

THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS  
ACTION AGENDA SUMMARY

DEPT: Chief Executive Office

BOARD AGENDA # \*B-2

Urgent

Routine

CEO Concurs with Recommendation YES  NO

(Information Attached)

AGENDA DATE March 31, 2009

4/5 Vote Required YES  NO

SUBJECT:

Approval of Final Completion for Clark and Sullivan Builders, Inc., for the Gallo Center for the Arts Project Using Existing Funds, Approval of a Change Order for Unforeseen Site Conditions and Related Fiscal and Budget Actions to Close Out the Project - Chief Executive Office

STAFF RECOMMENDATIONS:

1. Approve the final completion of the Clark & Sullivan contract for the construction of the Gallo Center for the Arts project; within existing project funding and proceeds, by taking the following actions:
  - a. Approve and accept the final contract with Clark & Sullivan Builders, Inc., of Sacramento, California, as follows:
    1. ORIGINAL CONTRACT \$21,107,000
    2. TOTAL CHANGE ORDERS \$ 1,696,940
    3. FINAL CONTRACT COST \$22,803,940
  - b. Authorize release of retention being held in escrow account for the benefit of Clark & Sullivan Builders in the principal amount of \$2,210,938.80

(Continued on Page 2)

FISCAL IMPACT:

On November 20, 2007, Staff reported to the Board that due to pending litigation, Staff could not at that time make recommendations concerning final close out of the Clark & Sullivan contract for the construction of the Gallo Center for the Arts. All other contracts were fully closed in a timely and satisfactory manner. It was noted that Staff would return to the Board for follow-up close out activity as appropriate. Since then, a settlement of the pending litigation has been negotiated and is pending court approval.

(Continued on Page 2)

BOARD ACTION AS FOLLOWS:

No. 2009-188

On motion of Supervisor Monteith, Seconded by Supervisor Grover

and approved by the following vote,

Ayes: Supervisors: O'Brien, Chiesa, Grover, Monteith, and Chairman DeMartini

Noes: Supervisors: None

Excused or Absent: Supervisors: None

Abstaining: Supervisor: None

1)  Approved as recommended

2)  Denied

3)  Approved as amended

4)  Other:

MOTION:

ATTEST:

Christine Ferraro  
CHRISTINE FERRARO TALLMAN, Clerk

File No.

**STAFF RECOMMENDATIONS: (Continued)**

2. Approve a change order to Clark & Sullivan Builders, Inc., in the amount of \$500,000 for impacts to subcontractors for unforeseen site conditions, funded by funds in the County Treasury for the project and authorize the Auditor to increase appropriations by \$500,000 in the project budget.
3. Approve the Related Fiscal and Budget Actions necessary to close out the Gallo Center for the Arts Project, including:
  - a. Authorize the Auditor Controller to transfer remaining project funds of \$219,796, which represents previous General Fund contributions for the Gallo Project budget, from the Gallo Project budget (fund 2052) to the CEO – Plant Acquisition budget, and increase appropriations in the same amount for approved closeout expenses.
  - b. Authorize the Auditor-Controller to release \$11,154.02, plus any additional accrued interest earnings, remaining in the Central Valley Center for the Arts (CVCA) fund to the CVCA upon project close out.
  - c. Authorize the use of existing appropriations in the Chief Executive Office - Plant Acquisition Budget up to \$140,000 for approved project close out costs and related professional services, to be offset by no less than \$10,350 to be received by the County from W.F. Hayward & Co. as discovery sanctions.

**FISCAL IMPACT: (Continued)**

Upon court approval of the pending settlement, anticipated on April 2, 2009, Staff seeks approval of its recommended actions to close out the Clark & Sullivan contract and the Gallo Center for the Arts Project. The actions recommended by Staff close out the Gallo Center for the Arts Project with the money set aside by the County and the CVCA for the Project. The following recommendations are a series of essentially technical adjustments required to accomplish final close-out, settlement of litigation, and payment obligations.

