

City of San Juan Bautista: Funding Issues of Its Water System Project

Conducted by

San Juan Bautista Water Issues Committee

Issued July 31, 2008



**County of San Benito
Civil Grand Jury
2007-2008**

CITY OF SAN JUAN BAUTISTA: FUNDING ISSUES OF ITS WATER SYSTEM PROJECT

SUMMARY

The Economic Development Administration (EDA) had awarded a \$3.8 million grant to the City of San Juan Bautista (SJB) and the San Benito County Water District (SBCWD) to assist in the construction of an improved water system to increase capacity and service within the City and the adjoining service area. SJB and SBCWD were unable to reach a joint agreement on the construction and administration of the project. SBCWD then withdrew from the project. The EDA performed an audit of SJB to assess financial, managerial, and administrative support capabilities. The EDA suspended the award in September 2007 because the audit uncovered deficiencies in all three categories. The EDA's termination of the grant "for convenience" in March 2008 included a corrective action plan to be implemented by SJB prior to any further eligibility for EDA assistance. SJB has stated to the 2007-08 San Benito County Civil Grand Jury that the City has viable alternatives to obtain the more than \$9 million (2006 SJB estimate) needed to fund the project but has refused to disclose any of its plans.

PURPOSE OF INQUIRY

The Grand Jury followed up the 2005-06 Grand Jury's investigation into the problems SJB has in implementing the long-awaited construction project to upgrade and increase the capacity and service of its water system. The objectives of the current Grand Jury's inquiry were:

- To determine what local government entities are doing to provide the people of SJB with a sufficient water supply and the upgrade to the city's water delivery and wastewater treatment systems that would be compliant with laws and regulations.
- To discover through what financial means the SJB City Council or any other local agency plans to fund the construction of the project.

METHODOLOGY

Members of the 2007-08 Grand Jury formed a special committee to investigate the funding of the construction of the SJB water system project. This committee conducted interviews as well as reviewed public documents and materials relating to the water system project and its funding by the EDA.

DISCUSSION

The need for improvements of the SJB water supply, as well as of its water and wastewater treatment systems, has been long standing. Movement to remedy those

problems started in the 1990s and culminated in February 2005 with the federal government approving a grant application for the construction of a water treatment plant, access to San Felipe Project water, storm water drainage pipeline replacement, a sewer treatment plant, and new water holding tanks.

SJB and SBCWD received, as co-recipients, a \$3.8 million grant from the EDA towards the October 2001 estimated cost of \$7,936,900 for the construction project. According to the EDA, this was an extraordinary-size grant.

In March 2005, disagreements occurred between the SJB City Council and SBCWD regarding the financial management and subsequent ownership of a portion of the project. SBCWD withdrew from the project in June 2006.

Thereafter, the federal government, through its Department of Commerce Office of Inspector General (OIG), performed an audit of SJB's performance on the design phase of the project. In a letter dated September 10, 2007 (see public document in Figure 1 following this report) from the EDA Regional Director (in Seattle, Washington) to SJB and SBCWD and in another letter also dated September 10, 2007 (see public document in Figure 2) to SJB, the EDA director wrote that as a result of the analysis of the OIG audit findings and recommendation, EDA had determined that the grant for the construction of the water treatment plant would be terminated "for cause." In addition, there would be no allowance for EDA participation in any project costs with SJB. The following is a summary of the audit findings:

- The City failed to allow access to project-related documents.
- The City failed to provide adequate accounting documentation.
- The City failed to utilize promptly EDA funds to pay for engineering services.
- The City failed to demonstrate adequate management and administrative processes.
- The City failed to oversee the project-management-consultant agreement.

It is noted that the September 10, 2007 EDA letter did not follow procedural regularity by including a corrective action plan to cure the above violations. The above-mentioned EDA letter did hold open the use of the \$3.8 million grant to SBCWD without SJB. SBCWD expressed no interest in pursuing this invitation. Additionally, county officials stated in interviews that the County's involvement in the project would infringe on SJB's jurisdiction.

SJB expressed that they have viable alternatives for funding the water system project and that SJB does not need the \$3.8 million grant from the federal government. The funding sources could not be disclosed.

SJB Appeal to EDA

On October 12, 2007, SJB filed an appeal to the EDA to rescind the termination of the award. The EDA response, dated March 21, 2008 (see public document in Figure 3), upheld its position regarding the lack of availability of records and documents needed to conduct an audit. EDA cited multiple sections of requirements and stated the need for SJB to cooperate with EDA could not have been made more obvious to the city. The EDA also exercised its option to forgo the exit audit due to the previous conduct of the representatives of the City. According to the EDA, the denial of records was justification

for termination of the grant “for cause” and for giving SJB a “high risk” designation. However, as noted above, the EDA failed to provide a corrective action plan that is required prior to a termination. Therefore, in light of the EDA requirement for grant recipients to commence construction within 36 months of receiving the award (by February 2008), EDA accepted the City’s offer to agree to a termination of the grant “for convenience” rather than termination “for cause.” As part of its termination agreement, SJB is required to comply with the following terms of EDA’s corrective action plan (see public document in Figure 4):

- SJB will pay EDA in full \$53,188 plus interest for improperly billed consultant costs.
- SJB will release EDA for any costs incurred with this \$3.8 million award.
- SJB will conduct an audit that contains the same scope of work as the OIG audit of February 2007. The audit will be paid by the City, and the auditor will be approved by the EDA.
- Services provided by the consultant for the previous EDA award will not be allowed to be billed in connection with any new EDA award.
- The City will implement a “robust code of ethics and conduct” in accordance with specified standards.
- The Mayor will send EDA a letter assuring the agency that the City will provide full access to documents, records, and personnel as requested by the EDA or OIG.
- SJB will meet all requirements that apply to any future EDA assistance.
- SJB will provide performance reports as required by any future EDA award.

According to its April 14, 2008 letter (See Figure 5), EDA acknowledges payment of \$53,188 from SJB, and that only interest remains due.

The LAFCO Report

The Local Agency Formation Commission (LAFCO) issued in its *Countywide Municipal Services Review Draft, November 2007* that SJB needs to define the means by which the water system will be implemented, including the terms and conditions of SBCWD participation, the status of regaining the \$3.8 million federal grant, and the nature of additional funding necessary to complete the project. SJB city officials have made representations to the Grand Jury that they have viable alternatives for funding the water system project and that SJB does not need the \$3.8 million grant from the federal government. SJB officials have refused to disclose to the Grand Jury what those sources may be. The LAFCO report reveals that SJB plans to fund the balance of the project through bank debt, grants, and private placement bond funding.

LAFCO also remarked in its report that SJB officials are considering two potential annexations totaling more than 700 acres. Both areas are on SJB’s south boundary. LAFCO opined that given SJB’s financial condition and current water service levels, SJB needs to determine whether it is able to provide adequate service levels for the proposed annexing areas without further impacting current residents and businesses.

Current Cost Estimate for the Project

An additional issue that the Grand Jury has not addressed yet is the current cost estimate for the project. The 2005-2006 Grand Jury noted in its report that SJB officials estimated the cost to be \$9,183,000 due to inflation and the results of reviewing the proposed project and re-estimating project costs. According to the LAFCO report, the current cost estimate is \$9.3 million. However, neither the Grand Jury nor LAFCO has independently verified the accuracy of this estimate.

FINDINGS

- F1.** The \$3.8 million EDA grant to the city was terminated for cause on September 10, 2007. SJB filed an appeal on October 12, 2007. The EDA revised the termination “for cause” to termination “for convenience” on March 21, 2008 and specified a corrective action plan.
- F2.** The EDA did not terminate the grant with respect to SBCWD. However, the grant has expired due to time limits.
- F3.** The Grand Jury is unable to identify a governmental authority to implement the proposed water system project.
- F4.** The Grand Jury is unable to ascertain if SJB has adequate financing for the construction of the water system project.
- F5.** SJB is in the process of discussing with unidentified others about the potential of annexing adjoining lands.

COMMENTS

The City of San Juan Bautista has stated that it intends to withhold documents about alternative sources of funding. It has stated that it is for a temporary and relatively short period. However, Government Code §54950 (the first statute of the Brown Act) recites that “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

The people of the City of San Juan Bautista and San Benito County should know what these sources are now.

