

AGENDA ITEM 5.0

California Cultural and Historical Endowment Board Meeting
8/23/2012

STAFF REPORT

GRANTEE:	City Of Oakland, Office of Neighborhood Investment
PROJECT:	Oakland Fox Theater
LOCATION:	Oakland
PROJECT SUMMARY:	Grantee is making a retroactive request for a material change to authorize work that is different than what was requested in the original grant application and which has already been completed.
FUNDING RESERVED:	\$500,000
FUNDING RESERVATION DATE:	04/14/2010
FUNDING APPROVAL DATE:	06/22/2010
IN GRANT AGREEMENT?:	Yes
GRANT AGREEMENT TERM:	03/31/2011-08/31/2011
FUNDING ROUND:	Funding Round 4

BACKGROUND INFO

The Fox Theater, originally opened in 1928, is one of the Bay Area's best surviving examples of an early 20th Century movie palace. Inspired by the Brahman Temples of Northern India, with brick and terra cotta exterior, an elaborately tiled 115 foot tower dome and exotic Hindu and Moorish ornamentation, the Fox had no discriminatory policies towards its patrons which was unusual for the time.

CCHE Round 4 funds were awarded to the Oakland Redevelopment Agency, now the City of Oakland, by the CCHE Board on June 22, 2010, for finishing historical touches of the interior and exterior of the theater's historic wraparound building.

In January 2012, CCHE staff asked the City of Oakland to address ongoing communication and submission issues. The City indicated that it proposed to change the work plan to include work that had already been completed to the interior of two of the four wraparound buildings that are part of the exterior of the Oakland Fox Theater. The two buildings in question include restaurant space on 18th and Telegraph Street and space known as "V.I.P." space. The work plan revision included building improvements for restaurateur tenants, rather than the "historic, finishing work" described in the original grant application.

In March 2012, CCHE Executive Director Mimi Morris, Grant Manager Francelle Phillips, and Project Manager Diane Sousa and City of Oakland Project Manager Patrick Lane discussed the proposed work plan revisions and CCHE learned that the City of Oakland had already authorized improvements made by the tenants to the two buildings during the time period: March 2010-March 2012.

CCHE learned that the improvements were not necessarily made in accordance with CCHE requirements, terms and conditions, nor according to the standards of the Secretary of the Interior for the Treatment of Historic Buildings. (See attached photos.)

CCHE advised the grantee that the completed work done on the restaurant and "VIP" space was a departure from the

historic improvements proposed in the grant application which had been approved by the CCHE Board in June of 2010. CCHE further advised the grantee that their grant had expired last August and that the work which was performed was done without the consent of the board and that reimbursement would not be possible without Board approval of a material change request. CCHE staff advised the grantee that CCHE staff would not be supportive of a material change request in light of the substantial departure from the work included in the original grant proposal and grantee's failure to submit both an acceptable workplan and extension documentation to the CCHE in advance of expending funds.

At the May 31st, 2012, CCHE Board meeting, the City of Oakland made a retroactive request for a material change from the original scope of work included in their grant application which asked for funding to make artistic improvements to the historic wraparound building and requested instead that grant funds be used to reimburse tenant-commissioned renovations that had already been completed for the two leased spaces of the wraparound building.

No action was taken by the Board regarding the grantee's request for a material change. The Board instead returned the issue to staff and to the City of Oakland, requesting the City to communicate well with CCHE and provide all the information regarding the bidding process and invoices so that the Board could better understand the issues and make a decision at the next meeting. The Board directed CCHE staff to review the timing and the nature of the expenditures to determine if any of the costs could be deemed allowable within any framework. The Board asked staff to assess the grantee's compliance with the bidding process.

CCHE subsequently requested that the City of Oakland submit by July 2nd its contractor invoices and documentation demonstrating the competitive bidding process used to select contractors that performed work on the project. On July 3rd, no documentation had been received and staff emailed the City of Oakland to remind them of the deadline for submission. Later that evening a spreadsheet of expenditures was submitted, but there was no documentation submitted in support of a competitive contractor selection process.

On July 19th, CCHE staff Francelle Phillips and Diane Sousa participated in a conference call with City of Oakland staff, Patrick Lane, to discuss Mr. Lane's questions regarding the competitive bid process. Mr. Lane said he was experiencing difficulty obtaining documentation of the competitive bid process under which the tenant selected the contractor(s) for building improvements. CCHE staff relayed to Mr. Lane that CCHE was obligated to support its initial recommendation to the CCHE Board to consider withdrawal of the City of Oakland's grant approval due the grantee's noncompliance with the grant's requirements and terms and conditions.

On August 15th, Patrick Lane submitted some documentation as evidence of a competitive contractor selection process. The documentation consisted only of a listing of several vendors and a series of recent internal emails attesting to the fact that there had been a competitive selection process. There was no evidence of any bid submissions nor evidence of any evaluations of the various submissions leading up to a selection of a contractor.

REQUEST

The City of Oakland on May 31st retroactively requested a material change from the original scope of work in their grant application which asks for funding to make artistic improvements to the historic wraparound building and requested instead, that grant funds be used to reimburse tenant-commissioned renovations that have already been completed for two leased spaces of the wraparound building.

The City of Oakland's request qualifies as a material change because there has been a change in focus of the project so

that the revised plan no longer reflects the original purpose of the CCHE grant and there has been a change of circumstances affecting the grantee's ability to implement the project.

