



Board Report

File #: 2015-1556, File Type: Budget

Agenda Number: 62.

CONSTRUCTION COMMITTEE OCTOBER 15, 2015

SUBJECT: I-405 SEPULVEDA PASS IMPROVEMENTS PROJECT

ACTION: AUTHORIZATION FOR LIFE-OF-PROJECT BUDGET INCREASE

RECOMMENDATION

CONSTRUCTION COMMITTEE FORWARDED DUE TO ABSENCES AND CONFLICTS the approval of the attached agreement referred to as "Contract Modification", including partial close-out of the **I-405 Sepulveda Pass Widening Project** ("Project"), in the amount of \$103M and modifications to the schedule of the Arbitration Agreement. This recommendation is an interim increase to the Life-of-Project (LOP) budget by \$103M, increasing the LOP budget from \$1,205.4M to \$1,308.4M and amend the FY16 budget by \$103M.

ISSUE

In order to initiate the close-out process for the Project, Metro staff is requesting an increase in the LOP of \$103M for partial close-out of the Project in accordance with the Contract Modification.

DISCUSSION

The 2006 California State Senate Bill 1026 authorized Metro to conduct a demonstration program to enter into a design-build contract for the construction of the northbound high-occupancy vehicle (HOV) lane and related improvements on Interstate 405 freeway through the Sepulveda Pass that would complete the final link in one hundred miles of HOV lanes stretching from Orange County to North Los Angeles County. The strategy to proceed with a design-build contract arrangement was undertaken as a means to facilitate acceleration of the Project, reducing the duration of impact to adjacent communities and returning the corridor to full utility a number of years earlier, including significant improved safety with interchange improvements, wider shoulders, ramps and bridges.

On April 23, 2009, the Board awarded Contract C0822 for the design and construction of the I-405 Sepulveda Pass Widening Project to Kiewit Infrastructure West, Co. and established an original LOP budget of \$1,034M for the Project.

A report prepared in 2014, found the improvements had provided the following benefits:

- Reduced peak-period congestion by 2 hours.
- Reduced daily vehicle delays by 37%.
- Increased northbound vehicle capacity by 15%.
- Reduced arterial flow volumes on adjacent major streets by 20-50%.
- Improved safety - 25% fewer Freeway Service Patrol (FSP) requests and 35% fewer incidents on I-405.

On May 15, 2015, Metro and Kiewit signed an Alternative Dispute Resolution Contract Modification (“Arbitration Agreement”), which amended the Contract to resolve the issues between them by a binding arbitration process established and defined by the Arbitration Agreement. The Arbitration Agreement specifically identified which issues were to be addressed in Hearing 1 and Hearing 2.

Substantial Completion was issued by Metro to Kiewit on September 18, 2015. In order to expedite Project close-out, the attached Contract Modification would resolve all of the Hearing 1 issues that otherwise would have to be decided in the arbitration. This agreement comprises the \$103M and closes out Hearing 1 completely. The terms of the Contract Modification provide additional details and information in this regard. The Contract Modification does not resolve any Hearing 2 issues which will still proceed in the arbitration under a new schedule culminating in a hearing in February 2017 pursuant to the Contract Modification.

DETERMINATION OF SAFETY IMPACT

The changes identified in this board report will have no impact on safety of the overall I-405 at completion.

FINANCIAL IMPACT

Impact to Budget

Funding for the \$103.0M action was not included in the FY16 budget for Project 405523. In order to execute the payment of partial close-out, the FY16 budget will need to be amended by \$103.0M. The funding sources for the payment are a combination of previously obligated federal Regional Surface Transportation Program funds (approximately \$26M) and Proposition C 25% cash/bonds, approximately \$77M. We will seek to maximize the use of federal grants and use the Proposition C 25% funds as the funds of last resort. Since this is a multi-year project, the project manager and cost center manager will be responsible for budgeting future fiscal years.

The Proposition C 25% funds are not eligible for bus and rail operations. The Regional Surface Transportation Program funds are broadly eligible for any transportation capital purpose, including transit preventative maintenance and contracted-out paratransit services.

ALTERNATIVES CONSIDERED

Metro could reject the Contract Modification and increase in LOP and continue with arbitration of the Hearing 1 issues.

NEXT STEPS

Subject to Board approval, as requested above, the Chief Executive Officer will execute the Contract Modification closing out Hearing 1 issues. At the next Board meeting, staff will request authorization for soft costs to close out the Project and continue to provide support for the arbitration of Hearing 2 issues.