RECOMMENDATIONS

- R1.** SJB City Council publicly disclose its plans on how SJB will meet the requirements of the EDA's corrective action plan (based on Finding F1).
- R2.** SBCWD determine and publicly disclose what monies it has available for the water system project and whether it will commit such monies to the project even without the \$3.8 million grant from the EDA (based on Findings F2 and F3).
- R3.** SJB City Council consider modifying its current position regarding administration and ownership with SBCWD prior to re-applying for the EDA grant for the water system project (based on Finding F2).
- R4.** SJB City Council publicly disclose plans to implement the construction of the water system project (based on Findings F3 and F4).
- R5.** SJB City Council prepare and publicly disclose a current cost estimate for the water system project (based on Finding F4).
- R6.** SJB City Council determine and publicly disclose what monies are now available from the State of California for the water-system project (based on Finding F4).
- R7.** SJB City Council determine and publicly disclose what monies it now has available from its own reserves (based on Finding F4).
- R8.** SJB City Council publicly disclose what bank debt it has secured for the water system project and how it intends to obtain public approval of said debt (based on Finding F4).
- R9.** SJB City Council publicly disclose what other grants it has secured for the water system project (based on Finding F4).
- R10.** SJB City Council publicly disclose what it has done to secure private placement bond financing and how it intends to obtain public approval of said financing (based on Finding F4).
- R11.** SJB City Council publicly disclose the last two fiscal years' audited financial statements, including the opinion of the auditor for each year and the management letter for each year that the auditor submitted to SJB (based on Finding F4).
- R12.** SJB City Council consider and publicly disclose how it will be able to provide adequate service levels for anticipated annexing areas without further impacting current residents and businesses (based on Finding F4 and F5).
- R13.** SJB City Council identify and publicly disclose the policies regarding development fees to pay the costs of the project (based on Finding F5).
- R14.** SJB City Council publicly disclose the name(s) of its hired consultants and advisors on any intended or anticipated annexations and what it has done to assure that these people have no conflict of interest with the City in regards to these proposed annexations (based on Finding F5).

RESPONSE REQUIRED

To comply with the Penal Code, including sections 933 and 933.03 (see page viii of this document), the following affected agency (or agencies) shall respond to all relevant findings and recommendations, especially, without limitations, to the findings and/or recommendations specified below.

The following agencies shall respond to the listed recommendations:

- City of San Juan Bautista: R1, R3 through R14
- San Benito County Water District: R2

BIBLIOGRAPHY

Interviews


- San Benito County Water District
- San Juan Bautista Government
- San Benito County Government
- U.S. Department of Commerce Economic Development Administration
- San Benito County Local Agency Formation Commission

Documents

- San Benito County Local Agency Formation Commission. "City of San Juan Bautista Municipal Services (Section 3.0, et seq.)," *Countywide Municipal Services Review Draft*, November 2007.
- 2005-06 San Benito Grand Jury. "City of San Juan Bautista Water System Project Funding Issues/Investigation," *2005-2006 San Benito County Grand Jury Report*. (Published 2006).
- U.S. Department of Commerce Economic Development Administration to the San Juan Bautista City Council and the San Benito County Water District, September 10, 2007. (Letter terminating the federal grant for cause).
- U.S. Department of Commerce Economic Development Administration to the SJB City Council, September 10, 2007. (Letter summarizing EDA's audit findings)
- U.S. Department of Commerce Economic Development Administration to the SJB City Council, March 21, 2008. (Letter rejecting SJB's appeal of the grant)
- U.S. Department of Commerce Economic Development Administration. *Termination for Convenience between the Economic Development Administration and the City of San Juan Bautista*. March 21, 2008.
- U.S. Department of Commerce Economic Development Administration to the SJB City Council, April 14, 2008. (Letter clarifying issues regarding the *Termination for Convenience* document).

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Figure 1 Letter from the Economic Development Agency to the City of San Juan Bautista and the San Benito County Water District (Page 1 of 7)

	U.S. DEPARTMENT OF COMMERCE Economic Development Administration 915 Second Avenue, Room 1890 Seattle, WA 98174 Fax: 206.220.7669 Voice: 206.220.7660
<u>2nd Certified Mail Article Nos.</u> City of San Juan Bautista (7002 2410 0005 7520 4241) San Benito County Water District (7002 2410 0005 7520 4258)	RECEIVED SEP 17 2007 SAN BENITO COUNTY WATER DISTRICT
SEP 10 2007	
<u>CERTIFIED MAIL - RETURN RECEIPT REQUESTED</u> City of San Juan Bautista (Article No. 7002 2410 0005 7520 4234) San Benito County Water District (Article No. 7002 2410 0005 7520 3893)	
City of San Juan Bautista 311 Second Street San Juan Bautista, California 95045 Attn: The Honorable Priscilla Hill Mayor of San Juan Bautista	San Benito County Water District 30 Mansfield Road Hollister, California 95023-9732 Attn: John Gregg District Manager
RE: <u>City of San Juan Bautista and San Benito County Water District, California</u> Audit Resolution Determination EDA Award Number: 07-01-05478 Audit Report Number: STL-18499-07-0001	
Dear Mayor Hill and Mr. Gregg:	
<p>The Economic Development Administration (EDA) made an award to the City of San Juan Bautista (City) and the San Benito County Water District (Water District) in the amount of \$3.80 million on February 1, 2005 to fund the construction of improvements to the water system to increase capacity and service within the City and the adjoining service area in San Benito County. The award had been made, in part, in reliance on the Water District's financial, managerial, and administrative support to the City, which has limited resources. EDA suspended the award on August 11, 2005, because the co-recipients failed to execute a "Joint Agreement" for the administration of the award as required by Special Condition No. 12 to the EDA award. On June 30, 2006, the Water District requested to withdraw as co-recipient of the EDA award.</p>	
Partially as a result of the Water District's request to withdraw from the EDA award, the Office of Inspector General (OIG) conducted a post award systems review audit to:	
<ul style="list-style-type: none">• assess the financial capability of the city, given that the city was proposed as the sole EDA recipient;• determine whether the city's fiscal and administrative systems comply with Federal standards for grant management;• determine whether the city is financially positioned to acquire the proposed private placement loan and effectively manage the financial aspects of the project;• assess the city's administrative capability; and• assess the consultant's qualifications to manage the grant and construction project and the city's efforts to verify those qualifications.	
As a result of this review, the OIG prepared a final report, Audit Report No. STL-18499-07-0001, dated April 20, 2007, for EDA Award Number 07-01-05478. EDA prepared an audit resolution proposal in response to the audit report. The OIG concurs with the actions EDA will undertake to resolve the audit	

Source: City of San Juan Bautista Public Record, 2007.

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This report issued: July 31, 2008

Figure 1 Letter from the Economic Development Agency to the City of San Juan Bautista and the San Benito County Water District (Page 2 of 7)

findings and recommendations. As a result of EDA's analysis of each audit finding and recommendation, **it has been determined that the grant to the City of San Juan Bautista (City) will be terminated for cause with no allowance for EDA participation in any project costs with the City.** However, EDA finds no reason to terminate the grant as to the San Benito County Water District, should the Water District elect to continue the project without the City, either as the sole grantee or with another governmental entity as co-grantee.

A summary of the audit findings and recommendations, and EDA's resolution of them, is as follows:

- **The City failed to allow access to project related documents**

The OIG attempted to conduct a post award systems review audit, but states that it could not complete the audit and make determinations because the City was not cooperative. Cooperating with an OIG audit is a grant condition as stated in Part E of the Standard Terms and Conditions of the grant agreement. The OIG states that its auditor was not allowed access to the City records. The City's response to the OIG audit was to deny the statements in the audit and to submit the documents it chose with its audit response. Rather than allowing access to records during the audit, it appears that the City attempted to select which of its records may be reviewed in an audit, which is improper and a breach of the grant agreement. The OIG recommended that EDA consider terminating the grant for failure to comply with the audit grant condition. EDA concurs that the City did not meet the requirements of the grant agreement to allow access to records, books, papers or documents related to the project.

- **The City failed to provide adequate accounting documentation**

To assess the financial capability of the City, the OIG reported that the auditor requested from the City copies of project-associated accounting documentation, including reports, spreadsheets, reconciliations to date, supporting work papers, and other hard copy documentation to support the invoices. The City's independent audit reports for fiscal years ending June 30, 2003 through 2006 had reported deficits under the EDA construction grant, and the auditor sought documentation prepared by the independent auditors regarding the deficits. If the deficits were the result of errors, then documentation was to be provided explaining the errors and supporting the corrections. Additionally, written confirmation was requested from the City that the financial statements included disclosure of all off-balance sheet arrangements and related-party transactions. The OIG advised that as of the date of the OIG audit, the City had not provided the requested documentation.

