



## CITY OF KIRKLAND

### Department of Public Works

123 Fifth Avenue, Kirkland, WA 98033 425.587.3800

www.kirklandwa.gov

## MEMORANDUM

**To:** Kurt Triplett, City Manager

**From:** Pam Bissonnette, Interim Public Works Director  
Dave Snider, P.E., Capital Projects Manager

**Date:** February 21, 2013

**Subject:** Central Way Pedestrian Enhancement Project – Phase II  
Accept Work

### RECOMMENDATION:

It is recommended that City Council:

- Accepts the work on the Central Way Pedestrian Enhancement Phase II Project, as constructed by Kamins Construction of Bothell, WA;
- Establishes the statutory lien period; and
- Approves a net Project budget increase in the amount of \$29,000, as described in the BUDGET paragraphs below, using REET 2 funds as the preferred funding source (Attachment C).

### BACKGROUND DISCUSSION:

The Central Way Pedestrian Enhancements – Phase II Project provided pedestrian and traffic calming improvements along the south side of Central Way, between Lake Street and 4<sup>th</sup> Street (Attachment A). The improvements made are consistent with the *2001 Downtown Strategic Plan* and include new concrete sidewalk to replace damaged sidewalk, new curb and gutter, and pedestrian “bump-outs” at crosswalks. The Project also provided for video detection equipment at the intersection of Central Way and Lake Street, additional on-street parking, new surface water system upgrades, and improved Parks maintenance access along Central Way at Peter Kirk Park.

At their regular meeting of May 15, 2012, City Council awarded the Central Way Pedestrian Enhancements – Phase II Project contract to Kamins Construction in the amount of \$214,932.88. Construction began in July and was completed in November, 2012, with a total of \$238,182.76 being earned by the contractor, including three change orders. The three change orders covered labor and material costs related to the repair of an electrical street lighting conduit problem encountered beneath the existing concrete sidewalk being replaced, minor irrigation system improvements, and storm water catch basin adjustments. A fourth change order was issued after the physical work was complete; this final change order came as a result of a negotiated settlement between the City and the contractor on a claim for extra compensation submitted by the contractor’s attorney. Including this final change order, the total amount paid to the contractor equals \$253,182.76.



## BACKGROUND FOR CLAIM

During the course of the work, a minor grade discrepancy between the plans and the existing concrete curb and sidewalk elevations was discovered at one of the new curb bump-outs located at Central Way and Main Street. The City's inspector prepared a field design drawing that resolved the discrepancy and provided it to the contractor. The contractor received the information and did not protest or request for more information at that time or prior to commencing the work.

The contractor began grading for the new bump-out on August 13, 2012, and on August 14, commented about the grade changes and informed the inspector that he believed there would be additional costs; nothing was received in writing by the City. All work efforts for the Project, including those for the bump-out grade adjustments, were tracked by the inspector; all work on this particular bump-out was completed over the course of a few partial work days.

On August 23, 2012, after completing the work, the Contractor submitted a demand for extra compensation; however, the information provided was insufficient and the Project Engineer was unable to substantiate the Contractor's demand. The information provided was merely an assertion that the work cost an additional \$20,109 and included no attempt to provide the detailed, daily, and contemporaneously recorded evidence that additional expense for the Project had been incurred; these types of records are required as a part of the City's standard contract documents.

Recognizing that there was in-fact a grade change at one specific location, and a field modification was provided to the contractor, a thorough verification of the inspector's daily records was made. An amount of \$2,639 was justified by the Project Engineer and the inspector as a reasonable sum to compensate the Contractor for the minor grade changes encountered, and an offer to resolve the matter was made. At that point, the Contractor turned to legal counsel for representation and stopped communicating directly with City staff.

On October 3, 2012, approximately two months after the contested work was completed, the contractor's attorney submitted a letter demanding additional compensation – the October letter demanded \$28,362 rather than the \$20,109 that had been identified on August 23, 2012. To this, the City responded that 1) the original claim and supplemental protest were untimely as per the contract, 2) the August 23 letter could not correct the untimely protest, and 3) sufficient information had never been presented to evaluate the validity of the claim, as is required in the City's contract. Based on these issues, it was the City's opinion that the claim had been waived. Subsequently, the Contractor filed a Demand for Arbitration.

## DEMAND FOR ARBRITRATION

The City was notified by the American Arbitration Association (AAA) that a dispute resolution on this matter had been filed. Following that notice, City staff spoke with a private attorney specializing in construction to discuss the City's best options. At the conclusion of that conversation, the following issues were made apparent:

- Based on the record keeping and City generated documents, the City would fare "very well" *if* this were a Superior Court hearing.
- As arbitration; however, the City would have exposure for two reasons: 1) due to staff's attempt to "negotiate" with the Contractor early in the process by presenting an estimate of the cost to resolve the matter, an arbitrator would most likely grant the Contractor at least that amount (\$2,639), and 2) as a disagreement between two parties, arbitrators typically move to the "middle" and, in this case, the middle is approximately \$15,000.