**Clark & Sullivan Contract Close Out**

The current budget for the Gallo Center for the Arts project is \$39,724,147. The County's contribution to date is \$15,176,889 which includes a \$2.5 million land donation and \$176,889 for the initial feasibility study. The contribution from the County's partner in the project, the Central Valley Center for the Arts (CVCA), is \$23,806,830 and the City of Modesto contribution is \$740,427.54.

Staff recommends the Board approve and accept the final contract with Clark & Sullivan Builders, Inc., of Sacramento, California, as follows:

ORIGINAL CONTRACT	\$21,107,000
TOTAL CHANGE ORDERS	\$ 1,696,940
FINAL CONTRACT COST	\$22,803,940

Staff recommends the Board authorize the release of retention being held in escrow account for the benefit of Clark & Sullivan Builders in the principal amount of \$2,210,938.

The recommended adjustments include \$139,197 in the County contribution toward final project close out costs. There is no additional net fiscal impact to the County, as the funds are presently available in the County's Treasury in funds appropriated for and dedicated the project. The final project total budget will be \$40,224,147, reflective of the adjustments recommended.

#### **Clark & Sullivan Change Order**

Staff seeks Board approval of a change order to Clark and Sullivan Builders, Inc. in the amount of \$500,000 for the impact to subcontractors of the unforeseen site conditions work related to the construction of the Gallo Center for Performing Arts, and to authorize the Auditor Controller to increase appropriations of \$500,000 to the Gallo Project budget. There is no additional fiscal impact to the County, as the funds are presently available in the funds deposited by the Central Valley Center for the Arts into the County's Treasury which were dedicated to the Gallo Center for the Arts Project.

#### **Gallo Project Close-Out**

Staff recommends the Board authorize the Auditor Controller to transfer remaining project funds of \$219,796, which represents previous General Fund contributions for the Gallo Project budget to the Chief Executive Office - Plant Acquisition budget. The Board is also being requested to authorize the release of \$11,154, plus any additional accrued interest earnings remaining in Fund 2053 to the CVCA from funds previously donated by the CVCA to the County for this project.

These adjustments and transfers from funds set aside for the project , along with budgeted funds in the Plant Acquisition budget will cover all final costs and project close out expenses.

With the Board's approval of the recommended actions, the County's overall contribution to the Gallo Center Project will be \$15,316,086. The CVCA's overall contribution will be \$24,167,634, and the City of Modesto's overall contribution to the

project will be \$740,427, for a total project budget of \$40,224,147. Actual costs through close out are \$40,201,531, which includes the \$2,500,000 land donation.

## **DISCUSSION:**

This agenda report recommends appropriate actions to close out the final contract for the Project with general contractor Clark & Sullivan Builders, Inc., as discussed below.

### **Clark and Sullivan Contract Close Out**

The Gallo Center for the Arts was a phased construction project. On November 21, 2006, the Board of Supervisors approved a revised project budget for the Gallo Center effort to include the remaining phases of equipment, construction furnishings and project completion expenses.

On May 25, 2004, based on Board of Supervisors approval, the Project Manager issued a Notice to Proceed to Clark & Sullivan Builders, Inc., the general contractor on the project. Substantial completion was granted as of September 7, 2007. The original contract amount was \$21,107,000, and change orders in the amount of \$1,196,940 have been approved as of the date of this report.

Although the grand opening of the Gallo Center for the Arts took place on September 27, 2007, final close out of the Clark & Sullivan contract required resolution of litigation that entailed claims against the County by Clark & Sullivan and its subcontractors, as well as claims by the County against Clark & Sullivan. For example, on June 13, 2008, Clark & Sullivan transmitted its final invoice for the project, seeking an additional payment of \$8,705,791.25 for itself and \$2,971,365 for its subcontractors, including \$491,029.06 in claimed subcontractor losses relating to differing site conditions encountered at the outset of the project (see discussion below).

Cost records obtained during the litigation indicated that Clark & Sullivan spent \$7 million in excess of its contract price, to complete the project. Subcontractor cost records obtained during the litigation indicated subcontractors incurred over \$600,000 in costs in excess of their contract price, to complete the project. These costs are exclusive of profit and overhead.