In response to the OIG audit, the City submitted documentation that, it asserted, refutes the OIG's report. The City offered a letter from its contract accountant that stated in part that documents requested were provided, and that supporting work papers were not required to be submitted. A portion of the documents the contract accountant states were provided included a "posted transaction report." After the auditor had been on-site in San Juan Bautista for over two weeks and had returned to her office, the City faxed to the OIG Seattle office a "posted transaction report." The "posted transaction report" consisted of 36 pages of data that covered dates spanning from 2002 through 2006. The data consisted of an intermixed arrangement of "Journal Types" consisting of "Accounts Payable", "General Journal" and "Cash Receipts." In many instances multiple years were included in a single "Journal Type."

There was no explanation as to what this data represented, and the data did not appear to be responsive

Figure 1 Letter from the Economic Development Agency to the City of San Juan Bautista and the San Benito County Water District (Page 3 of 7)

to the issues or the OIG requests. There was no supporting documentation concerning the transactions nor any explanatory notes as to why certain entries were designated "Reclass." The "posted transaction report" appeared to be only an assortment of posted data entries. This data does not appear to respond to any of the OIG's requests for reconciliations to date and there was no documentation from the independent auditors explaining the deficits reported under the EDA construction grant, as detailed in the City's audit reports for fiscal years ending June 30, 2003 through 2006. No documentation explaining any errors or supporting any corrections was submitted, and there was no written confirmation from the City that the financial statements included disclosure of all off-balance sheet arrangements and related-party transactions. Because the "posted transaction report" was submitted after the OIG auditor left the City, it was not possible for the auditor to test the information against the source documentation to determine its accuracy and reliability.

The City failed to provide sufficient documentation demonstrating that the City was institutionally and financially capable to solely manage the EDA-funded project and ensure proper completion of the EDA-funded project. Therefore, if any future funding awards are made to the City by EDA, then the City will be designated as a "high risk" grantee.

- **The City's audit response – the "Posted Transaction Report"**

The City submitted documentation in response to the OIG audit, including one item, discussed above, a "posted transaction report." This report contained listings of numerous payments made to Montgomery Watson Harza for engineering services. EDA had made a **design** grant to the City in 1999 at a 67% grant rate (this grant is different from the **construction** grant that is the subject of this audit). However, the "posted transaction report" appeared to show that the City was making payments for engineering services to Montgomery Watson Harza approximately 75-148 days after the City received payments from EDA on an EDA **design** grant. [EDA makes the assumption that the charges relate to the EDA **design** grant, although they are not identified as such in the "posted transaction report", as the payee and the amounts match the invoices submitted to EDA to the penny.] Since EDA grants are disbursed on a reimbursement basis, the City did not appear to promptly utilize the EDA funds to pay for the engineering services as tabulated below:

Apparent Payee Invoice Date	Payee \$ Amount	EDA Reimburse Date	City Payment Date	Difference in Days between City Receipt of EDA Funds and City Payment
01/29/02	\$102,516.20	02/21/02	07/19/02	148
02/28/02	\$ 40,770.18	05/03/02	07/19/02	75
04/04/02	\$ 53,677.86	05/03/02	08/01/02	88

An additional letter from EDA, not part of this audit determination, will be forthcoming to the City concerning the City's failure to utilize funds received from EDA in a reasonable time frame to pay engineering service costs for the EDA **design** grant.

- **The City's failure to demonstrate adequate management and administrative processes**

To determine the City's ability to manage the EDA-funded project, the OIG audit attempted to assess the City's administrative capability, and assess the consultant's qualifications to manage the grant and construction project and the City's efforts to verify those qualifications. The OIG requested procurement data for acquisition of project consultant and project architect/engineer services, the project consultant's progress reports, documentation of time spent, information on the basis on which

Figure 1 Letter from the Economic Development Agency to the City of San Juan Bautista and the San Benito County Water District (Page 4 of 7)

the City assigned and monitored tasks under the consultant agreement, and how the City analyzed the accomplishments and level of effort provided.

The City responded that the services were procured in 1999 and 2000, the City is not required by law to keep records more than three years, and the documents were in archives. However, the City did submit documentation showing that the service procurements were approved by EDA during the previous EDA-funded design grant to the City, and that the EDA required record retention time frame was three years. The City further argued that it need not provide the documents because the project consultant would not be paid as part of the current EDA-funded project. It asserted that its website supplied the project consultant's progress reports and documentation of time spent by the consultant. The City provided a few sample copies of the project consultant's progress reports in its response to the OIG audit.

The documentation submitted by the City was not responsive to the OIG's requests. The website pages that supply the project consultant's progress reports are only agendas and minutes of City Council meetings. These are brief summaries that do not provide the level of detail that would allow the OIG to evaluate the City's management and administrative processes. If the website accurately described the progress reports from the consultant and were considered by the City to be adequate, this is an indication of inadequate City oversight of its consultants.

Regarding the procurement documentation, as the OIG audit states, the consultant's retainer agreement and the City's A/E agreement were still in place and governed on-going services. Payments were still being made to the contracted entities by the City, as noted by the "posted transaction report" submitted by the City in its response to the OIG audit. The related records for these active agreements should have been retained by the City, and even if archived, must still be made available for review. The City's insistence that these services would not be charged to the EDA project was not relevant, as the justification for the request was to evaluate City management and administrative processes.

The OIG auditor should have been allowed access to all documentation associated with the service agreements, and the City's reasons for not providing access are not persuasive. The City's failure to retain or provide this substantive documentation is an indication of inadequate City oversight and the City's inability to competently administer and manage a large EDA-funded project.

- **The City's failure to oversee the project management consultant agreement**

EDA noted that the project consultant, on behalf of the City, provided the auditor with a copy of his contract with the City for his work on the EDA design grant that was awarded to the City in 1999. The agreement was executed between the City and M.S. Davis Co. on November 1, 1999 for project management of "engineering/design." A sample of the consultant duties listed in the agreement were:

- Project Oversight/Financial Management
- EDA Contract Compliance
- Review of Consultant Progress Payment Requests
- Preparation of EDA reimbursement requests

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The agreement further states:

Cost: Not to exceed Thirty Seven Thousand Five Hundred Dollars (\$37,500), except with prior written approval of City; and

Method of Compensation: Compensation shall be invoiced monthly for six months at an amount of \$6,250 per month.

The EDA design grant file indicates that during the course of project management of the EDA design grant, the M.S. Davis Co. prepared and submitted reimbursement requests to EDA. At the completion of the EDA design grant, a total of \$166,250 of M.S. Davis Co. invoice costs had been submitted to EDA for reimbursement. By the terms of the contract, any contract amount exceeding \$37,500 should not have been paid without "prior written approval of City", and any amendment of the grant-funded contract required review and approval by EDA. While the OIG auditor was on-site, the auditor stated she tried to obtain from the City and/or the project consultant any amendments that had been written for this contract, but none was provided. The previously referenced additional letter that will be forthcoming from EDA to the City will also address the City's failure to execute written amendment(s) to its project management services contract.

Neither the City nor the project consultant provided copies of amendments made to the project consultant agreement regarding compensation and/or scope of services, and no other supporting documentation was available, other than brief descriptions on the website. There is no documentation of the City's oversight or the consultant's performance of duties. Proper administrative oversight would generally require detailed project reports from consultants to justify invoice payments. The City failed to either require or to provide this evidence. The apparent lack of oversight of this contractual arrangement is additional evidence that the City lacks sufficient capability to administer and manage the current EDA-funded project.

This deficiency is compounded by the appearance that the consultant's duties apparently included submitting invoices to EDA for his own work and overseeing his own work. As noted by the "posted transaction report" submitted by the City in its response to the audit, the consultant continued to receive \$6,250 per month, but no records were presented showing that the consultant was held accountable for anything other than attendance and comments in City Council meetings.

EDA agrees with the OIG that the City had not met the requirements of the grant assurances to allow access to records, books, papers or documents related to the project. EDA finds that the documents submitted by the City in response to the OIG audit indicated that the City lacked sufficient institutional, fiscal and administrative capability to adequately administer and manage the EDA-funded project. Consequently EDA will terminate the project for cause to the City with no allowance for EDA participation in any project costs with the City. Furthermore, if any future funding awards are made to the City by EDA, then the City will be designated as a "high risk" grantee. Finally, EDA finds no reason to terminate the grant as to the San Benito County Water District, should the Water District elect to continue the project without the City, either as the sole grantee or with another governmental entity as co-grantee.

