for as an enforceable obligation of the Successor Agency with funding provided pursuant to an approved Recognized Obligation Payment Schedule (“**ROPS**”). However, funding for this obligation was suddenly denied by the California Department of Finance (“**DOF**”) in connection with the ROPS for the 2017-2018 period, as well as the 2018-2019 period. DOF took the position that the activities of the Successor Agency to remediate the FMW Site, as an obligation arising from the settlement agreement with Chevron relating to Site B, was not an enforceable obligation of the Successor Agency. Thereafter, on May 21, 2019, the Successor Agency sued DOF regarding their determination in Sacramento County Superior Court. On February 27, 2020, the Superior Court ruled in favor of the Successor Agency, finding that the obligation arising under the settlement agreement with Chevron was an enforceable obligation and thus funding for the Successor Agency to remediate the FMW Site was to be restored. Nevertheless, DOF filed an appeal of the trial court’s ruling on April 24, 2020.

During the pendency of the appeal, on August 13, 2020, DTSC issued an Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order (“**Order**”) to the Successor Agency to remediate hazardous substances contamination in soil and groundwater at the FMW Site. The Order requires the Successor Agency to, among other matters, undertake work to finalize the FS/RAP for the FMW Site and then implement the FMW Site cleanup. The Order constitutes an enforceable obligation of the Successor Agency pursuant to Health and Safety Code section 34171(d)(1)(C) of the Redevelopment Dissolution Act and effectively obligated DOF to restore the necessary funding to remediate the FMW Site. Accordingly, issuance of the Order made DOF’s appeal of the trial court decision moot, and thus the litigation between the Successor Agency and DOF was resolved.

## **DISCUSSION**

### *Approval of Remediation Plans and Specifications; Delegation of Authority to City Engineer Regarding Changes/Modifications to Remediation Plans and Specifications*

As noted earlier, the FS/RAP for the FMW Site was approved by DTSC on April 12, 2023. A copy of DTSC’s approval of the FS/RAP and IS/MND is enclosed as Attachment 1. The preferred remedial alternative set forth in the FS/RAP envisions a multi-step process to remediate the FMW Site. The initial stage of remediation includes demolition of the existing building, soil excavation to approximately 5 feet below ground surface (bgs) across the entire FMW Site and 10 feet bgs in a targeted area heavily impacted with volatile organic compounds (“**VOCs**”), off-site disposal, and backfill with imported clean soil/fill. Thereafter, thermal (heat) treatment of soil and groundwater with extraction and treatment of vapor and steam before they are vented into the open air will be implemented. Further, a multi-phase extraction (“**MPE**”) system will be used to extract and treat deeper contaminated groundwater and soil vapor. Treated groundwater will then be discharged to the sanitary sewer system. Soil vapors will be captured and clean air vented. Additional cleanup of groundwater may occur by injection of biological

amendments, if needed. Other protective measures include capping the Site with asphalt, concrete or another form of hardscape as a protective barrier and restricting future land usage with a Land Use Covenant. A vapor intrusion evaluation will be conducted, and a mitigation system may be installed on-site and/or off-site as a contingency depending on the results of the evaluation.

The plans and specifications to implement the first phase of remediation have been developed by EKI Environment & Water, Inc. (“**EKI**”), in coordination with staff, to be consistent with the preferred remedial alternative set forth in the FS/RAP. The plans and specifications are enclosed as Attachment 2 (which will be available to the public by the close of business on Friday, June 2, 2023), and include: a set of seven (7) sheets of plans identifying title sheet and vicinity map, existing site conditions, above-grade demolition, below-grade demolition and excavation for site – overview, below-grade demolition and excavation for site – target elevations, site restoration and grading plan, and sections and details; standard front end construction contract and general conditions for construction contracts; and technical specifications that are tailored to the specialized remediation work to be undertaken.

The first phase of the remediation Project will include the following activities:

- Above grade demolition of an approximately 47,000 square foot (“**sft.**”) concrete tilt-up building with up to approximately 20-foot high wood rafters, recycling of the concrete walls off-site, and disposal or recycling of other demolition debris offsite in accordance with state regulations and Title 8 Chapter 26 of the Emeryville Municipal Code – Construction and Demolition Waste Requirements;
- Managing the removal of hazardous building materials such as lead-based-paint, asbestos containing materials, polychlorinated biphenyls (“**PCBs**”)—containing caulking or equipment (e.g., transformers, capacitors, light ballasts), and/or mercury containing fluorescents light bulbs and thermometers, in accordance with state regulations and Title 8 Chapter 26 of the Emeryville Municipal Code – Construction and Demolition Waste Requirements;
- Excavation of known or potentially contaminated soils across the entire Site (which is approximately 78,000 sft.) to 5 feet below ground surface (bgs) and up to 10 feet bgs in an approximately 1,600 sft. area heavily impacted by VOCs. Soil excavation also includes removal of: (a) the concrete floor slab and associated below grade concrete foundations for the existing building at the Site and (b) below grade historical buried Marchant building features such as concrete slab(s), foundations, utilities (sanitary and storm drains and other potential facilities associated with

manufacturing operations such as sumps), and/or loading dock first encountered at about 1.5 feet bgs;

