



Staff Report

Date: May 24, 2022

To: City Council/City Council Sitting as the Local Reuse Authority

From: Valerie J. Barone, City Manager

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Subject: **Considering a requested First Amendment and timeline extension to the Exclusive Agreement to Negotiate (ENA) between the Local Reuse Authority (LRA) and Concord First Partners, LLC regarding the disposition and development of the former Concord Naval Weapons Station (CNWS) and either: (1) denying the request, or (2) granting an ENA extension until June 29, 2022, and directing staff to negotiate an ENA amendment for Council consideration on June 28, 2022.**

CEQA: Not a project/exempt under Public Resources Code Section 21065, CEQA Guidelines Sections 15060(c), 15061(b)(3), and/or 15378.

Report in Brief

Concord First Partners, LLC (CFP) is seeking an amendment to the existing Exclusive Agreement to Negotiate (ENA) dated October 26, 2021.

Under the existing ENA, the LRA and CFP agreed to a negotiating process consisting of Term Sheet development within 180 days (extended to May 25, 2022), followed by the development of a Specific Plan/completion of an Environmental Impact Report (EIR) and a Disposition and Development Agreement (DDA) consistent with the accepted Term Sheet within the next 24 months (approximately May 2024). Together, those three documents – DDA, Specific Plan, and EIR – would set forth the scope and timing of CNWS property development, delivery of community benefits, and related financial issues.

CFP's proposed amendment would change that negotiation process and timeline by: (1) providing an additional 90 days (*i.e.* August 23, 2022) in which to complete a Term Sheet, (2) negotiating an early-stage "outline" DDA¹ before land use planning and environmental review moves forward, (3) granting CFP an enforceable right in the CNWS property in the early-stage "outline" DDA, (4) requiring that the LRA reimburse CFP for certain expended costs should the City Council fail to approve the future EIR and Specific Plan, and (5) extending the timeframe for drafting the Specific Plan and EIR from 24 months to 36 months (*i.e.* approximately August 2025).

Recommended Action

Review CFP's proposed amendment to the ENA, provide CFP with up to 10 minutes to present their requests, and take public comment.

Staff recommends denial of CFP's proposed amendment to the ENA, as not being in the best interests of the LRA, and more specifically for the reasons outlined in the Analysis section below.

Unless extended by Council, the current ENA expires on May 25, 2022 (the day after the Council's consideration of this item).

CFP's proposed amendment to the ENA was provided to the LRA on May 10, 2022. Given the short timeframe between receipt thereof and publication of this staff report, and because staff has not yet received Council direction on the proposed amendment, staff has not been able to negotiate with CFP as to the ENA's provisions and specific language. Should Council support considering an ENA amendment, staff recommends following Alternative 2 (grant the ENA extension until June 29, 2022 and direct staff to negotiate the ENA amendment to be brought back before Council on June 28, 2022; this is discussed in more detail in the Alternatives section of this report) so that CFP's requested amendment language can be revised for clarity, to mitigate both parties' risk, and better protect community goals.

Background

The City Council-approved Request for Master Developer Qualifications (RFQ) issued by the LRA on April 16, 2021 contained a form ENA at "Appendix G – Template Exclusive Agreement to Negotiate" which set forth the negotiation process and timeline. Under the LRA's template form of ENA, the selected master developer was to receive exclusive rights to negotiate with the LRA during the approximately two year negotiating period with no guarantees regarding the outcome of those negotiations. Under the LRA's form of ENA the selected master developer would not have any enforceable property interest in the CNWS property unless and until the master developer obtained

¹ LRA staff is referring to the DDA requested in CFP's proposed amendment as the **early-stage, "outline" DDA** because, as proposed, it is to be considered earlier and contain fewer specifics than the DDA called for in the existing ENA.

City Council approval of a new Specific Plan, EIR, and accompanying DDA. This is the same process that Lennar agreed to in 2016 when they were selected as the Master Developer for Phase 1 of the CNWS project.

Under RFQ Section 5.2.6, to “expedite negotiations with the selected Master Developer” respondents were asked to “provide either a statement that the terms of the Form of Exclusive Negotiating Agreement (ENA) found in Appendix G are acceptable as drafted, or a list of material changes the Respondent would expect to be made before signing the ENA.” Respondents were offered the opportunity to submit requested changes confidentially.