Figure 1 Letter from the Economic Development Agency to the City of San Juan Bautista and the San Benito County Water District (Page 6 of 7)

Instructions for Appeal of this Audit Resolution Determination

1. Upon receipt of this Audit Resolution Determination, you have thirty (30) calendar days to submit a written appeal of EDA's decision to the Assistant Secretary of Commerce for Economic Development, with copies provided to the Office of Inspector General (OIG) and the EDA officials named below. The appeal must be postmarked within thirty (30) calendar days from receipt of this Audit Resolution Determination. If a valid appeal is not received, the right to appeal is lost. For purposes of judicial review, this Audit Resolution Determination, if unappealed, shall be the final decision of the U.S. Department of Commerce with respect to the merits of the findings.
2. The appeal should address each audit finding and recommendation separately. The appeal procedure is your *final* opportunity to present additional evidence in support of your position on EDA's determinations. The Recipient must submit an appeal containing an explanation of why, under the pertinent facts and applicable legal authorities, the Recipient disagrees with this Audit Resolution Determination. This submission must be timely made to the address(es) specified below.
3. You must include any and all supporting evidence but may refer to evidence previously submitted in lieu of resubmitting such evidence. EDA will consider all evidence submitted in a timely manner and, in due course, issue to the Recipient a final determination on appeal. Documents, records and other materials supplementing the appeal must be attached and specifically referenced. Any conclusory statements countering an EDA determination (or an audit finding or recommendation) will be discredited unless supporting documentation for such statements is attached to the appeal. EDA, in evaluating and reaching a final determination on the appeal, is under no obligation to undertake further independent investigation to determine facts germane to the audit or your position on findings and recommendations set out in OIG's audit report(s).
4. An appeal of this Audit Resolution Determination must be sent to the following officials:

Original: Sandy K. Baruah
Assistant Secretary of Commerce for Economic Development
U.S. Department of Commerce
Economic Development Administration
1401 Constitution Avenue, N.W., HCHB #7800
Washington, D.C. 20230

Copies to: John Seeba
Assistant Inspector General for Audits
U.S. Department of Commerce
Office of Inspector General
1401 Constitution Avenue, NW
Washington, DC 20230

David Sheppard
Regional Inspector General for Audits
Office of Inspector General
U.S. Department of Commerce
915 Second Avenue, Room 3062
Seattle, WA 98174

Figure 1 Letter from the Economic Development Agency to the City of San Juan Bautista and the San Benito County Water District (Page 7 of 7)

Anita Sanders
EDA Audit Liaison
Administrative and Support Services Division
U.S. Department of Commerce
Economic Development Administration
1401 Constitution Avenue, N.W., HCHB #7227
Washington, D.C. 20230

A. Leonard Smith
EDA Regional Director
Economic Development Administration
915 Second Avenue, Room 1890
Seattle, WA 98174

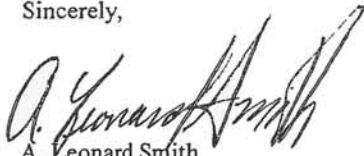
Civil and Criminal Penalties

If you make or provide any knowingly false or frivolous statement, representation or evidence, you may be liable for penalties under the False Claims Act at 31 U.S.C. § 3729 *et seq.* or under other applicable statutes, or subject to criminal penalties under 18 U.S.C. §§ 286, 287, 1001 and 1002, or other applicable statutes.

Agency Point of Contact

Please direct any questions regarding this matter and, also, any notice that the Recipient has filed bankruptcy, to Sandy K. Baruah, the EDA point of contact, at the address referenced above for submitting an appeal, or at (202) 482-5081.

Sincerely,




A. Leonard Smith
Regional Director
Seattle Regional Office

Copies to: John Seeba, Assistant Inspector General for Audits
David Sheppard, Regional Inspector General for Audits
Jackie Day, OIG
Anita Sanders, EDA

Figure 2 Letter from the Economic Development Agency to the City of San Juan Bautista (Page 1 of 5)

SEP 10 2007



U.S. DEPARTMENT OF COMMERCE
 Economic Development Administration
 915 Second Avenue, Room 1890
 Seattle, WA 98174
 Fax: 206.220.7669
 Voice: 206.220.7660

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
 (Article No. 7002 2410 0005 7520 3909)

City of San Juan Bautista
 311 Second Street
 San Juan Bautista, California 95045
 Attn: The Honorable Priscilla Hill
 Mayor of San Juan Bautista

RE: City of San Juan Bautista, California
 EDA Award No. 07-01-04876

Dear Mayor Hill:

This letter is issued as a result of the Economic Development Administration (EDA) review of documentation submitted by the City of San Juan Bautista (City) regarding the Office of Inspector General (OIG) Audit Report Number STL-18499-07-0001 (copy of the audit resolution determination letter is enclosed) concerning the EDA-funded construction project 07-01-05478. Two items in the City's response to the OIG audit were noted by the EDA as follows:

- **The City's "Posted Transaction Report"**

The City submitted documentation in response to the OIG audit, including one item, a "posted transaction report." This report contained listings of numerous payments made to Montgomery Watson Harza for engineering services. EDA had made a **design** grant (EDA Award No. 07-01-04876) to the City in 1999 at a 67% grant rate (this grant is different from the **construction** grant that was the subject of the OIG audit). However, the "posted transaction report" appeared to show that the City was making payments for engineering services to Montgomery Watson Harza approximately 75-148 days after the City received payments from EDA on the EDA **design** grant. [EDA makes the assumption that the charges relate to the EDA **design** grant, although they are not identified as such in the "posted transaction report", as the payee and the amounts match the invoices submitted to EDA to the penny.] Since EDA grants are disbursed on a reimbursement basis, the City did not appear to promptly utilize the EDA funds to pay for the engineering services as tabulated below:

<u>Apparent Payee Invoice Date</u>	<u>Payee \$ Amount</u>	<u>EDA Reimburse Date</u>	<u>City Payment Date</u>	<u>Difference in Days between City Receipt of EDA Funds and City Payment</u>
01/29/02	\$102,516.20	02/21/02	07/19/02	148
02/28/02	\$ 40,770.18	05/03/02	07/19/02	75
04/04/02	\$ 53,677.86	05/03/02	08/01/02	88

In accordance with 15 Code of Federal Regulations (CFR) Part 24, the Federal Government imputes interest upon Federal funds that were received but not utilized in a reasonable time frame to pay debt.

I HEREBY CERTIFY THAT THE FOREGOING DOCUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

DATED: 10/14/07
Michelle Harza
 Deputy
 CITY CLERK OF THE CITY OF SAN JUAN BAUTISTA, CALIF.

Source: City of San Juan Bautista Public Record, 2007.

City of San Juan Bautista: Funding Issues of Its Water System Project

This report issued: July 31, 2008

Figure 2 Letter from the Economic Development Agency to the City of San Juan Bautista (Page 2 of 5)

The Current Value of Funds Rate is used to calculate interest on overdue Federal Government receivables, which is based on the Treasury Tax and Loan rate that is in effect on the first day the Government is due interest and carries throughout the interest period. Therefore, the imputed interest (Int.) by the Government is determined to be \$2,108 as tabulated below:

<u>Payee \$ Amount</u>	<u>EDA \$ Share at 67% (Rounded)</u>	<u>Treasury Tax & Loan Rate Jan. 1 - Jun. 20, 2002</u>	<u>Days Delinquent</u>	<u>Imputed Int. \$ Amount (Rounded)</u>
\$102,516.20	\$68,686	5.0 %	148	\$1,393
\$ 40,770.18	\$27,316	5.0 %	75	\$ 281
\$ 53,677.86	\$35,964	5.0 %	88	\$ 434
			TOTAL	\$2,108

However, if the City earned interest on the funds that were received by EDA, then that interest total must be returned to EDA, less an allowable \$100 in interest per calendar year for administration expense, as defined in EDA's "Requirements for Approved Construction Projects", Section IV. Of the above imputed interest and the possible earned interest, the City must return to EDA the **higher** of the two interest amounts. [31 CFR 901.9].

- **The City's failure to oversee the project management consultant agreement**

EDA noted that the project consultant, on behalf of the City, provided the OIG auditor with a copy of his contract with the City for his work on the EDA design grant that was awarded to the City in 1999. The agreement was executed between the City and M.S. Davis Co. on November 1, 1999 for project management of "engineering/design." A sample of the consultant duties listed in the agreement were:

- Project Oversight/Financial Management
- EDA Contract Compliance
- Review of Consultant Progress Payment Requests
- Preparation of EDA reimbursement requests

The agreement further states:

Cost: Not to exceed Thirty Seven Thousand Five Hundred Dollars (\$37,500), except with prior written approval of City; and

Method of Compensation: Compensation shall be invoiced monthly for six months at an amount of \$6,250 per month.

