

OFFICE OF THE  
COUNTY COUNSEL



COUNTY OF SANTA CRUZ

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## GOVERNMENT TORT CLAIM

### RECOMMENDED ACTION

Agenda November 10, 1998

To: The Board of Supervisors

Re: Claim of Rhodes & Kesling, No. 899-047

Original Document and associated materials are on file at the Clerk to the Board of Supervisors.

In regard to the above-referenced claim, this is to recommend that the Board take the following action:

X 1. Deny the claim of Rhodes & Kesling, No. 899-047 and refer to County Counsel.

Deny 2 the application to file a late claim on behalf of \_\_\_\_\_ and refer to County Counsel.

Grant 3 the application to file a late claim on behalf of \_\_\_\_\_ and refer to County Counsel.

- 4 . Approve the claim of \_\_\_\_\_ in the amount of \_\_\_\_\_ and reject it as to the balance, if any, and refer to County Counsel.

5. Reject the claim of \_\_\_\_\_ as insufficiently filed and refer to County Counsel.

CC: Tom Burns, Administrator  
Redevelopment Agency

RISK MANAGEMENT

By Janet McKinley

COUNTY COUNSEL

By Elaine Lewis

LTR9.WPT

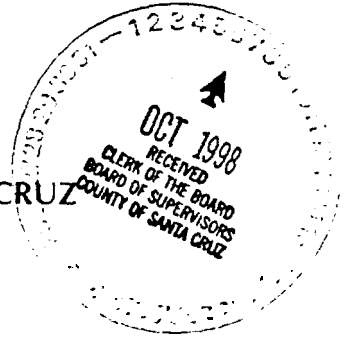
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899-047

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CLAIM OF RHODES & KESLING, INC.  
TO COUNTY OF SANTA CRUZ  
AND REDEVELOPMENT AGENCY FOR COUNTY OF SANTA CRUZ

(Government Code Sections 905 and 910)



(1) Name and address of claimant:

(a) Claimant:

Rhodes & Kesling  
2 190 Stokes Street, Suite 102  
San Jose CA 951284512

(b) Persons to whom notices may be sent:

Mr. Mitch Rhodes  
Rhodes & Kesling  
2 190 Stokes Street, Suite 102  
San Jose CA 951284512

with copies to:

A. Robert Rosin, Esq.  
Simpson, Aherne & Garrity Professional Corporation  
1900 So. Norfolk, Suite 260  
San Mateo, CA 94403

Attorneys for Claimant

(2) Date, place and circumstances of claim; general description of damages and losses as known at this time:

This claim arises from a public works construction project (the "Project") for the County of Santa Cruz (the "Owner"). The project was to construct certain improvements constituting the Live Oak Community Swim Center. The Project was awarded by the Owner to Claimant on or about August 28, 1996.

During the Fall of 1996, one of Rhodes & Kesling's subcontractor's, Paul T. Beck Contractors, submitted a claim for what it alleged were costs associated with differing site conditions and extra work. Rhodes & Kesling in turn submitted these claims, on a pass-through basis, to the Owner. The Owner failed to pay this claim, and Beck walked off the job.

Litigation ensued. The County directly entered into a good faith settlement with Beck, which later was held by the Court to bar all claims by Beck against Rhodes & Kesling for differing conditions and other matters for which the County was responsible.

On September 22, 1998, at the conclusion of a nonjury trial, the Superior Court issued a tentative decision. The decision found that Rhodes & Kesling had not breached its subcontract with Beck. Nevertheless, the court found that Beck was excused from further performance because of differing site conditions (for which the County was legally responsible) and because the County had not promptly made reasonable payment for Beck's claim. Rhodes & Kesling believes that the portion of the Court's decision excusing Beck from further performance was in error, and by submitting this claim, Rhodes & Kesling does not admit or concede that the ruling was correct.

The trial court also noted the County knew or should have known almost immediately upon the beginning of construction that differing conditions at the site would require import and export of material.

As a direct consequence of the Court's ruling, Rhodes & Kesling now has costs of reprocurring Beck's work with other subcontractors. Beck should have been responsible for these costs because it walked off the job, but according to the Court's ruling, the County's actions resulted in Beck having an excuse for not continuing performance. The reprourement costs were incurred as damages at the time that the Court issued its ruling, with the actual payments to the replacement subcontractors above and beyond Beck's subcontract amount having been made in the past year (certain amounts also will be paid in the future, when retention and payments to the subcontractors come due).

Because Rhodes & Kesling has not completed its investigation of its claims and has not yet had access to all information and documents in the possession of the Owner, Rhodes & Kesling reserves the right to amend, supplement or modify this claim.

As noted above, this claim is filed out of an abundance of caution. Previous claims filed with the government were sufficient to put the County on notice; the reprourement costs simply constitute new and additional damages resulting from the differing site conditions and subsequent actions by the County. By filing this claim, Rhodes & Kesling does not admit that the trial court was correct in ruling that Beck was excused from performance.

(3) Names of County employees with knowledge of claim:

Based upon the information currently available to it, Claimant does not know all of the persons employed by Owner who were responsible for the matters alleged herein. However, the following persons are believed to have knowledge regarding the matters in question

Tom Burns  
G.C. Carlson  
Tri-B (William Crum)  
Mark Mitchell

(4) Amount of claim:

Jurisdiction of the claim will rest with the Superior Court -under Section 910(f) of the Government Code. The amount of the claim exceeds \$10,000; thus, a statement of the amount of damages is not legally permitted.

(5) Signature:

RHODES & KESLING, INC.

By

A handwritten signature, likely "A. C. Rhodes", is written over a horizontal line.

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