In their Statement of Qualifications submitted on June 18, 2021, CFP stated:

“The format of the Exclusive Agreement to Negotiate is acceptable (emphasis added). However, we understand that Discovery/Seeno will be required to pay project costs on a go forward basis and that those costs must be agreed upon by the Discovery/Seeno and the LRA. We understand a separate reimbursement agreement is to be negotiated. We also understand that the LRA is looking to be reimbursed for certain costs incurred to date. It is our understanding that how those incurrent costs will be paid is subject to further discussion and agreement and that the LRA is not looking for a payment at this time.” – page 39 of the CFP Statement of Qualifications

Based, in part, upon CFP’s stated position, the City Council, sitting as the LRA, selected CFP as the Master Developer for the Community Reuse Project at its August 21, 2021 public meeting. The Council directed staff to negotiate the ENA with them and return it for Council consideration.

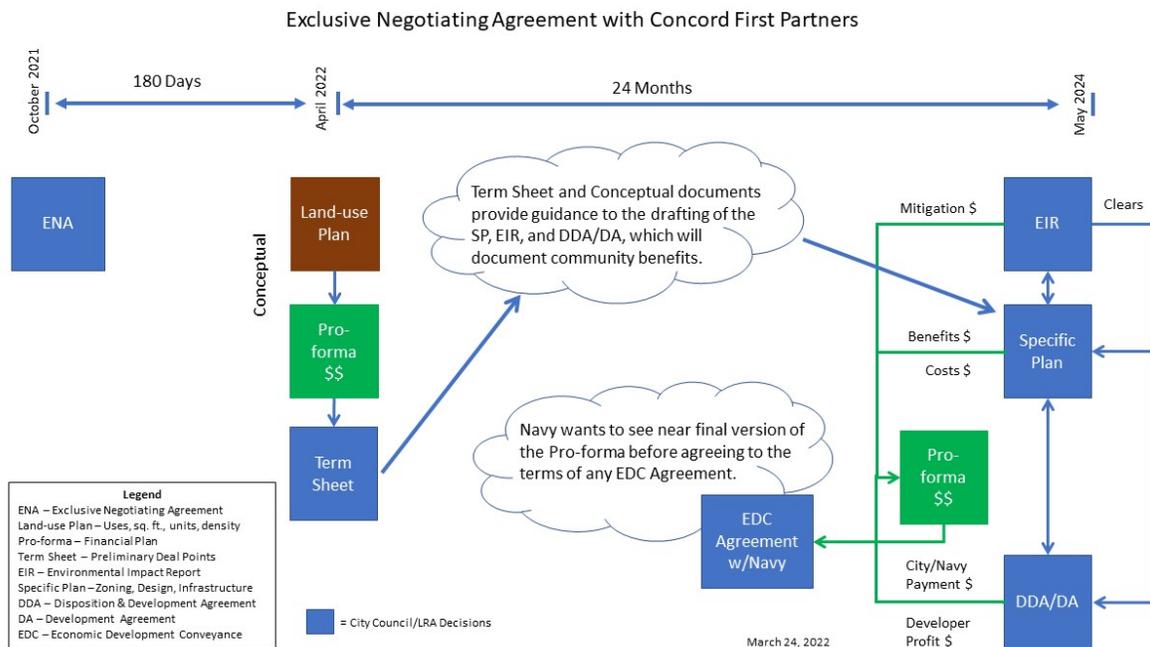
During those discussions with staff about the specific terms of the ENA, CFP expressed their key concern was that, should the LRA and CFP somehow part ways, CFP would have taken on significant unsecured financial risk or faced a shift in political perspectives. CFP to date has proposed two key approaches to mitigating that risk. First, CFP suggested securing an early “purchase agreement” or “option agreement” to bridge the approximately 2 year period between Term Sheet approval and consideration of a Specific Plan, EIR, and comprehensive DDA for approval. CFP asked for reimbursement of certain expended costs if the ultimate Master Developer was not CFP.

Staff has indicated to CFP that their concerns are understood and that staff is amenable to exploring mitigation approaches that are mutually beneficial to both the LRA and CFP as long-term partners in the CNWS property development project. However, staff has also shared with CFP that it is unclear whether the LRA has the legal ability to grant CFP such a property interest, or how doing so would affect the Navy’s property disposition plans.