With concurrence from our outside construction specialty attorney, it was concluded that the City's best interest would be served by settling the matter ahead of the date of arbitration. If the matter were to go to an arbitrator there would be an added risk that attorney's fees could be included in any settlement and, according to our attorney, those fees would most likely be

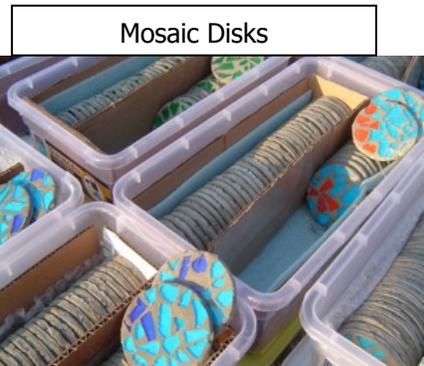
in the range of an additional \$10,000 to \$15,000, and possibly more. As a result, on February 5, 2013, the Assistant City Attorney and the contractor's attorney reached a settlement agreement in the amount of \$15,000.

The City was not a willing participant in arbitration as staff had proven to its satisfaction, as well as that of outside legal counsel with expertise in this arena, that the contractor had not satisfied the requirements that justified a claim for additional compensation. The Washington State Standard Specifications used for this project provided an avenue to the contractor to unilaterally pursue arbitration as a means to resolve his dispute. Current City staff cannot recall any other time this language has been used in this manner and, because the City was unable to expeditiously and inexpensively obtain relief through arbitration, for all future contracts this procedure will be optional rather than mandatory. Staff, with assistance from the City Attorney's office, has modified the City's standard contract language to allow dispute resolution through arbitration only upon the "mutual written agreement of both parties."

## BUDGET

The current budget for the Project is a combination of State Pedestrian and Bike Safety Grant (\$198,000) and City funds (\$214,000) for a total Project budget of \$412,000 (Attachment B). The budget, at the time of award, included a typical 10% construction contingency. The budget, including the contingency, was essentially exhausted through the normal course of the construction, including all payments for the physical work with the first 3 change orders, inspection and project management, public outreach, and the grant required educational element. In addition; however, the City incurred more expenses for additional staff time to defend the claim, arbitration filing fees and outside legal counsel. With the diminished budget, and in order to responsibly negotiate with the contractor's attorney, staff requested and received a City Manager approved interim budget increase, as provided for under Kirkland Municipal Code (KMC) KMC 3.85.220. The interim budget increase of \$21,000 allowed staff to diligently pursue a remedy to the contractor's claim for additional compensation.

With all costs now known, and in order to formally establish the Project's final budget through City Council action, the Project is in need of a net budget increase of \$29,000. Included within that requested amount is the City Manager approved interim budget increase of \$21,000, plus an additional \$5,000 for increased project management costs, all external legal fees, and the final American Arbitration Association costs. In addition, as approved by City Council at their May 5, 2012 meeting, the Project was to receive an art element. Since the overall Project budget was depleted through the claims proceedings, including the original amount identified for art, an additional \$3,000 is also included in the net of \$29,000 being requested. If re-approved by City Council at their March 5 meeting, the art, consisting of mosaic dots embedded in the new concrete sidewalk at clustered intervals, will be installed by the artist this spring.



The source of the City's portion of the overall project budget includes general government and surface water utility funds. At the time the original budget was established the surface water utility funding portion was estimated to be 24% of the total project costs. Through the course of construction the actual surface water costs attributed to the project came in at a level less than the 24% estimated amount. In addition, as grant reimbursements were received, those reimbursements were proportionally distributed to the two City funding sources. As a result of these two factors, the Project's surface water budget will have a positive balance of \$21,000 while the general government portion of the overall budget will be negative by approximately \$50,000. To fully fund the project for close out staff has identified REET 2 as the funding source. These changes are outlined in the Fiscal Note (Attachment C).

- Attachment A: Vicinity Map
- Attachment B: Project Budget Report
- Attachment C: Fiscal Note