ATTACHMENTS

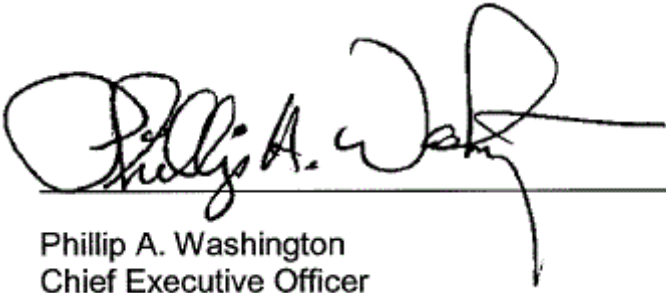
Attachment A - Contract Modification

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Phillip A. Washington
Chief Executive Officer

Contract Modification – Resolution of Hearing 1 Disputes

This Contract Modification resolves the Disputes identified as Hearing 1 issues in the May 15, 2015 Alternative Dispute Resolution Contract Modification (“Arbitration Agreement”). This Contract Modification is entered into on this [REDACTED] day of October, 2015 (“Effective Date”), by and between the Los Angeles County Metropolitan Transportation Authority (“LACMTA”) and Kiewit Pacific Co., n/k/a Kiewit Infrastructure West, Co. (“Kiewit”) (collectively, the “Parties”), relating to the I-405 Sepulveda Pass Widening Project (“Project”). All provisions of the April 23, 2009 Design Build Contract (“Contract”) and the Arbitration Agreement not amended or modified herein shall remain in full force and effect. The Parties agree as follows:

1. On May 15, 2015 Kiewit and LACMTA executed the Arbitration Agreement which amended the Contract to resolve the disputes between them by a binding arbitration process established and defined by the Arbitration Agreement.
2. Kiewit and LACMTA specifically identified all of their disputes relating to the Project (“Disputes”). Attachment B to the Arbitration Agreement clearly spells out that the only Disputes (other than Excepted Claims such as latent defects) the Parties may assert against each other are those listed in Attachments C and D.
3. The Arbitration Agreement established two separate hearings (“Hearing 1” and “Hearing 2”) to address the Disputes. Attachments C and D specifically identified which Disputes were to be addressed in Hearing 1 and Hearing 2.¹ For purposes of this Contract Modification, the “Hearing 1 Disputes” include all claims or issues that Kiewit reserved the opportunity to incorporate into Attachment C pursuant to numbered paragraphs 2 and 3 on the first page of Attachment C.
4. The Arbitration Agreement expressly contemplates the amicable resolution of both the Hearing 1 and Hearing 2 Disputes. This Contract Modification implements the contemplated resolution of the Hearing 1 Disputes. The Parties confirm their intent to continue working toward resolution of the Hearing 2 Disputes.
5. Kiewit and LACMTA have fully and finally resolved all Hearing 1 Disputes (subject to footnote 4 of Attachment C to the Arbitration Agreement - i.e., delay and disruption caused by Hearing 1 issues), including interest, costs or attorneys’ fees thereon.
 - a. By December 31, 2015, LACMTA will pay Kiewit the total net amount of \$103,000,000 (One Hundred and Three Million Dollars) as full, final and complete resolution of all Hearing 1 Disputes consisting of the following amounts:

¹ Attachment D identified the ADR Disputes as “Phase I” or “Phase II” disputes instead of “Hearing 1” or “Hearing 2”. For the purposes of the Arbitration Agreement and the Settlement Agreement, the term “Phase I” is synonymous with “Hearing 1” and the term “Phase II” is synonymous with “Hearing 2.”

- i. Kiewit Attachment C Hearing 1 Disputes: \$113,000,000 (One Hundred and Thirteen Million Dollars).
 - ii. LACMTA Attachment D Hearing 1 Disputes: (\$10,000,000) (Ten Million Dollars) credit to LACMTA.
 - b. These payments will increase the Contract Price to \$1,000,871,095 (One Billion Eight Hundred Seventy One Thousand and Ninety Five Dollars).
 - c. By December 31, 2015, in addition to the amount to be paid above, LACMTA shall authorize the release from escrow to Kiewit, of all outstanding retention except for \$10,000,000.00 (Ten Million Dollars) which will remain in escrow in accordance with the terms of the Contract.
6. This Contract Modification is conditioned on approval of the LACMTA Board ("Board"). LACMTA will advise the Board about this Contract Modification on or before September 24, 2015, and seek final Board approval at the October 22, 2015 Board meeting. In the event that the Board does not approve this Contract Modification by December 1, 2015, this Contract Modification shall be rendered null and void.
7. The Effective Date of this Contract Modification is deemed the date of the written resolution of all Hearing 1 issues of LACMTA and Kiewit.
8. The date of April 15, 2015 in the definition of Excepted Claims and as referenced in footnote 2 in Attachment C to the Arbitration Agreement is modified to September 18, 2015.
9. Based on this resolution of all Hearing 1 Disputes and subject to the terms of this Contract Modification, Kiewit and LACMTA each release and waive any unpaid amounts which were sought by either of them for any of the Hearing 1 Disputes, including but not limited to any amounts that were stated, estimated or to be determined (TBD) for such disputes, and shall not seek or include in Hearing 2 any of the amounts sought by either of them for any of the Hearing 1 Disputes. Both Parties expressly reserve the right to tender evidence regarding the Hearing 1 Disputes in Hearing 2 if relevant to the Hearing 2 Disputes.
10. The Arbitration Agreement is further modified as follows:
 - a. By December 31, 2015, LACMTA will provide Kiewit with any existing schedule analysis prepared by or for the use of LACMTA's project personnel evaluating the impacts on the Project and any determination whether Kiewit is or is not entitled to any further extension of time; provided, that this does not require LACMTA to provide Kiewit with any analysis subject to protection as attorney work product or disclosed to Kiewit only as part of confidential settlement discussions, and does not require LACMTA to prepare any such analysis that is not already existing. Subject to the foregoing, this obligation includes, but is not limited to, LACMTA providing: (i) the existing details and electronic schedules for the 2013 Metro analysis for the 149 day extension; (ii) the existing details and