- Removal and replacement of existing operating utilities in order to accommodate the excavation and removal of soil;
- Performing a portion of the excavation activities of extremely elevated VOC concentrations in soils (approximately 1,600 sft. up to 10 feet bgs), in Level B Personal Protective Equipment (“**PPE**”) within a temporary enclosure with ventilated air treatment in accordance with a Bay Area Air Quality Management District (“**BAAQMD**”) permit and using covered bins for transport and disposal of excavated soils;
- Performing the soil excavation activities, as defined above, in close proximity to occupied commercial buildings and in a densely developed commercial and residential neighborhood;
- Preparing a Noise Mitigation Plan for review and approval by the Successor Agency and the City that specifies best practices to reduce noise and vibration impacts of construction equipment, establishes a program to receive and respond to noise complaints from the local community, and designates a “Noise Disturbance Coordinator”. Implementing the Noise Mitigation Plan during soil excavation and backfilling activities;
- Performing the soil excavation activities, as defined above, subject to monitoring by a qualified archaeologist and tribal monitor. The qualified archaeologist will have the authority to halt and/or redirect excavation work if archaeological deposits or other evidence of cultural resources are encountered;
- Removing piping, underground storage tanks, or other buried building features associated with historical industrial processes that may be present but are currently unknown;
- Managing approximately 1,400 tons of building debris and asphalt and 400 cubic yards of above grade concrete debris in accordance with the City’s Municipal Code Title 8 Chapter 26 - Construction and Demolition Waste Requirements. Transportation and disposal of approximately 2,000 cubic yards of below grade concrete debris (e.g., floor slab and buried building features) at either a municipal landfill or a Class II non-hazardous waste landfill;

- Transportation and disposal of approximately 13,500 tons of excavated soil as non-Resource Conservation and Recovery Act (“RCRA”) hazardous waste; approximately 2,300 tons of soil as RCRA hazardous waste at a Class I hazardous waste landfill; and approximately 10,700 tons of soil as nonhazardous waste;
- Backfill of the excavation areas with clean imported fill material; and
- Equipment and vehicle decontamination; dust, vapor, and odor control; noise and vibration control; construction traffic management control; storm water and dewatering water management.

Pursuant to Emeryville Municipal Code Section 7-7.01 (b), the City Engineer has exclusive authority to approve and exercise discretionary authority as to the plan or design of a construction of, or an improvement to, public property in advance of the construction or improvement. However, because this is a remediation Project of the Successor Agency, not the City, to be certain the Successor Agency will be able to avail itself of the design immunity provided pursuant to Government Code section 830.6, the Successor Agency Board is presented with this item to approve the plans and specifications. Government Code section 830.6 immunizes public entities from liability for a dangerous condition if the condition is a result of a defective design. For design immunity to apply, the design must have been approved by the public entity before construction. Accordingly, it is recommended that the Successor Agency Board approve the plans and specifications on file with the City Clerk’s Office.

Further, as is often the case in construction projects, the need to make changes, revisions, or modifications to the plans and/or specifications will likely arise. To maintain the design immunity in relation to such a modification, it would need to be approved by the Successor Agency. However, once the remediation project is out to bid and thereafter awarded, given the requirements of noticing public meetings, it would be impractical and cause costly delays to have the Successor Agency approve all changes to the plans or specifications that are made or required. Accordingly, consistent with the provisions of the Emeryville Municipal Code as applicable to City projects, the resolution of the Successor Agency includes a delegation of authority to the City Engineer to approve all changes, revisions or modifications to the plans or specifications that are made or required.

#### Approval to Solicit Bids from Pre-Qualified Contractors

On March 21, 2023, the Successor Agency adopted Resolution No. SA07-23 and authorized staff to engage in a process set forth in the Public Contract Code to prequalify contractors for the opportunity to submit a bid on the FMW Site Demolition and Excavation Project, Project No. 23 EPW003. On April 3, 2023, the Successor Agency issued a Request for Pre-Qualification of Bidders (“**Request for Pre-Qualification**”), inviting

contractors to apply for prequalification to bid on the project. Responses to the Request for Pre-Qualification in the form of a Statement of Pre-Qualification Package (“**SOPQ**”) were due on April 28, 2023. Eight prospective bidders submitted SOPQs to EKI, the Successor Agency’s environmental engineer for the Project.

The prospective bidders’ SOPQs were reviewed, and their responses scored pursuant to the scoring rubrics provided in the Request for Pre-Qualification. On May 12 and 15, 2023, MCK Americas, Inc., subconsultant to EKI providing construction management services, contacted references identified by prospective bidders to conduct interviews with randomly selected contacts from at least two completed projects included in the SOPQs. Based on the Successor Agency’s evaluation, the following three highest scoring contractors are pre-qualified to bid (“**Pre-Qualified Contractors**”):

- ENTACT, LLC;
- Innovative Construction Solutions; and
- American Integrated Services, Inc.

The Pre-Qualified Contractors received high scores on Part IV of the questionnaire, *Recent Construction Projects Completed and Personnel Proposed for this Project*, and on the interviews with randomly selected contacts from at least two completed projects identified in the SOPQs.