Central Way  
Pedestrian  
Enh.  
(Phase II-  
South Side)  
CNM-0065

**Pedestrian  
Bump Out  
Locations  
Typical:** 

**Additive Schedule B:  
Improvements to Park  
Maintenance Entrance**

**Additive Schedule A:  
Surface Water Improvements**

**Sidewalk  
Improvements**  




-  Buildings
-  Park
-  Water
-  Road
-  Sidewalk
-  Other





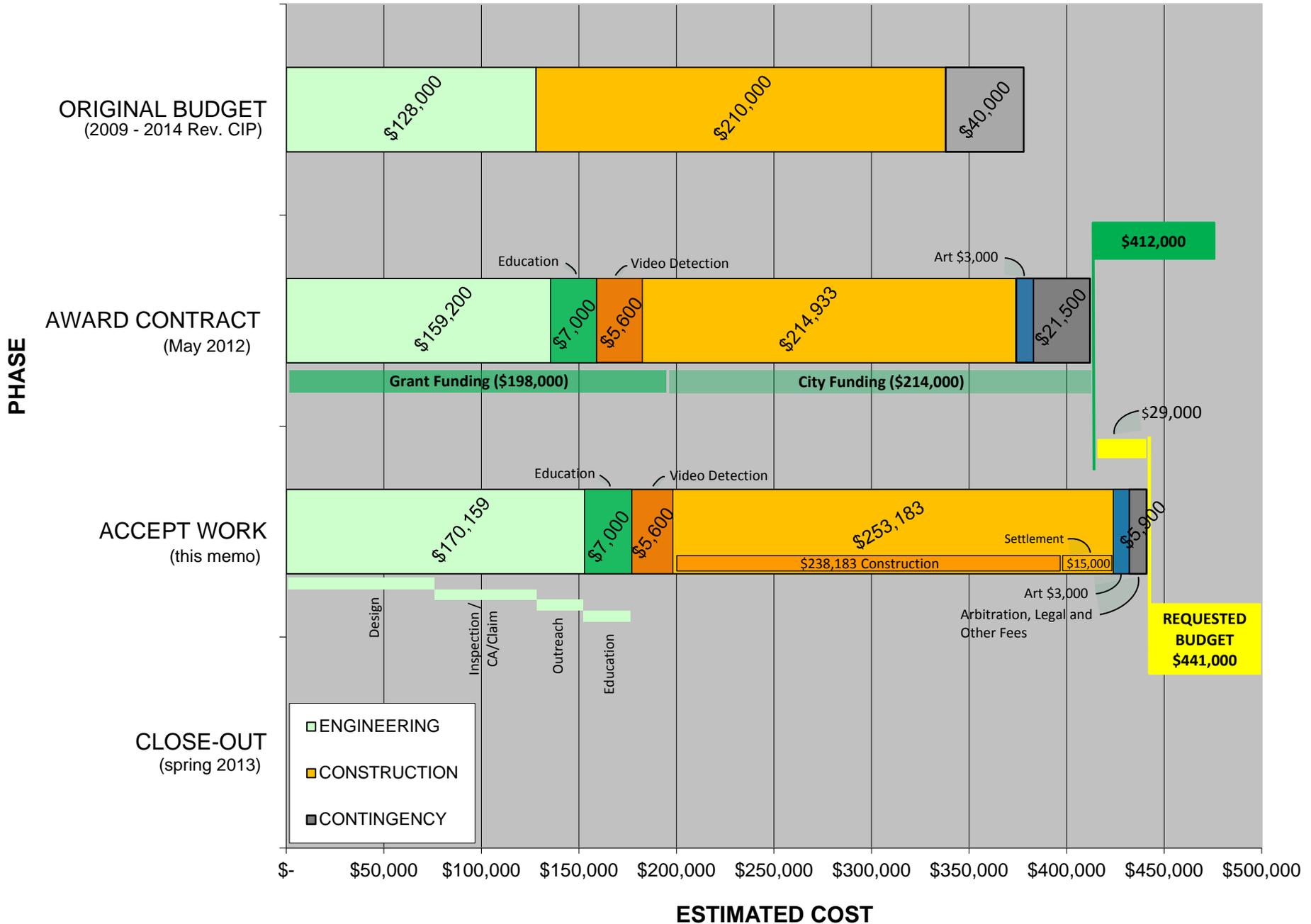
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# Central Way Pedestrian Enhancements (Phase II- South Side ) Project (CNM-0065)

Attachment B

## Project Budget Report



## FISCAL NOTE

CITY OF KIRKLAND

Source of Request							
Pam Bissonnette, Interim Public Works Director							
Description of Request							
Request for funding of a net of \$29,000 for the Central Way Pedestrian Enhancements Phase II (CNM 0065) as outlined in the acceptance of work memorandum. The request includes a use of REET 2 Reserves of \$50,000 and a return to Surface Water Transportation Reserve of approximately \$21,000. The total project budget is expected to change from \$412,000 to \$441,000.							
Legality/City Policy Basis							
Fiscal Impact							
One-time use of \$50,000 from REET 2 Reserve. The reserve is able to fully fund this request. Return of funds of \$21,000 to the Surface Water Transportation Reserve.							
Recommended Funding Source(s)							
Reserve	Description	2014 Est End Balance	Prior Auth. 2013-14 Uses	Prior Auth. 2013-14 Additions	Amount Request	Revised 2014 End Balance	2014 Target
	REET 2 Reserves	2,294,806	214,000	0	50,000	2,030,806	N/A
	Surface Wtr. Transportation	3,092,276			(21,000)	3,113,276	N/A
2013-14 Prior Authorized Use of REET 2 reserve: \$214,000 for the NE 112th Street Sidewalk Project.							
Revenue/Exp Savings							
Other Source							
Other Information							
Prepared By	Neil Kruse, Senior Financial Analyst				Date	February 22, 2013	