To address CFP’s request for cost reimbursement were they to have a specific plan and CEQA document approved but not be successful having a DDA approved, staff included an additional item to the “Preliminary Stage Negotiation Matters” in Exhibit B of the proposed ENA. That ENA was subsequently approved by the City Council on October 26, 2022. The revised last bullet of Exhibit B reads:

“Any other issues that the Parties mutually agree to negotiate, including terms under which Developer would potentially be compensated for amounts expended on a specific plan and EIR if City Council were to approve those two items but then reject the proposed DDA as negotiated by City and Developer’s negotiating teams.”

ENA Agreement (Negotiation Process) Diagram (Full page version – see Attachment 1)



Work then shifted to the negotiation and creation of a Term Sheet and supporting conceptual documents with the 180-day timeframe required under the ENA (subject to certain extensions)².

The purpose of the Term Sheet is to address what the ENA at Exhibit B calls “Preliminary Stage Negotiations Matters” such as development phasing, aspects of the Specific Plan content, terms of property transfer, and various financial obligations and arrangements. CFP is diligently working to create a conceptual land-use plan that

² That timeframe was administratively extended until May 25, 2022, pursuant to ENA Section 3.3.

provides a basis for a conceptual pro forma (financial plan); with both documents supporting provisions to be included in the Term Sheet. This work and negotiations regarding the Term Sheet between CFP and the LRA are still in progress.

In February 2022, in discussions about a draft Term Sheet, the CFP representatives reiterated the desire for a property interest, this time in the form of a “purchase agreement” or “option agreement.” CFP explained they could not undertake work beyond a Term Sheet without such an agreement as they were not in a position to expend the significant sums required to prepare a Specific Plan and EIR without financial recourse via an enforceable right to the CNWS property and/or a reimbursement arrangement. LRA staff responded that it had no direction from the City Council to negotiate such an agreement and, to resolve the matter, indicated the question would be put on the Council’s March 22, 2022, agenda for resolution. In early March, CFP withdrew their request for a separate agreement and indicated they would suggest an alternative approach.

At the end of March, CFP presented the work they had done on the conceptual documents to LRA staff. CFP indicated difficulties in developing a project land use concept that met Area Plan requirements, City Council priorities, and community expectations as outlined in the RFQ³, that also provided a reasonable rate of Developer return on investment. Based on that work and the need for further discussions, the City Manager extended the Preliminary Stage of the ENA for 30 days, from April 25 to May 25, 2022.

LRA expectations, community benefits, land uses, infrastructure phasing and other Term Sheet related matters were discussed by the LRA and CFP during April but did not result in a draft Term Sheet.

On April 21, 2022, City/LRA staff and CFP representatives held a teleconference with the Navy during which CFP submitted a question regarding CFP’s desire for a “binding agreement” (Attachment 3) before proceeding with Specific Plan or EIR work. CFP’s question appeared to address a general agreement between the City/LRA and CFP, which has consistently been our mutual goal, but did not clearly address CFP’s goal of securing an enforceable right in the CNWS property. The Navy carefully stated that they have no “legal standing” to object to such an agreement, but that they do have concerns with any agreement that might add or create delays or complications to the transfer of the land to the LRA, or anyone else.

³ RFQ Section 3 – Master Developer Responsibilities, contains, among other things, Section 3.4 Community Facilities and Improvements (page 18) and Section 3.15 Affordable Housing (page 23). A copy of Section 3 is Attachment 2, and the complete RFQ can be found at this link: [Request for Master Developer Qualifications](http://concordreuseproject.org/DocumentCenter/View/2185/RFQ-2021-4-16-Final) or <http://concordreuseproject.org/DocumentCenter/View/2185/RFQ-2021-4-16-Final>

On April 27, 2022, CFP sent the LRA a letter indicating their inability, so far, to design a project that meets RFQ expectations (see footnote 2) and provides a reasonable Developer return on investment. The letter, among other things, requested that an amendment to the ENA be put on the LRA's agenda for May 24, 2022. See Attachment 4.

The text of CFP's amendment to the ENA began as their alternative approach, proposed in the middle of March, but has evolved over several versions into this requested amendment to the ENA provided to LRA staff on May 10, 2022. See Attachment 5.

Analysis

Under the existing ENA, the LRA and CFP agreed to a negotiating process consisting of Term Sheet development within 180 days, followed by the development of a Specific Plan/completion of an Environmental Impact Report (EIR) and a Disposition and Development Agreement (DDA) consistent with the accepted Term Sheet within the next 24 months. Together, those three documents – DDA, Specific Plan, and EIR – would set forth the scope and timing of CNWS property development, delivery of community benefits, and related financial issues.