The EDA design grant file indicates that during the course of project management of the EDA design grant, the M.S. Davis Co. prepared and submitted reimbursement requests to EDA. At the completion of the EDA design grant, a total of \$166,250 of M.S. Davis Co. invoice costs had been submitted to EDA for reimbursement. By the terms of the contract, any contract amount exceeding \$37,500 should not have been paid without "prior written approval of City", and any amendment of the grant-funded contract required review and approval by EDA. While the OIG auditor was on-site, the auditor stated she tried to obtain from the City and/or the project consultant any amendments that had been written

Figure 2 Letter from the Economic Development Agency to the City of San Juan Bautista (Page 3 of 5)

for this contract, but none was provided. Since the City did not provide "prior written approval of City" documentation to increase the M.S. Davis Co. contract amount, the City must return the EDA overpayment, calculated as $\$166,250 - \$37,500 = \$128,750$.

However, the final total project costs for the design grant exceeded the original project budget costs by \$52,511, and the City was solely responsible for, and paid, this "overrun" amount of \$52,511. EDA will assume that this "overrun" amount pertains to the overpayment on the M.S. Davis Co. contract. Therefore, EDA will deduct from the overpayment amount the "overrun" amount, or, $\$128,750 - \$52,511 = \$76,239$. Consequently, with the EDA grant rate at 67 percent, the amount EDA was overcharged was \$51,080 ($\$76,239 \times 0.67$, rounded).

With regards to the possible earned interest noted above, the City may present evidence, either documents or affidavits, to indicate the use of the funds and to establish the interest earned. Furthermore, with regard to the project consultant contract overpayments noted above, the City may present any additional evidence not previously considered. All evidence must be submitted within 15 calendar days of the date of this letter to the EDA point of contact noted below. EDA will consider all evidence submitted in a timely manner and, in due course, issue to the City a final determination. While EDA may forego debt collection activities pending the issuance of EDA's final determination, interest will continue to accrue until the debt is paid in full.

This letter serves as the initial demand for full payment of the debt in the amount of \$51,080 of project management overpayments made to the City plus appropriate interest charges for the City's failure to properly utilize EDA reimbursements (minimum of \$2,108) for a minimum total of \$53,188, plus interest thereon at the rate of 4 percent per annum, owed as a result of these findings. Agency records supporting this \$53,188 (or higher) debt are the City's response to the OIG Audit Report No. STL-18499-07-0001 and the enclosed Audit Resolution Determination letter. Absent additional evidence of the interest, the debt will be established to be \$53,188. An account receivable will be established with EDA. Payment is due in one lump sum within thirty (30) days of receipt of this letter (the "Due Date"). Payment may be made by check made payable to the "Economic Development Administration" and mailed to:

Economic Development Administration
Bank of America
P.O. Box 100462
Atlanta, Georgia 30384

In the lower left corner of the check please state "EDA Award No. 07-01-04876" and on a second line state "Debt Payment." Payment may also be made by wire transfer. The necessary information for wire transfers to EDA is:

ABA No.: 026009593
Account No.: 3750217933

Under the Debt Collection Act of 1982, as amended (31 U.S.C. § 3701 *et seq.*), interest will accrue on the principal, or any portion thereof, owing and unpaid from the date of receipt of this letter until the debt is paid in full. However, interest will automatically be waived on any portion of the principal that is paid within thirty (30) days. The rate of interest that the Recipient will be assessed is

Figure 2 Letter from the Economic Development Agency to the City of San Juan Bautista (Page 4 of 5)

specified above, determined in accordance with 31 U.S.C. § 3717.

Interest charges will continue to be added until the entire debt has been paid in full. This includes payment of all principal and interest charges. Any sums received will be applied first towards interest charges, and lastly, towards principal.

Collection Actions

EDA is entitled to take all appropriate steps to collect delinquent debts and will do so if the debt is not paid as demanded herein. These steps may include:

- referring the debt to the U.S. Department of the Treasury for offset of the City's income tax refunds, the City's contractor/vendor payments and any other federal payments, including but not necessarily limited to certain loans to the City, that are not exempt from offset;
- referring the debt to a private collection agency;
- reporting the debt to a credit bureau;
- referring the debt to the U.S. Department of Justice for litigation;
- referring the debt to the U.S. Department of the Treasury for any of the above-described actions, which referral is required when the debt has been delinquent for 180 days; and
- performing administrative offset or common law set-off of the debt against any payments or credits that may be owed to the City by EDA.

Additionally, failure to pay the debt by the Due Date may result in payments being withheld under any current U.S. Department of Commerce awards to the City and in the termination of such awards. In addition, the City will become ineligible for federal loans (except disaster loans), loan insurance or loan guaranties. Also, it is U.S. Department of Commerce policy that no award of federal funds shall be made to a grant or cooperative agreement applicant who has an outstanding delinquent debt to the Department.

EDA believes that the payment of this debt is entitled to priority treatment in accordance with 31 U.S.C. § 3713. Failure to satisfy EDA's claim before paying the claims of other creditors may result in the personal liability of one or more of the City's officers, employees or other representatives for this debt.

Inspection and Copying of Documents

The City has the right to inspect and copy the agency records related to the debt as determined by the responsible agency official(s). However, with respect to this debt, the responsible agency official(s) has determined that all documents have been previously provided to the City or are being provided herewith. These documents include the EDA design Award, the Office of Inspector General (OIG) Audit Report Number STL-18499-07-0001, the City's response to the OIG Audit, and the Audit Resolution Determination letter. If the City wishes to obtain additional copies, the EDA point of contact who will explain the procedures for inspecting and copying the originals:

Figure 2 Letter from the Economic Development Agency to the City of San Juan Bautista (Page 5 of 5)

Karen Borell
Regional Counsel
Economic Development Administration
915 Second Avenue, Room 1890
Seattle, WA 98174

Repayment Agreement

The City may request to enter into a written repayment agreement with the responsible EDA official(s) to repay the debt, including interest, penalties and administrative charges determined by EDA. If the Recipient wishes to exercise this right, the Recipient must do so within thirty (30) days of the date of receipt of this letter. This is the City's only opportunity to do so.

To request to enter into a repayment agreement, the City must submit a proposed repayment schedule or, if the City is unable to pay the full amount of the debt, a settlement proposal in lieu of the schedule. This submission must be timely made to EDA at the address specified above. EDA will review all materials submitted in a timely manner and any obtained from other sources (e.g., credit reports), and issue a decision to the City.

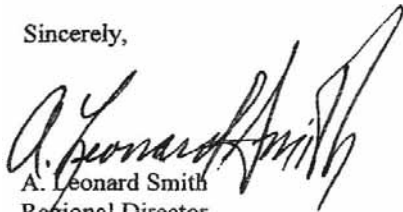
Civil and Criminal Penalties

If you make or provide any knowingly false or frivolous statement, representation or evidence, you may be liable for penalties under the False Claims Act at 31 U.S.C. § 3729 *et seq.* or under other applicable statutes, or subject to criminal penalties under 18 U.S.C. §§ 286, 287, 1001 and 1002, or other applicable statutes.

Agency Point of Contact

Please direct any questions regarding this matter and, also, any notice that the City has filed bankruptcy, to Karen Borell, the EDA point of contact, at the address referenced above or at (206) 220-7701.