CCHE has found that all proposed costs are unallowable for the following reasons:

The material change request is non-compliant with Re-granting requirements:

According to CCHE Requirements under Round 4, **"Applicants who apply for CCHE funding are responsible for carrying out the project from its initiation to completion. An applicant cannot delegate or assign the grant or tasks to another entity."** (Round 4 Request for Applications, Appendix One: CCHE Requirements, Page 8 of 9). There have been many requests for assignment of grants during the life of the CCHE, but they have been consistently denied because of this rule which the Board adopted. The purpose of the requirement is to prevent the circumvention of the competitive process and to ensure that the financial capacity of the applicant can be fully assessed.

The City of Oakland requests that CCHE reimburse the City for work that was commissioned and paid for by the grantee's tenants and completed without board approval. The grantee, The City of Oakland, was not responsible for carrying out the project from its initiation to completion but rather relinquished control of project construction and oversight to the subleased tenants (Rudy's Can't Fail Cafe and GASS Entertainment LLC/Another Planet Entertainment) for building improvements.

The material change request is non-compliant with Subcontracting terms and conditions:

According to the Standard CCHE Grant Agreement, **"The Grantee is responsible for all subcontracted work. Subcontractors not specifically identified in the grant application must be obtained using a competitive bidding process, or provide a satisfactory explanation and obtain CCHE staff approval for non-compliance with this requirement. Nothing in this Agreement creates any contractual relationship between any third party contractor and CCHE. All subcontracts must be in writing and must include specific language that established the rights to the auditors of the State to examine the records of the subcontractors relative to the services and materials provided under the subcontractor and/or the grantee agreement."** (R4-37 Grant Agreement, Exhibit D-Special Terms and Conditions on Subcontracts, Page 16; The Grant Agreement was released as part of the original Request for Applications (RFA) in October 2009).

The City of Oakland did not furnish documentation to support that a competitive process was administered for selecting contractors that performed work on the project.

In sum, the allowability of all costs is tainted by the City of Oakland's noncompliance with CCHE's grant management requirements (direct project oversight, substantive control of project construction and completion, and a competitive process for contractor selection). To allow any costs proposed in the material change would require the CCHE Board to reverse previously established CCHE Board policies on sub-granting and subcontracts.

Consistent with the Board's directive, staff analyzed the provided invoices and concluded that, for the grant period, expenses of \$373,500 could be considered allowable if they had complied with the competitive bidding and the regrant restriction.

The competitive bidding requirement adopted by the Board complies with DGS's State Contract Manual rules for

government contracts. The purpose is to create a level playing field for all applicants and to avoid giving any applicant an unfair advantage over others. The documentation provided by the City of Oakland to substantiate that a competitive process was used does not show any submission of bids or comparison of bids. Consequently, it does not support a finding that the grantee followed a competitive process for the selection of the general contractor.

Other Factors to be considered:

In addition to the non-compliance of sub-granting and subcontracting requirements, the material request significantly modifies:

The Project Thread - *If the proposed modification to the original application does not substantially change the scope of the project thread, the project should be allowed to continue in its modified/amended form.* In this instance the proposed tasks significantly deviate from the original intent of the grant application which included finishing historic touches to the exterior and interior of the wraparound building.

Project Access -*If the proposed amendment causes a change in public access to the project because of change of project thread or location, it will be considered by the CCHE Board in making their determination as to whether or not to grant an amendment or terminate the Grant Agreement.* By changing the scope of work from historic finishing touches of the interior and exterior of the wraparound building to renovations of a VIP Space, public access is limited. The VIP space is exclusive, private in nature, and not open to the general public. CCHE's funds must be used for spaces that will be available to the general public for a period of at least 20 years, making any expenditures for improvements to the VIP space with CCHE funds unallowable. It was made clear at the May 31, 2012, meeting that CCHE funds would not be used to reimburse for this private space.

Capacity of Applicant - *Changes in key personnel, budgetary changes involving specific tasks indicated in the work plan, and local, regional zoning or planning laws may should also be considered.* The material change request submitted by the City asks that CCHE reimburse the City for work that was commissioned and paid for by the grantee's tenants not the key personnel assigned to the grant and work plan.

BUDGET DETAIL

The City of Oakland is requesting a budget revision, in the form of a material change request, to revise all previously approved tasks related to the artistic improvements of the historic wraparound building such as: floor and ceiling improvements; fixtures and historic lighting; painting, stenciling, and other wall and column treatments; casework and hardware; restored historic storefronts and permanent hardscape and installation of awnings; and direct the funds instead into the tenant-commissioned renovations that have already been completed: design and consultation costs; construction management; ceiling demolition; faux brick wall painting; Barbie doll display case; benches; lighting wiring; emergency exit lighting; handrails; roof repair; and wet bar. (See Photos.)

	CCHE BUDGET	MATCH
Building and Facility Costs:		
Rudy's Can't Fail Café	\$500,000	\$300,000

STAFF RECOMMENDATION

In keeping with the CCHE Board's policy on sub-granting and contractor selection, CCHE staff recommends that the Board reject the material change requested by the City of Oakland and withdraw the grant award due to the grantee's noncompliance with CCHE grant guidelines and failure to spend CCHE funds on Board approved tasks.

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