CFP's proposed amendment would alter the negotiation process and timeline specified in the RFQ and existing ENA. The ENA amendment would commit the LRA to negotiate an early-stage "outline" DDA and, if adopted by the LRA, would grant CFP a legally enforceable right to purchase the CNWS property before work on the Specific Plan and EIR is started.

Adopting the proposed amendment creates the expectation that an early-stage "outline" DDA with enforceable property rights will be the likely outcome, putting the LRA at risk in the event the parties cannot reach agreement. This means failure to ultimately grant CFP enforceable property rights could trigger an assertion by CFP that the LRA did not act reasonably which could result in the CNWS property being tied up in litigation for a significant period of time.⁴

Were CFP to secure an enforceable property interest, CFP could potentially attempt to leverage its property interest by litigating to prevent the LRA from seeking future third party developers (whereas the LRA was able to move forward when the Lennar ENA expired). As local partners, that is not a result that is desirable to either the LRA or CFP, both of whom have a shared goal of seeing the LRA's vision of a world class CNWS property development realized.

⁴ Navy staff has indicated they would likely not be willing to put an EDC process on hold for several years if related litigation occurred.

Staff does not recommend that the LRA insulate CFP from financial risk via conveying an interest in property it does not currently own, the LRA can attempt to address CFP's political concerns. As discussed in the background section earlier in this report, LRA staff has proposed that the Council consider the DDA, Specific Plan, and EIR in one combined action so that the full scope of the City/CFP relationship would be affirmed or denied at one time.

The proposed amendment to the ENA has the following key provisions:

1. Extends the Preliminary Stage for ninety (90) days to complete the Term Sheet. (August 2022)
2. Starts the DDA Stage – Phase 1 for ninety (90) days to negotiate an early-stage “outline” DDA that provides CFP an enforceable right to purchase the CNWS property with the terms and conditions for post-closing use and development obligations to be deferred to a later stage statutory development agreement (DA) that would be considered for approval by City Council concurrently with Specific Plan and EIR. (August 2022)
3. Requires the Council to consider both Term Sheet and the early-stage DDA within ninety (90) days.
4. Authorizes the City Manager to extend the DDA Stage – Phase 1 for up to ninety (90) additional days. (November 2022)
5. Establishes and extends a second phase of negotiations from 24 months to 36 months to allow for preparation of a Specific Plan, EIR, and negotiation and drafting of the proposed DA to include business terms that are currently contemplated to be included in a later stage DDA. (August – November 2025)
6. If the City Council does not approve the Term Sheet and early-stage “outline” DDA within the DDA Stage – Phase 1 timeframe, the ENA would terminate.
7. Establishes a timeline for CFP to enter into a Deposit and Reimbursement Agreement under which CFP must pay LRA Project Costs. Parties to complete and execute that Deposit and Reimbursement Agreement by July 31, 2022 (*i.e.* prior to City Council consideration of the Term Sheet and early-stage “outline” DDA).
8. LRA may terminate⁵ the early-stage “outline” DDA if CFP fails to diligently process Project Approvals⁶ or seek Entitlement Milestones⁷, or fails to use its commercially reasonable efforts to satisfy Closing Conditions⁸.

⁵ Termination would not eliminate risks associated with the enforceable property interest.

⁶ Project Approvals - Any Specific Plan or other land use plan, entitlements, permits, or approvals for the Project, subject to CEQA at a Project level analysis – See Section 5 of the October 26, 2021, ENA.

⁷ Entitlement Milestones - See Exhibit A to the proposed amendment

⁸ Closing Conditions - See Recital C in the proposed amendment – preparation and processing of complete applications for Project Approvals, Entitlement Milestones, Council approval of Project Approvals including a

9. Provides that if LRA fails to approve the Project Approvals (Specific Plan, EIR and DA) by the end of the ENA term, the LRA must reimburse CFP for any Third Party Materials⁹ that are used by a subsequent developer of the Base.

Staff's primary concerns with the proposed amendment are: (1) shifting the DDA to the beginning of the negotiation process, which would give CFP an enforceable right to the CNWS property prior to work on the Specific Plan or EIR, and (2) creating an LRA obligation to reimburse CFP for certain costs expended should the LRA ultimately fail to approve the Specific Plan and/or EIR. Each of these concerns is discussed in more detail below.

