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CITY COUNCIL
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COUNCILMAN - 5TH DISTRICT

To: Members of Council

From: Darrell L. Clarke, President

Date: December 20, 2016

Re: Rebuild

I would like to thank the Administration for providing to Council the Rebuild Update, dated 12/12/16, the Managing Director's memo, dated 12/13/16 and the William Penn Grant Award Agreement, dated 12/7/16. This information is helpful for understanding the scope of Rebuild, and the issues raised by the various approaches to achieving its promise. I would also like to thank the Administration for its willingness to have a dialogue about the merits of different transaction structures.

I. The Administration Proposal

The Administration proposes that the Council authorize PAID to issue \$300M in bonds under an agreement obligating Council to appropriate funds for debt service over a term of years. The Administration further proposes that Council authorize the long-term lease, of all or most, of the 406 parks, playgrounds, recreation centers and libraries that constitute the Rebuild Sites, and sub-lease them to the Fairmount Park Conservancy and the Free Library Foundation, as Project Users.

PAID would enter into project development and funding agreements with the Conservancy and the Foundation using the bond proceeds. The Conservancy and the Foundation would enter into design, construction and other contracts needed to improve the Rebuild Sites and implement the program. After the Rebuild site-improvements are completed, the Conservancy and the Foundation would assume stewardship of the Rebuild Sites as Project Users.

As a general rule, PAID's enabling legislation requires that PAID construction contracts be awarded to the lowest responsible bidder. The only exception is where the Project User can or will acquire legal title to the completed project under an existing agreement, including for example an agreement-of-sale or long-term lease for 50 or 99 years. In that case, the Project User can award construction contracts without regard to the low-bid requirement. "Project User" is defined as any person or entity "which owns, leases or uses all or any part of a project..."

The Administration was asked how it intended to meet the title-transfer requirement for avoiding the low-bid requirement; but to date we've received no direct response. But judging by the Administration's proposal, I assume it intends a lease arrangement with the Project Users long enough to constitute a transfer of title. If Council passes legislation authorizing the long-term leases, the Project Users will be able to award contracts free of the low-bid requirement. If Council does not authorize the leases or other instruments transferring legal title, PAID must advertise, bid and award contracts to the lowest responsible bidder.

The Administration argues that awarding contracts free of the low-bid requirement will: 1) make it more likely that workforce and DBE inclusion goals are achieved; 2) deliver high quality projects efficiently; and 3) draw additional resources. The Administration maintains that too often, the low bidder has a poor history of meeting minority participation goals and that the City's bureaucracy hinders the expeditious delivery of capital projects.

II. Alternative Proposal

As an alternative, most projects could be undertaken using the City's Procurement Department Modernization Program, the Capital Program Office enhanced with forty (40) new full-time trades people and the Rebuild Team. In fact, this is the approach advanced by the Administration in its grant application. In addition, the PAID structure could be used on a case-by-case basis, where the Project User has a substantive and community-supported connection to the specific park, recreation center or playground, justifying a long-term lease arrangement.

III. The Administration Proposal Requires Transferring a Substantial Amount of Public Funds and Facilities to Private Parties

Every approach has its draw-backs. However, the Administration's approach of placing the total \$300M of public funds into the hands of PAID, the Conservancy and the Foundation in the first year of Rebuild, seems needlessly risky and maybe even irresponsible. And according to the Rebuild Update, PAID would be authorized to sub-grant City money for site-specific projects long after Council will have relinquished its decision-making authority by voting to give all Rebuild money to PAID in year-one.

Similarly, making the Conservancy and Foundation the long-term stewards of all or most of the City's parks, recreation centers, playgrounds and libraries, without any transparent competitive process, undercuts the community engagement goal of Rebuild and seems to

privatize those facilities' operations. What would be the fate of the community groups, Advisory Councils and others who currently use, maintain and operate programs at those facilities? Can the Conservancy evict them? Shouldn't communities where these facilities are located, have a say in the facilities' operation and oversight? What would be the fate of Parks and Recreation staff, who hold jobs operating, maintaining and fixing-up those facilities? Unfortunately the Administration's proposal does not address these issues.