Staff will provide notice to all prospective bidders of the Successor Agency’s determination. Further, those prospective bidders who are not pre-qualified to bid will be advised of their right to appeal the determination in accordance with the terms and conditions laid out in the Request for Pre-Qualification. The prospective bidders that did not qualify will have seven (7) calendar days following receipt of the Successor Agency’s notice of determination to file an appeal. The appeal will be heard by a panel comprised of Successor Agency and EKI staff (“**Appeal Panel**”) within seven (7) calendar days of receipt of the appeal. The Appeal Panel will render their decision within five (5) calendar days following the hearing, which decision will be final and binding.

Having approved the plans and specifications, it is recommended that the Successor Agency authorize staff to solicit bids from the Pre-Qualified Contractors to undertake the FMW Site Demolition And Excavation Project, Project No. 23 EPW003.

### Consideration of CEQA

As noted above, on April 12, 2023, DTSC, as lead agency in accordance with CEQA, approved the IS/MND and thereafter approved the Final FS/RAP. The IS/MND can be accessed via the link noted below for Attachment 3. Accordingly, DTSC imposed mitigation measures as a condition of approval of the remediation project and thus determined that the remediation project will not have a significant effect on the

environment. A copy of the mitigation measures outlined in the IS/MND and imposed as conditions of approval of the remediation project are set forth in Attachment 4. These mitigation measures are designed to address potential impacts on biological resources (*Mitigation Measure BIO-1*), cultural resources (*Mitigation Measure CULT-1, CULT-2*), hazards and hazardous materials (*Mitigation Measure HAZARDS-1, HAZARDS-2*), noise (*Mitigation Measure NOISE-1, NOISE-2, NOISE-3a, NOISE-3b*), and transportation (*Mitigation Measure TRANS-1*). All mitigation measures have been incorporated into the plans and specifications for the remediation project.

As a responsible agency under the provisions of CEQA, the resolution includes a finding in accordance with CEQA Guidelines Section 15096 that the Successor Agency has considered the environmental effects of the remediation Project as shown in the IS/MND approved by DTSC, as lead agency; accordingly, the resolution directs staff to file a Notice of Determination in accordance with CEQA Guidelines Section 15075.

## **FISCAL IMPACT**

On April 14, 2023, the DOF approved ROPS 2023-2024 which includes and authorizes funding for the first phase of remediation at the FMW Site. Accordingly, as of the commencement of the ROPS 2023-2024 cycle on July 1, 2023, the Successor Agency will have requisite funding available for the anticipated cost of the first phase of remediation.

## **TIMELINE**

Following the approval of this item by the Successor Agency, staff will move forward with the process of notifying the prospective bidders of the determination made by the Successor Agency regarding which have been identified as Pre-Qualified Contractors, conducting any required appeal hearings, soliciting bids from the Pre-Qualified Contractors and evaluating the bids received. It is anticipated that the Successor Agency will be able to award a contract to one of the Pre-Qualified Contractors to implement the first phase of the remediation project at the regular meeting of September 5, 2023. As noted above, the Successor Agency will be in possession of the requisite funding before the award of this contract. Assuming a notice to proceed (“**NTP**”) is issued to the contractor awarded the contract in the later part of September 2023, actual demolition and excavation activities will commence a few months thereafter, likely November/December 2023, and Project completion sixteen (16) months after the NTP in approximately January 2025.



## CONCLUSION

Staff recommends the Successor Agency consider the information contained in this report and all public testimony, and thereafter adopt the enclosed resolution to approve the plans and specifications for the remediation of the FMW Site, delegate authority to the City Engineer to make and approve any changes or revisions to the plans and specifications as necessary or required, authorize staff to solicit bids from the Pre-Qualified Contractors as necessary and required to implement the Order, and direct staff to file a Notice of Determination in accordance with CEQA Guidelines Section 15075.

**PREPARED BY:** Pedro Jimenez, Assistant City Manager

**APPROVED AND FORWARDED TO THE  
CITY COUNCIL OF THE CITY OF EMERYVILLE AS SUCCESSOR AGENCY TO THE  
EMERYVILLE REDEVELOPMENT AGENCY:**



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Paul Buddenhagen, Executive Director

## ATTACHMENTS

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| Attachment 1:    | DTSC Approval of FS/RAP and IS/MND – April 12, 2023   |
| Attachment 2:    | Plans & Specifications - FMW Site Demolition And Excavation Project – Project No. 23 EPW003   |
| Attachment 3:    | Initial Study/Mitigated Negative Declaration<br><a href="https://www.envirostor.dtsc.ca.gov/getfile?filename=/public%2Fcommunity_involvement%2F6871294915%2F8-30-22_FMW-FinalIS-MND_noAppD_signed.pdf">https://www.envirostor.dtsc.ca.gov/getfile?filename=/public%2Fcommunity_involvement%2F6871294915%2F8-30-22_FMW-FinalIS-MND_noAppD_signed.pdf</a> |
| Attachment 4:    | Mitigation Measures – Appendix A to Initial Study/Mitigated Negative Declaration  |
| Draft Resolution |   |