Adopting an early-stage "outline" DDA Incorporating an Enforceable Property Right

There are fundamental and procedural differences between a Disposition and Development Agreement (DDA) and a Development Agreement (DA) and reasons why the existing ENA brings both documents for consideration at the end of the process – together with the Specific Plan and EIR.

A DDA is an agreement which a local agency may enter into in a "proprietary" capacity (*i.e.* as a landowner) and provides the terms and conditions of a property sale by a public agency to a private developer. Because the local agency is acting as a landowner, it has considerable latitude with respect to the terms and conditions under which it agrees to dispose of property to a developer. Typically, and as provided in the RFQ, those terms include price and terms of payment, schedules for phasing of land take-down and development, and Developer commitments to provide community benefits as project development occurs. Price and terms of payment – and likely other key deal points – would likely need to be based on the scope of planned development. To the extent the DDA contains project development specifics, accompanying environmental review (CEQA) would occur concurrently. Often, such environmental review affects project development (*e.g.* by requiring mitigation measures and/or project alternatives be implemented to reduce impacts) and costs.

A DA is an agreement authorized under California Government Code Sections 65864 *et seq.* It is essentially a contract between a local jurisdiction (here, the City) and a developer detailing the standards and conditions – such as rules, regulations, and official policies on permitted uses of the land, density, design, improvement, and construction standards and specifications – that will govern development of the property. A DA provides assurances to the developer that the development standards and conditions that apply to the project will not change during the term of the agreement. DAs also permit a local agency to negotiate public benefits beyond those

Development Agreement, execution of an Navy/City Conveyance Agreement consistent with the DDA; any other requirements found in the Term Sheet.

⁹ Third Party Materials – All documents, reports, and other work product generated by third parties for Developer with respect to the Project.

allowed under existing rules and regulations. Because DAs are considered ordinances, they can only be adopted after a public hearing process, which can take up to two months (first reading, second reading, then 30 days until effectiveness); that process must also be followed for DA amendments. DAs are considered “projects” under CEQA and require environmental review at the time of adoption.

Under the existing ENA, both the DDA and DA are to be negotiated and drafted substantially consistent with the Area Plan, and in parallel with the Specific Plan and EIR because the drafting and consideration of those documents will require a greater level of expert analysis, transparency, public input, and will identify issues that may not have been considered in a preliminary document like a Term Sheet. If a DDA, even an early-stage “outline” version that only addresses key components, is approved at the Term Sheet stage, then it could inhibit the iterative process of developing a Specific Plan and EIR and constrain the LRA’s ability to negotiate community benefits. If issues are later identified through the land use planning and/or environmental review process that should have been reflected in the DDA or go beyond Term Sheet provisions, then it is very likely to create conflict between the LRA and CFP. The LRA will be at a disadvantage in resolving any such conflicts if CFP already has a DDA with an enforceable property right in the CNWS.

Another reason both the DDA and DA are considered concurrent with the Specific Plan and EIR, is the requirement to provide environmental review of the documents before their adoption. Under the existing ENA, the Term Sheet is a preliminary document designed to serve as a basis for the drafting of the Specific Plan, EIR, and DDA/DA documents. The Term Sheet would not commit the City/LRA to a definite land use plan or project; so, as the details of the Specific Plan, DDA and DA are developed, there will be sufficient flexibility to comply with CEQA requirements and the opportunity to modify the project via mitigation measures or alternatives to avoid environmental impacts as needed. Adopting a DDA early in the process with the Term Sheet (as called for in CFP’s proposed ENA amendment) turns this process on its head and may trigger the need for environmental review at this early stage or leave the project vulnerable to litigation.

The proposed amendment also requires that the LRA’s Economic Development Conveyance (EDC) agreement with the U.S. Navy contain terms and conditions consistent with the early-stage “outline” DDA. This will be difficult to accomplish as the Navy has previously expressed a desire to see a near final version of the project’s pro-forma (financial plan) based on the final consideration drafts of the Specific Plan and EIR. It is at that point, well after the early-stage “outline” DDA as requested by CFP, that the Navy expects to enter into an agreement reflecting the payment(s) the LRA will make to the Navy regarding property transfer.

The Navy has carefully expressed no legal objection to a “binding agreement.” However, Navy staff informed LRA team that the early-stage “outline” DDA model has

not been used by any other base closure community. The Navy has also expressed concern with any provisions or changes to process that could cause delays to, or interfere with, the Navy's ultimate conveyance of the property.