For these and other reasons, I do not share the Administration's apparent belief that it is necessary to entrust so much public money and property to private non-profits, in order to achieve minority participation goals, deliver projects efficiently or to attract other charitable funding. In fact, the Administration represented in its grant application that it would achieve all of these outcomes using the Rebuild Team, along with staff from Parks and Recreation and the Library. Nowhere in the Grant Application or the Grant Award Agreement is there any reference to using PAID, the Conservancy or the Library Foundation for carrying out Rebuild, or achieving its desired outcomes of diversity, project delivery, or attracting other charitable giving.

IV. There is no Demonstrated Correlation between the Low-bid Requirement and Workforce Participation Rates

The Administration seems to reason that the City's failure to achieve participation goals is the result of low-bidders being awarded contracts despite a poor history of meeting participation goals. But according to an OEO report for FY16 city-contracts, the City achieved 31.5% minority-workforce participation on a goal of 32%, while complying with the Charter's low-bid requirement. And in truth, low participation rates are more likely linked to the City's history of failing to use the tools available to enforce compliance including: the Procurement Commissioner's power to reject as *not-responsible*, the low-bid of a bidder that has a poor history of meeting participation goals; the Procurement Commissioner's power to debar for poor performance or repeated failure to comply with contract requirements; the power to use the Labor Standards Unit for monitoring and enforcing workforce participation goals; and the power of OEO to monitor and enforce DBE goals and recommend debarment in appropriate cases.

V. Conservancy Demographics do not Mirror the City or Demonstrate a Commitment to Diversity

And based on its own staffing and Board make-up, the Conservancy cannot be assumed to have diversity as a core value, or that it will prioritize diversity in the selection of Rebuild contractors. Its current staff of twenty-one (21) people has but one person of color: an Asian female. And its Board of thirty-two (32) has but six (6) members of color, five (5) of whom are ex-officio members serving by virtue of their status as elected officials. And none of the Conservancy-Officers is a person of color. The Conservancy's record on diversity is not encouraging. Are we to assume it will suddenly choose minority contractors when it is free to choose who it wants?

Neither has it been demonstrated that the Conservancy can deliver a large number of capital projects efficiently, or to provide stewardship to hundreds of parks, recreation centers and playgrounds located all across the City. According to the Rebuild Update, the Conservancy has only completed twenty (20) projects in 10 years. And according to a recent Conservancy Board report, it is currently looking to hire between six (6) and twelve (12) new people at an estimated cost of \$1M in Rebuild money, to build up its capacity to undertake Rebuild. Shouldn't that money be used to enhance the City's capacity instead?

In addition, the Conservancy intends to establish a new single-purpose, limited liability company to carryout Rebuild. The purpose is to insulate Conservancy assets from liabilities related to Rebuild. The Board of the new entity would consist of seven members: two appointed by the Mayor and five appointed by the Conservancy. Council is notably absent from this arrangement despite its crucial role of appropriating Rebuild funding. Obviously, the Conservancy is not ready, willing and able to be Project User and landlord for hundreds of parks, recreation centers and playgrounds. Giving them hundreds of sites in year-one of Rebuild is not responsible.

VI. William Penn Grant does not Require the Administration Proposal

The Administration has also argued that the PAID structure is needed to comply with grant requirements and to attract other funding. However, there is not a single term or condition in the Grant Award Agreement that references or requires the use of PAID or a Project User. Furthermore, it successfully argued the City's own capacity in securing the Wm. Penn Grant which, according to the press release, is the largest grant of its kind given by the Charity. If the City's capacity was sufficient to secure the Wm. Penn grant, why would it not be sufficient for other potential funders?

VII. Conclusion

Despite my concerns, I intend to keep an open mind about the various proposals and look forward to a robust airing of these and other issues when this matter is formally presented to Council in the Spring Session. In the meantime, please call or write if you have any questions and please accept my best wishes to you all for a Merry Christmas and a Happy New Year.