Despite these losses alleged by Clark & Sullivan and its subcontractors on the project, the County, with the assistance of mediator Hon. Richard Silver (Ret.), was able to negotiate a settlement that entailed payment by the County of the contract balance to Clark & Sullivan, including the release of retention monies presently being held in an escrow account; payment by the County of an amount to compensate the subcontractors for their losses incurred as a result of differing site conditions encountered at the outset of the project and assignment by the County to structural

steel subcontractor Olson & Co. of certain County rights should further action be pursued. A County-required condition of the settlement was payment by Clark & Sullivan to its subcontractors of their contract balance and retention for the Project from the settlement proceeds.

In exchange for the County's payments of these amounts, and after Court approval of the proposed settlement terms, Clark & Sullivan has agreed to dismiss its lawsuit against the County and to issue release bonds to the County for the subcontractor actions still pending against the County. Clark & Sullivan was not able to negotiate a settlement of the claims against it by subcontractor W.F. Hayward; accordingly, those claims will continue without County involvement. The County will, however, take those actions necessary to collect \$10,350 from W.F. Hayward & Co. as discovery sanctions previously awarded by the Court in this matter.

A complete recapitulation of this contract, including a summary, change order log, record documents, certificates, guarantees and warranties, can be found in the Project Close-Out Report prepared by the Construction Manager. Staff will authorize the release of retention in accordance with the Public Contract Code.

Each of the settlement actions is discussed in more detail below.

### **Final Contract Closeout**

Clark & Sullivan seeks payment of its remaining contract balance in the amount of \$491,052. County Staff has verified the accuracy of this amount. This amount is presently being held in the County's construction fund for the Gallo Center for the Arts, and its payment was being withheld pending resolution of the litigation between the County and Clark & Sullivan. Payment of this amount will continue to be conditioned upon court approval of the settlement terms and Clark & Sullivan's execution of the settlement agreement and issuance of release bonds for all outstanding subcontractor actions against the County.

### **Release of Retention**

In accordance with the approved Construction Contract, and as is routine in such construction projects, as part of its payments to Clark & Sullivan Builders, Inc. for The Gallo Center for the Arts, the County has deposited \$2,210,938.80 (10% retention) in construction retention funds into an escrow account opened jointly by Clark & Sullivan and the County that is required to remain open until project closeout. As part of the negotiated settlement and resultant close out of Clark & Sullivan's contract, it is recommended that authorization be granted to release this amount to Clark & Sullivan in accordance with the Public Contract Code. Pursuant to the escrow agreement, County Staff must transmit a letter to the Escrow Agent, notifying the Escrow Agent that

the County is releasing any claim it may have to the amounts held in the Escrow Account and authorizing the withdrawal of those amounts by Clark & Sullivan. Release of the retention amounts held in the Escrow Account will continue to be conditioned upon court approval of the settlement terms and Clark & Sullivan's execution of the settlement agreement and issuance of release bonds for all outstanding subcontractor actions against the County.

#### **Change Order 34A:**

During the initial phase of the project, the contractor, Clark & Sullivan Builders, Inc., encountered concrete and debris buried in the project site. As reported by the Staff to the Board on September 27, 2005, under California law, the County is responsible for the costs attributable to "unforeseen site conditions."

The Board approved Change Order 34 on September 27, 2005 to compensate Clark & Sullivan for its own impacts due to the unforeseen site conditions at the Project, including buried slabs, walls, debris, and an old fuel tank. The September 27, 2005 Board report contained extensive background concerning the discovery, investigation, and recommended resolution of the unforeseen site conditions. The initial settlement of the contractor's original request for compensation for this work in September, 2005, covered only the general contractor's craft labor, and did not cover subcontractor requests regarding this issue, most of which had not yet been received at that time.

As a result of extensive settlement negotiations and in light of information obtained by the County regarding subcontractor losses, an increase in the contract price of \$500,000 is appropriate. It is the County's obligation to pay the costs of unforeseen site conditions. Had these conditions been known earlier, they would have been included in the original scope of work and contract.

Change Order 34A compensates Clark & Sullivan for the impacts to its subcontractors of the unforeseen site conditions. Staff recommends the Board of Supervisors approve Change Order 34A in the amount of \$500,000. Resolution of this matter as the subcontractor portion of Change Order 34 ensures that the subcontractors will be compensated for their contract balance and retention.