Sincerely,

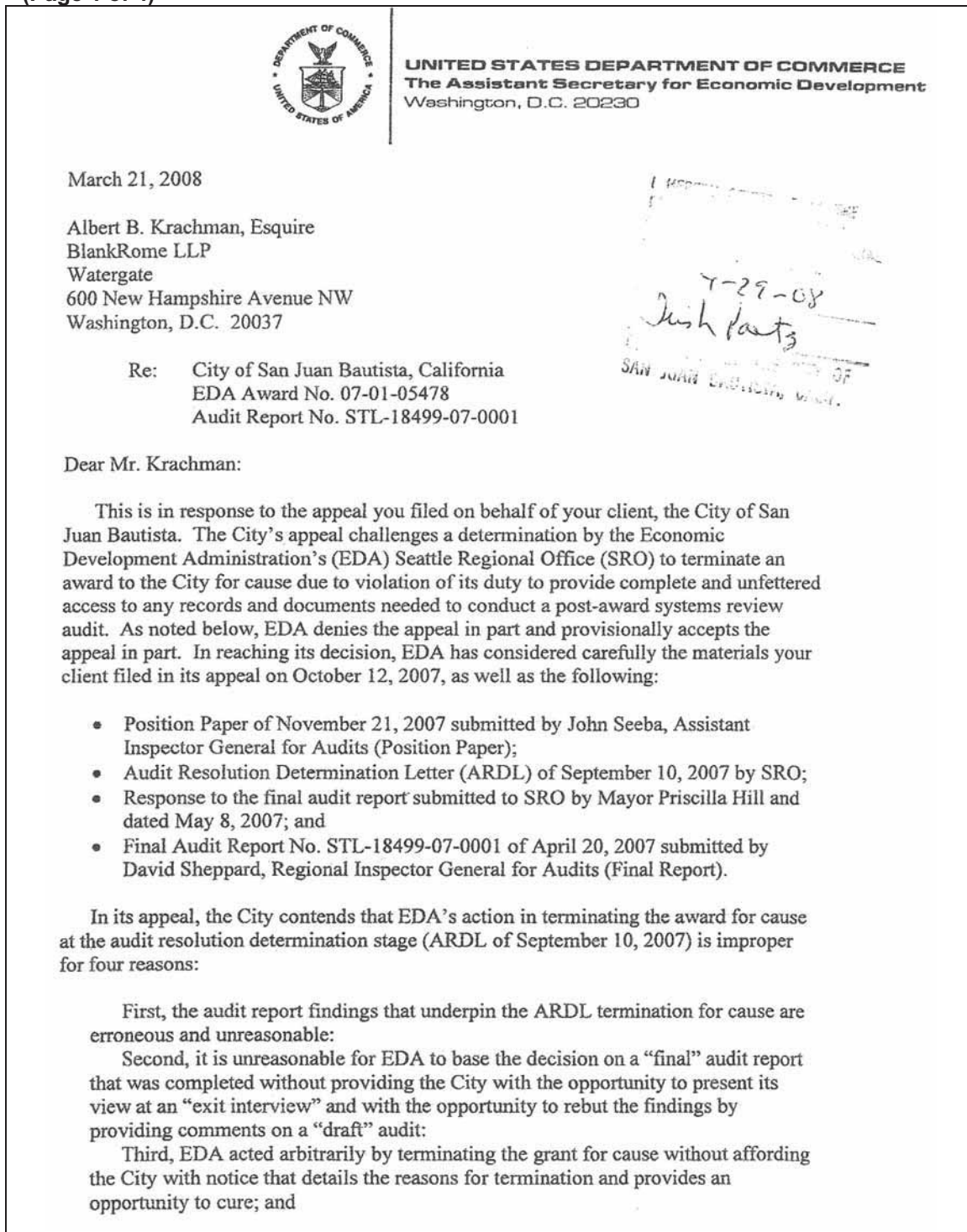


A. Leonard Smith
Regional Director
Seattle Regional Office

Enclosure

Copies to: John Seeba, Assistant Inspector General for Audits
David Sheppard, Regional Inspector General for Audits
Jackie Day, OIG
Anita Sanders, EDA

Figure 3 Response letter from the Economic Development Agency (EDA) to the City of San Juan Bautista regarding the City's appeal to the termination of the EDA award (Page 1 of 4)



Source: City of San Juan Bautista Public Record, 2007.

Figure 3 Response letter from the Economic Development Agency (EDA) to the City of San Juan Bautista regarding the City's appeal to the termination of the EDA award (Page 2 of 4)

Appeal of the City of San Juan Bautista, California
EDA Award No. 07-01-05478
Audit Report No. STL-18499-07-0001
Page 2 of 4

Fourth, EDA acted arbitrarily by designating the City a "high risk" recipient without prescribing a corrective action plan that afforded the City a period of time to cure any shortcomings.

In addition, the City admits liability for improper payments with respect to a previous EDA project, in the amount of \$53,188 plus interest. Finally, the City also contends that it is in fact presently responsible and capable of administering EDA grant funds in accord with the requirements of federal law.

On appeal, EDA rejects in their entirety the first two grounds for reversing the decision at the audit resolution stage. It is axiomatic that a fundamental duty of any recipient of federal funds is to provide unfettered access to any records and documents needed to conduct an audit to ensure that the recipient is carrying out the purposes of the grant award. This responsibility is made manifest in EDA's Standard Terms and Conditions (March 1999) that are made part of the grant:

- Paragraph A.1.a of the Standard Terms and Conditions of the award required the City to comply with all provisions of the Public Works and Economic Development Act (PWEDA) and EDA regulations at title 13, Code of Federal Regulations, chapter III;
- Subsection (b) of section 608 of PWEDA provides that the Secretary of Commerce, the Inspector General, or any duly authorized representative "shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient that related to assistance received" under the Act;
- EDA regulations implement section 608 of PWEDA at 13 C.F.R. § 302.14. In addition to repeating the language of the statute, paragraph (b) of § 302.14 specifies that EDA is entitled to --
 "[A]ccess to its properties in order to examine all books, correspondence, and records, including without limitation computer programs and data processing software, to verify the Recipient's compliance with Investment Assistance requirements";
- Section E of the Standard Terms and Conditions also reiterates the requirement to provide access to the Inspector General to carry out responsibilities under the Inspector General Act of 1978, as amended (5 U.S.C. App. I, sec.1 *et seq.*).

Accordingly, the need to cooperate in the conduct of an audit could not have been more obvious to the City. In its appeal, the City acknowledges that "all of its interactions with the Auditor were not commendable, and for this the City apologizes" and that it "is taking corrective action to prevent such circumstances in the future." Appeal, at page 2. In its Position Paper of November 21, 2007, the Office of Inspector General (OIG) states that "key ... personnel [of the City] were unprofessional, uncooperative, contentious, and hostile in dealings with our office and with our auditor," and that the City's apology "does not mitigate the uncalled for abuse our auditor suffered." Position Paper, at page 6. The OIG reiterates that in fact the City denied access to the documentation and key

Figure 3 Response letter from the Economic Development Agency (EDA) to the City of San Juan Bautista regarding the City's appeal to the termination of the EDA award (Page 3 of 4)

Appeal of the City of San Juan Bautista, California
EDA Award No. 07-01-05478
Audit Report No. STL-18499-07-0001
Page 3 of 4

personnel necessary to accomplish the objectives of the post-award review of the City's systems. Position Paper, at page 1. EDA agrees and concludes that the City's lack of cooperation was a material violation of terms of the award.

EDA also rejects the City's contention that the OIG's decision to forego an "exit conference" and issue the report in final was erroneous and unreasonable. Paragraph E.2.b(1) of the Standard Terms and Conditions expressly reserves that determination to the discretion of the Inspector General. See Standard Terms and Conditions, at page 16 (providing 30 days to comment on a draft report "unless the Inspector General determines otherwise"). In this case, the OIG exercised that discretion to forego an exit conference and go directly to a final audit report, noting that the "conduct of representatives from the city with the auditor led audit management to decide to not expose our auditor to further vitriol during an exit briefing." Position Paper, at page 6. OIG also notes that its audit files show clearly that the City was made aware of the consequences of its failure to provide access and its obstruction of the audit. Moreover, any contention that the City did not have opportunity to comment on the draft report is belied by the fact that the City submitted a response to the final audit report on May 8, 2007, and then was given an additional 30 days to respond following SRO's September 10, 2007 ARDL.

With respect to the City's third and fourth grounds for its appeal, both of which hinge on whether EDA acted arbitrarily in terminating the award for cause and designating the recipient "high risk," we conclude that a denial of access to records and personnel does amount to a material violation of the terms and conditions of the award and would justify termination for cause and "high risk" designation. However, the City is correct in asserting that such actions are predicated upon procedural regularity. In the given instance, EDA failed to propose a corrective action plan to detail the steps the City would need to take to cure the material violation. This plan was required before either action could become final.

In light of this procedural flaw, EDA could suspend at this time both actions and provide the City with a corrective action plan and time to respond. EDA would need to treat any such response expeditiously and fairly, but given the complexities of the project, proceeding in this manner is sure to entail an additional significant delay in the ultimate resolution of the matter. EDA is reluctant to take this tack because this award has already passed beyond EDA's rule that construction on approved projects must be underway no later than three years after date of the award (the third anniversary of the award occurred February 8, 2008). See *Summary of EDA Construction Standards*, as amended November 28, 2007, paragraph VII.B.2, at pages 20-21, available at: <http://www.eda.gov/InvestmentsGrants/Directives.xml>; see also Special Award Conditions #1 and #7 set out in the Exhibit 6 of the City's appeal at page SJB 0004 (specifying commencement of construction not later than 34 months after the date of award). EDA adopted this rule so that funds would not sit idle due to unresolved construction delays. Rather than delay this matter any longer and tie up funds that could be used on other projects that will immediately proceed to create higher-wage, higher-

Figure 3 Response letter from the Economic Development Agency (EDA) to the City of San Juan Bautista regarding the City's appeal to the termination of the EDA award (Page 4 of 4)

Appeal of the City of San Juan Bautista, California
EDA Award No. 07-01-05478
Audit Report No. STL-18499-07-0001
Page 4 of 4

skill jobs in distressed regions of the country, EDA will accept the City's offer made in its appeal to convert the termination for cause to a termination for convenience. Enclosed with this letter is a proposed agreement to accomplish that result which incorporates a series of actions that EDA will require and is tantamount to the "corrective action plan" that would be required to cure the procedural flaws in the original decision in the ARDL. If the City accepts the terms and conditions of the termination for convenience, EDA will rescind the City's designation as "high risk" and the City would remain eligible for EDA assistance.