electronic schedules performed thereafter by LACMTA showing the MSE Walls were on the critical path; and (iii) the existing details and electronic schedules of the “independent” analysis referenced in LACMTA’s October 2013 letter or a statement that this analysis was never performed.

- b. By January 15, 2016,
 - i. Records / ESI production by both parties completed;
 - ii. The parties will exchange updated pricing for the Hearing 2 Disputes.
- c. The subsection for Hearing 2 set forth in Attachment B of the Arbitration Agreement is modified as follows:
 - i. *Hearing 2: The Hearing 2 issues identified on Attachments C and D as Hearing 2 issues.*
 - *On June 1, 2016, Parties to exchange schedule analysis and reasonable and meaningful supporting information for Hearing 2 issues reflecting their then-current evaluation of the impacts on the Project and their determination as to the amount of any extension of time (including the number of compensable days) to which Kiewit is entitled, or any liquidated damages for delay to which LACMTA is entitled; provided, that such analysis may be later amended or updated based on discovery including expert opinions.*
 - *Written discovery by both parties for Hearing 2 completed on July 1, 2016.*
 - *Depositions of non-expert witnesses by both parties for Hearing 2 completed on September 15, 2016.*
 - *Hearing 2 Expert Witnesses:*
 - *Initial expert disclosures for Hearing 2 (including expert reports with (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; and (iii) any accompanying exhibits summarizing or supporting them) by any party seeking affirmative relief (including both parties’ expert disclosures and report regarding both parties’ schedule analysis) exchanged on September 1, 2016.*
 - *Expert rebuttal disclosures for Hearing 2 (including rebuttal reports meeting the same content requirements as the initial expert disclosures) exchanged on November 1, 2016.*
 - *Depositions of expert witnesses for Hearing 2 completed on December 15, 2016.*
 - *Begin on February 14, 2017.*
 - *Receive final, binding and enforceable award (subject to confirmation, correction or vacation) within forty-five (45) days after closure of Hearing 2.*

- 11. LACMTA granted Kiewit Substantial Completion as of September 18, 2015, pursuant to the terms of LACMTA’s letter CO882-OUT-04964 dated September 18, 2015. Kiewit shall perform the punch list work described in the attachment to LACMTA’s letter CO882-OUT-04964 dated September 18, 2015. Kiewit shall not be required to perform any new or additional punch list items before Punch List Completion and/or Final Acceptance. LACMTA and Kiewit agree that any additional or new work items identified by LACMTA and directed by LACMTA will be considered warranty work under the Contract.
- 12. LACMTA reserves the right to seek indemnification from Kiewit under the Contract for all currently pending property owner claims.
- 13. Kiewit shall indemnify LACMTA and Caltrans for (1) any breach of the Contract by Kiewit regarding survey and (2) any failure by Kiewit to comply with any applicable statute, regulation or ordinance by any government entity regarding survey. With respect to indemnity claims regarding survey, no claim for such indemnification shall be deemed to accrue, and the statute of limitations for any such claim shall not begin, until LACMTA or Caltrans incur any damages based on future events or third party claims notwithstanding and regardless of whether Kiewit was previously or is presently (1) in breach of the Contract regarding survey, or (2) has failed to comply with any applicable statute, regulation or ordinance by any government entity regarding survey.

AGREED AND ACCEPTED

Kiewit Infrastructure West Co.

Los Angeles County Metropolitan
Transportation Authority

By: _____
Scott L. Cassels
President

By: _____
Phillip Washington
Chief Executive Officer

APPROVED AS TO FORM

Kiewit Infrastructure West Co.

Mary C. Wickham
Interim County Counsel

By: _____

By: _____
Charles M. Safer
Assistant County Counsel