#### **POLICY ISSUES:**

The Board of Supervisors has the responsibility for final acceptance of capital improvement projects. This project promotes the Board of Supervisors' priorities for a strong local economy and effective partnerships.

Approval of Final Completion for Clark and Sullivan Builders, Inc., for the Gallo Center for the Arts Project Using Existing Funds, Approval of a Change Order for Unforeseen Site Conditions and Related Fiscal and Budget Actions to Close Out the Project - Chief Executive Office  
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**STAFF IMPACTS:**

Staff from the Chief Executive Office Capital Projects division is dedicated to the successful completion of the Gallo Center for the Arts.





Stanislaus County Capital Projects  
825 12<sup>th</sup> Street, Modesto, CA 95354  
Phone: (209) 525-4380 FAX: (209) 525-4385

**TRANSMITTAL**

**TO:** Liz King, BOS

**SUBJECT:** GALLO CENTER FOR THE ARTS

**DATE:** 5/22/09

We are sending you \_\_\_ *attached* \_\_\_ *under separate cover* the following material:

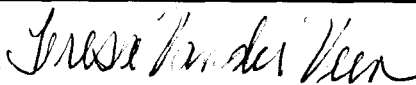
- |   |                                       |  |
|---|---------------------------------------|--|
| <input type="checkbox"/> Shop Drawings  | <input type="checkbox"/> Change Order | <input type="checkbox"/> Specifications    |
| <input type="checkbox"/> Copy of Letter | <input type="checkbox"/> Plans        | <input type="checkbox"/> Computer Printout |
| <input type="checkbox"/> Prints         | <input type="checkbox"/> Samples      | <input type="checkbox"/> Updates           |

COPIES	DATE	DESCRIPTION
1		Court Filed Request for Dismissal of Case 612057, Clark & Sullivan Builders, Inc vs County of Stanislaus, et al.

**REMARKS:**

For your files with Board Item B-2, 3/31/09.

COPIES: File AB 2.1.1 (4130)  
File AB 9.2  
File EB 23.129

SIGNED:   
Teresa Vander Veen

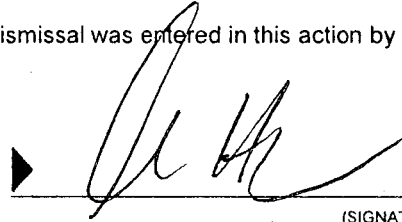
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): Eileen M. Diepenbrock (SBN 119254) Chris A. McCandless (SBN 210085) Diepenbrock Harrison 400 Capitol Mall, Suite 1800 Sacramento, CA 95814 ATTORNEY FOR (Name): CLARK & SULLIVAN BUILDERS, INC., Plaintiff	TELEPHONE NO.: (916) 492-5000 FAX NO.: (916) 446-4535	FOR COURT USE ONLY
Insert name of court and name of judicial district and branch court, if any: SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS		
PLAINTIFF/PETITIONER: CLARK & SULLIVAN BUILDERS, INC. DEFENDANT/RESPONDENT: COUNTY OF STANISLAUS, et al.		
<b>NOTICE OF ENTRY OF DISMISSAL AND PROOF OF SERVICE</b> <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Breach of Contract		CASE NUMBER: 612057 [Lead Case] consolidated with Case Nos. 623288 and 627977

TO ATTORNEYS AND PARTIES WITHOUT ATTORNEYS: A dismissal was entered in this action by the clerk as shown on the Request for Dismissal. (Attach a copy completed by the clerk.)