This is EDA's final decision with respect to the City of San Juan Bautista's appeal of the Determination. There are no other appeals available within the U.S. Department of Commerce.

Please direct any inquires regarding this matter to Otto B. Bird, EDA's Chief Counsel, at (202) 482-4687.

Sincerely,

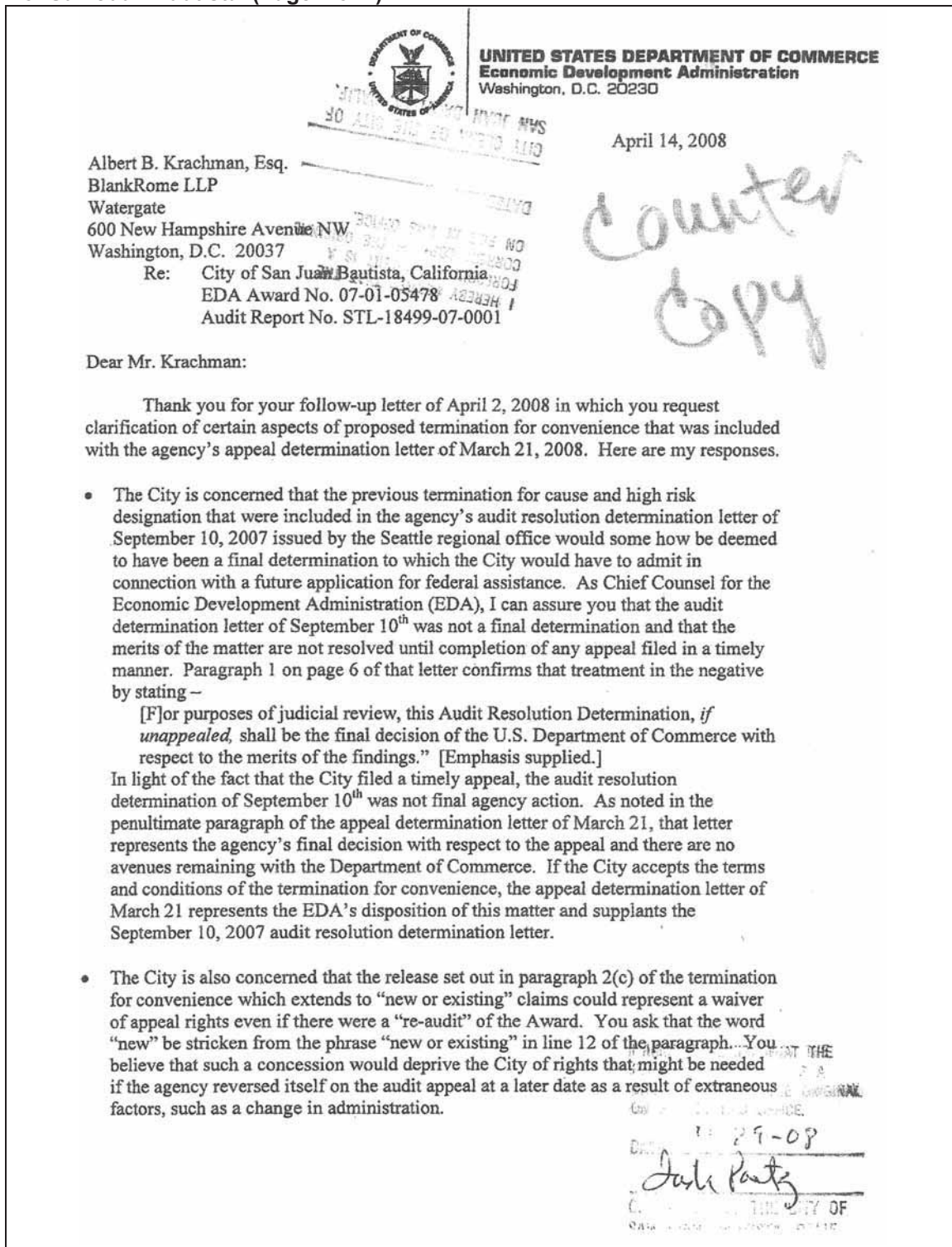
Handwritten signature of Sandy K. Baruah in black ink, with the initials 'SKB' written to the right of the signature.

Sandy K. Baruah
Assistant Secretary of Commerce
for Economic Development

Enclosure

cc: The Honorable Priscilla Hill
John Seeba, Assistant Inspector General for Audits
Otto B. Bird
A. Leonard Smith
Anita Sanders

Figure 4 The Termination for Convenience Agreement between the EDA and the City of San Juan Bautista (Page 1 of 2)



Source: City of San Juan Bautista Public Record, 2007.

Figure 4 The Termination for Convenience Agreement between the EDA and the City of San Juan Bautista (Page 2 of 2)

This provision by its own terms is limited to matters arising from the Award being terminated. EDA did not, and will not, disburse any amounts under the Award. The City is simply releasing EDA from any potential claim that it has under the terminated Award. This release must extend to the universe of known claims and any *future* claims that the City might otherwise determine to pursue at a later date. Moreover, as noted above, the appeal determination letter and the executed termination for convenience will represent the final agency action. The agreement is intended on its face “to resolve and settle all differences pertaining to the disputed matters” raised by the City in its appeal of October 12, 2007 (as set out in the fourth recital on page one of the termination for convenience).

A subsequent decision by the agency to “re-audit” would entail a new audit report number that would provide multiple opportunities to respond and ultimately trigger new appeal rights for the City if it contained adverse findings. *See* the Department of Commerce administrative order *DAO 213-5, Audit Resolution and Follow-up* available at <http://dms.osec.doc.gov/cgi-bin/doiit.cgi?218:112:1:2> (paragraph .03.b.1 of section 6 and section 8, specifying the multiple opportunities afforded an auditee to respond to audit reports and determinations to ensure that an auditee is afforded appropriate due process before final action is taken). As the official responsible for handling appeals of audit matters for EDA, I assure you that this office would not read paragraph 2(c) to affect the City’s right to appeal an adverse determination made as part of any such “re-audit” of the Award. Accordingly, we believe that such a change is not necessary.

- The City notes that it paid \$53,188. EDA acknowledges that it has received that payment through Pay.gov on March 30. Accordingly, only interest remains due in the amount of \$1,193.82 plus \$.13 interest per day from March 30 to date of payment. You request that section 2(b) of the agreement be amended to reflect the payment. We believe that no change is required – the agreement was signed by EDA on March 21, nine days before the City paid the principal. With the City’s signature after the date of payment, there is clearly no question but that the agreement was initiated prior to the payment and concluded after. We are also acknowledging receipt of the payment in this letter.

Thank you for your attention to this matter. I look forward to its conclusion.

Sincerely,



Otto Barry Bird
Chief Counsel
Economic Development Administration

cc: Ms. Jan McClintock
City of San Juan Bautista

Figure 5 Letter from the Economic Development Agency to the City of San Juan Bautista regarding the Termination for Convenience Agreement (Page 1 of 5)

ORIGINAL
OF THE IN THIS OFFICE
DATE: 4-29-08
J. L. Pate
CITY CLERK OF THE CITY OF
SAN JUAN BAUTISTA, CALIF.

**TERMINATION FOR CONVENIENCE
BETWEEN THE ECONOMIC DEVELOPMENT ADMINISTRATION
AND
THE CITY OF SAN JUAN BAUTISTA, CALIFORNIA**

This Termination for Convenience Agreement (the "Agreement") is entered into between the City of San Juan Bautista, California (City) and the United States of America, acting through the Economic Development Administration (EDA) of the U.S. Department of Commerce. This agreement becomes effective on the date the City's authorized representative signs below.