Reimbursement of Costs

CFP estimates spending approximately \$15 million in preparing the Specific Plan, EIR and covering City/LRA staff and consultant costs. The proposed ENA amendment would require the LRA to reimburse CFP's Third Party Material costs if, after a denial of their Specific Plan and EIR, a new developer or the city uses the materials in a future development.¹⁰

Such a reimbursement provision will be complicated to administer. The Area Plan and basic project infrastructure plans, adopted in 2012, were developed by using public funds and serve as the conceptual blueprint for development of the CNWS property. As a result, most if not all project plans will necessarily be derivative of those publicly paid for materials. Lennar and its consultants relied on those materials when refining project infrastructure and design (2017-2019) and Lennar's materials are available for CFP to reference. As a result, it will be a complex exercise to identify whether and to what extent CFP plans are derivative of these earlier documents. Further, it would be difficult to allocate dollar values to "original" CFP efforts, or discern whether future use of Third Party Materials would trigger CFP reimbursement. For these reasons, the proposed reimbursement requirement could lead to litigation and impede the City's ability to move forward toward redevelopment.

Alternatives

Staff provides the following alternative actions for City Council consideration:

1. Deny the requested ENA amendment (staff recommendation) and:
 - a. Confirm the existing negotiation process and timeline, but commit the LRA to considering all elements of the project – EIR, Specific Plan, DDA, DA and other matters – in one action to prevent the possibility that land-use matters are approved without the approval of a DDA or DA.
 - b. Ask CFP representatives if they wish to continue under the existing ENA.
 - c. Extend the existing ENA for 90 days to finish the Term Sheet.

2. Direct staff to negotiate an ENA amendment and:

¹⁰ The ENA with previous master developer, Lennar, did not provide for reimbursement, so that when Lennar's ENA expired in March 2020, they were only refunded the unexpended balance of their deposit account, but were not reimbursed for any costs incurred by them in pursuit of the Specific Plan, EIR or DDA; or for third party materials.

- a. Provide direction to staff on elements to be further negotiated in the proposed ENA amendment:
 - i. Should the amendment incorporate an enforceable property interest for CFP as part of an early-stage “outline” DDA?
 - ii. Should the amendment include a reimbursement provision?
- b. Direct staff to negotiate the language of the ENA amendment to achieve the Council’s direction while addressing clarity and defensibility of the amendment and have staff return to City Council for consideration of the negotiated ENA amendment at the June 28, 2022, meeting.
- c. Extend the existing ENA until June 29, 2022.

Financial Impact

Staff cannot provide details on the financial impact of the CFP proposed ENA amendment. As discussed in the analysis section of this report, staff believes it creates significant financial risks to the LRA and opportunities for future litigation. If such were to occur, or were the LRA required to pay CFP for their Third Party Materials, the impact would be in the millions. Based on CFP’s estimates of their costs for the Specific Plan and EIR, it could total as much as \$15 million.

Environmental Determination

Consideration of an amendment to the Exclusive Agreement to Negotiate does not commit the City to a definite course of action with respect to the subject property, and this activity does not constitute a “project” within the meaning of Public Resources Code Section 21065 and/or the California Environmental Quality Act (CEQA) Guidelines Section 150609(c)(2) and CEQA Guidelines Section 15378. Even if this activity is a project for CEQA analysis, if falls within the “Common Sense” CEQA exemption set forth in CEQA Guidelines Section 15061(b)(3) where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. No unusual circumstances exist and none of the exceptions under the CEQA Guidelines Section 15300.2 apply. This determination reflects the City’s independent judgment and analysis. The City previously prepared an EIR and addendum for the Reuse Plan and Area Plan, respectively. Appropriate CEQA analysis will occur in connection with formal negotiations for the physical development of the CNWS property.

Public Contact

The City Council Agenda was posted. The staff report and attachments will be available to the City Council/LRA and the public on May 17, 2022. Notification of this meeting and the availability of documents will be sent out to the Reuse Project’s interested parties list on May 17, 2022.

Attachments

1. ENA Agreement (Negotiation Process) Diagram
2. RFQ Section 3
3. CFP's Question to the U.S. Navy
4. Letter from Concord First Partners, LLC to Guy Bjerke, Director of Economic Development and Base Reuse (April 27, 2022)
5. Proposed First Amendment to the Exclusive Agreement to Negotiate (May 10, 2022)