Date: May 8, 2009

Chris A. McCandless

(TYPE OR PRINT NAME OF  ATTORNEY  PARTY WITHOUT ATTORNEY)



(SIGNATURE)

**PROOF OF SERVICE**

1. I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is: 400 Capitol Mall, Suite 1800 Sacramento, CA 95814

2.  I served a copy of the Notice of Entry of Dismissal and Request for Dismissal by mailing them, in a sealed envelope with postage fully prepaid, as follows:
- a.  I deposited the envelope with the United States Postal Service.
  - b.  I placed the envelope for collection and processing for mailing following this business's ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
  - c. Date of deposit: May 8, 2009
  - d. Place of deposit (city and state): Sacramento, CA
  - e. Addressed as follows (name and address): see Attachment 2e for Service List

3.  I served a copy of the Notice of Entry of Dismissal and Request for Dismissal by personally delivering copies to the person served as shown below:

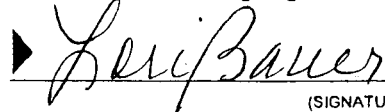
Name:	Date:	Time:	Address:
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4. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: May 8, 2009

Lori Bauer

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

ATTACHMENT 2e – Service List

Eric J. Firstman, Esq.  
Deirdre Joan Cox, Esq.  
Richard E. Elder, Esq.  
Wulfsberg Reese Colvig & Firstman  
300 Lakeside Drive, 24th Floor  
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Chino Hills, CA 91709  
Telephone: (909) 548-4444  
Facsimile: (909) 548-4449  
*Attorneys for W.F. Hayward Co., Inc.*

STANISLAUS COUNTY CIV 110  
SUPERIOR AND MUNICIPAL COURT

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):  
 Eileen M. Diepenbrock (SBN 119254) Chris A. McCandless (SBN 210085)  
 Diepenbrock Harrison  
 400 Capitol Mall, Suite 1800  
 Sacramento, CA 95814

TELEPHONE NO.: (916) 492-5000  
 FAX NO.: (916) 446-4535

ATTORNEY FOR (Name): CLARK & SULLIVAN BUILDERS, INC., Plaintiff

FILED FOR COURT USE ONLY BY FAX

Insert name of court and name of judicial district and branch court, if any.  
**SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS**

PLAINTIFF/PETITIONER: CLARK & SULLIVAN BUILDERS, INC.

DEFENDANT/RESPONDENT: COUNTY OF STANISLAUS, et al.

**REQUEST FOR DISMISSAL**

Personal Injury, Property Damage, or Wrongful Death  
 Motor Vehicle  Other  
 Family Law  
 Eminent Domain  
 Other (specify): Breach of Contract

CASE NUMBER:  
 612057 [Lead Case]  
 consolidated with Case Nos.  
 623288 and 627977

- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -

1. TO THE CLERK: Please dismiss this action as follows:

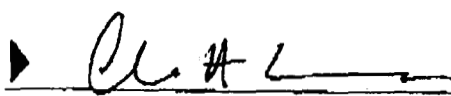
- a. (1)  With prejudice (2)  Without prejudice
- b. (1)  Complaint (2)  Petition
- (3)  Cross-complaint filed by (name): Clark & Sullivan (Case No. 623288) on (date): August 15, 2008
- (4)  Cross-complaint filed by (name): Clark & Sullivan (Case No. 627977) on (date): August 15, 2008
- (5)  Entire action of all parties and all causes of action
- (6)  Other (specify):\*

Date: April 21, 2009

Chris A. McCandless

(TYPE OR PRINT NAME OF  ATTORNEY  PARTY WITHOUT ATTORNEY)

\*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.



(SIGNATURE)

Attorney or party without attorney for:

- Plaintiff/Petitioner  Defendant/Respondent
- Cross-complainant

2. TO THE CLERK: Consent to the above dismissal is hereby given.\*\*

Date:

(TYPE OR PRINT NAME OF  ATTORNEY  PARTY WITHOUT ATTORNEY)

\*\* If a cross-complaint or Response (Family Law) seeking affirmative relief is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).



(SIGNATURE)

Attorney or party without attorney for:

- Plaintiff/Petitioner  Defendant/Respondent
- Cross-complainant

(To be completed by clerk)

- 3.  Dismissal entered as requested on (date):
- 4.  Dismissal entered on (date): as to only (name):
- 5.  Dismissal not entered as requested for the following reasons (specify):
- 6.  a. Attorney or party without attorney notified on (date):
- b. Attorney or party without attorney not notified. Filing party failed to provide  a copy to conformed  means to return conformed copy

Date:

Clerk, by \_\_\_\_\_, Deputy

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