RECITALS

WHEREAS, EDA, the City, and the San Benito County Water District entered into EDA award no. 07-01-05478 in the amount of \$3.8 million for the construction of improvements to the water system to increase capacity and service within the City and the adjoining service area in San Benito County (the Award);

WHEREAS, disputes have arisen between EDA and the City relating to access to documentation and key personnel in relation to an audit conducted of the Award and to the allowability of certain costs and the performance of certain work by a consultant under a previous award (award no. 07-01-04876), those disallowances being the subject of an Audit Resolution Determination Letter dated September 10, 2007, and a second letter dated September 10, 2007, both issued by EDA;

WHEREAS, the City has appealed the September 10th determination by EDA in a timely appeal filed on behalf of the City by the law firm of BlankRome LLP by letter dated October 12, 2007 to the Assistant Secretary of Commerce for Economic Development; and

WHEREAS, the parties hereto desire to terminate the award for convenience and to resolve and settle all differences pertaining to the disputed matters raised in the appeal.

NOW THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. **TERMINATION FOR CONVENIENCE.** Pursuant to 15 C.F.R. § 24.44, EDA is terminating the Award and the City hereby consents to such termination for the mutual convenience of the parties, subject to the terms and conditions set forth in this Agreement.
2. **TERMS AND CONDITIONS.**
 - a. **Participation in Costs.** As of the date of this Agreement, no federal funds have been disbursed under the Award and no costs incurred by the City in connection with the Award will be reimbursed by EDA.

Source: City of San Juan Bautista Public Record, 2007.

Figure 5 Letter from the Economic Development Agency to the City of San Juan Bautista regarding the Termination for Convenience Agreement (Page 2 of 5)

Termination for Convenience – EDA Award No. 07-01-05478
Agreement between the Economic Development Administration and the
City Of San Juan Bautista, California
Page 2 of 5

- b. **Reimbursement of Erroneous Charges.** Pursuant to the City's agreement in its appeal, the City will pay \$53,188, plus interest costs that have accrued from the date of that letter to the date of this agreement to EDA for costs improperly billed to a prior award relating to a contract with a consultant (award no. 07-01-04876).¹ The City shall make payment to EDA within 30 days of the date of execution of this agreement by check payable to "Economic Development Administration" delivered by correspondence addressed as follows:

Economic Development Administration
Room 7217
1401 Constitution Ave., NW
Washington, DC 20230

The check and transmittal letter shall contain this annotation:
"City of San Juan Bautista, Reimbursement Award, No. 07-01-04876"

The Economic Development Administration in collaboration with the U.S. Treasury has arranged for payments to EDA to be paid through the internet at pay.gov. If the City chooses this method, it should go to the www.pay.gov website. EDA is listed under "What Federal Agencies Can I Pay?"

If the City has any questions, please call EDA's Administrative and Support Services Division at 202-482-5271.

- c. **Release.** EDA avers that it duly suspended disbursement under the Award agreement on August 11, 2005 due to the inability of the City to reach agreement with the San Benito County Water District, co-recipient to the Award, and that it has not approved any costs that the City may have incurred in connection therewith. In consideration of the agreements contained herein, the City agrees that it will not take action in any way and in any forum whatsoever, including by filing action in State or federal court, to seek reimbursement for any such costs or to seek enforcement of the Award hereby terminated for convenience. The City further agrees to release EDA from any and all obligations, claims, demands, debts, issues, causes of action and liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, direct or indirect, new or existing, arising in connection with the work performed by or at the behest of the City on the Award and associated costs under the Award and those arising in connection with any other written or oral communications between the City and EDA, or any communications arising among the City, EDA and any other person or entity, or the actions of the City or EDA, as the case may be, or their officers, directors, shareholders, employees, attorneys, agents, successors, assigns,

¹ Interest will be calculated at the Department of Treasury current value of funds rate of 4 percent from September 15, 2007 through December 31, 2007 and 5 percent per year from January 1, 2008 through the date of execution of the agreement by the City.

Figure 5 Letter from the Economic Development Agency to the City of San Juan Bautista regarding the Termination for Convenience Agreement (Page 3 of 5)

Termination for Convenience – EDA Award No. 07-01-05478
Agreement between the Economic Development Administration and the
City Of San Juan Bautista, California
Page 3 of 5

heirs and representatives in connection with work performed by City and associated costs under the Award.

- d. ***Termination without Prejudice to Submission of a New Application.*** EDA agrees that this termination for convenience will not affect the City's eligibility for future awards from EDA. However, should the City seek new financial assistance from EDA, the following conditions will apply--
- i. The City asserts in its appeal that it is presently responsible and capable of managing and administering an EDA award in accord with federal law. Before considering additional assistance, the City shall demonstrate to EDA that it has this stated capacity by conducting an audit at its own expense and performed by an auditor satisfactory to EDA. Such audit shall be in accord with the post-award systems review scope of work of the audit undertaken by the Department of Commerce's Office of Inspector General audit of February 2007, that was designed to
 - Assess the financial capability of the City;
 - Determine whether the City's fiscal and administrative systems comply with Federal standards for grant management;
 - Determine whether the City is financially positioned to acquire the proposed private placement loan and effectively manage the financial aspects of the project; and
 - Assess the City's administrative capability.EDA will not extend assistance unless all significant findings and material weaknesses in the audit (if any) are resolved to its satisfaction.
 - ii. Should the City choose to engage the services of the consultant that the City employed in connection with the previous project for which the City admitted in its appeal to obtaining improper reimbursement under the previous award, such services will not be eligible expenditures and may not be billed to EDA in connection with any aspect of any such new award.
 - iii. The City shall demonstrate to the satisfaction of EDA that it has adopted and is implementing a robust code of ethics and conduct to ensure that the City maintains the highest standards of integrity required of recipients, including standards set out at of 13 C.F.R. § 302.17 and section L of EDA *Standard Terms and Conditions for Construction Projects* (available at http://www.eda.gov/ImageCache/EDAPublic/documents/pdfdocs2007/constructionstcsfinal_2epdf/v1/constructionstcsfinal.pdf).
 - iv. The City must provide a letter from the Mayor providing the Mayor's assurance that the City will keep and maintain, and provide at all times

Figure 5 Letter from the Economic Development Agency to the City of San Juan Bautista regarding the Termination for Convenience Agreement (Page 4 of 5)

Termination for Convenience – EDA Award No. 07-01-05478
Agreement between the Economic Development Administration and the
City Of San Juan Bautista, California
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full and unfettered access to, documents, records, and personnel as requested by EDA, the Office of Inspector General, or other Departmental or government representatives as may be necessary to carry out an audit or to determine compliance with the terms and conditions of the award in accord with 15 C.F.R. § 24.42, 13 C.F.R. § 302.14 and section C.16 and F of EDA *Standard Terms and Conditions for Construction Projects*. Such letter shall designate an official representative of the Mayor to whom EDA may address any concerns that arise in connection with a future award, if any.

- v. The City will submit performance reports to EDA on a monthly basis to report on the progress of any such award or more frequently due to significant developments or as may be specified in such award.
 - vi. The City will need to meet all financial, programmatic and legal requirements that apply to EDA assistance, including a new limitation relating to the exercise of the power of eminent domain in a manner consistent with section M.6 of EDA *Standard Terms and Conditions for Construction Projects*.
3. **GOVERNMENT’S CLAIMS.** Notwithstanding the foregoing, and while the parties are not aware of any such claims, the Government does not waive any claims it may have for any criminal actions, including criminal false claims under Title 18 of the U.S. Code, or and any civil false claims under Title 18 of the U.S. Code under the Cooperative Agreement.
 4. **COUNTERPARTS.** This Agreement may be executed in identical counterpart copies, each of which shall be an original, but all of which shall constitute one and the same agreement.
 5. **CHOICE OF LAW.** This Agreement shall be governed by, and construed and enforced in accordance with the federal laws of the United States of America.
 6. **ENTIRE AGREEMENT; SURVIVAL.** This Agreement constitutes the full and entire understanding and agreement between the parties with regard to the subject matter hereof. All representations and understandings among the parties, oral or otherwise, express or implied, previously made have been subsumed within or superseded by the terms of this Agreement. This Agreement shall not be suspended, waived, terminated, amended or modified in any manner except in writing signed by all parties.
 7. **ACCURACY OF RECITALS.** The parties hereto confirm the accuracy of the recitals hereto, which recitals are hereby incorporated herein and deemed to be a material part of this Agreement.


Figure 5 Letter from the Economic Development Agency to the City of San Juan Bautista regarding the Termination for Convenience Agreement (Page 5 of 5)

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IN WITNESS WHEREOF, this Agreement has been duly executed as of the Effective
Date.

For EDA:

For the City

By:  fnskb By: _____

Name: Sandy K. Baruah Name: _____

Title: Assistant Secretary of Commerce Title: _____
for Economic Development

Date: March 21, 2008 Date: _____

