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CONSTRUCTION COMMITTEE
November 18, 2004

SUBJECT: PROCESSING OF CONSTRUCTION CHANGE ORDERS

ACTION: RECEIVE AN ORDINANCE ESTABLISHING
PROCEDURES FOR PROCESSING CHANGE ORDERS

RECOMMENDATION

Receive the attached ordinance, revised from the version previously submitted, to establish procedures for processing construction change orders. The ordinance will be received by the Board at the December 13, 2004 Board meeting, but may not be finally adopted until a subsequent meeting.

ISSUE

Public Utilities Code §130243 sets forth a procedure for the processing by the MTA of construction contract change orders. It requires the contractor to submit certified cost and pricing data to justify its claimed costs for the additional work. If the value of this cost exceeds \$100,000, the MTA must audit the submitted data. The MTA's current practice in implementing this statute, can be time consuming and cumbersome and can result in project delays and has sometimes resulted in the final valuation of the change being delayed until after contract completion. It is recognized that a rigorous review process for proposed change orders is essential when there is a significant disagreement between the MTA and the contractor as to the appropriate value of a proposed change. However, an overly complex process offers no real advantage when the contractor's proposed price for the change does not significantly exceed the value determined by the MTA through its independent estimate.

The proposed ordinance recognizes this fact and offers an alternative process when the contractor's price for the change is not significantly different than that of the MTA. This proposed ordinance has been before the Construction Committee and the Board several times and the version presented now has been revised from the most recent previous version. As now revised the proposed ordinance still requires that proposed changes be priced by the MTA's estimating unit, and still provides for a streamlined procedure in those instances where the contractor's proposed price to do the change order work does not exceed the MTA's independent estimate by more than 5%. However, the revised proposal contains several changes primarily to address concerns raised regarding the previous version. These revisions include the following:

- The previous proposal only required a “review” by MTA management audit of the MTA’s independent estimate. The revised version requires that the estimate be “audited for accuracy, completeness and consistency with federal cost principles,” but only if the independent estimate exceeds \$100,000. This should remove any doubt as to whether the statutory requirement of an audit of any change exceeding \$100,000 will be met.
- The revised proposal will specifically acknowledge what the previous version assumed, but did not specifically state, that the contractor’s submittal of a price for the change will necessarily include at least a breakdown of the “separate cost elements, including profit, which make up the contractor’s proposed price.” This information will satisfy the “cost and pricing” data submittal requirement of the statute, even if this requirement applies to every proposed change without exception, as the Inspector General has asserted. The contractor will be required to “certify” this cost and pricing data.
- As in the previous version of the ordinance, further cost and pricing data will not be required if the contractor’s price does not exceed the MTA’s independent estimate by more than 5%. However, if the contractor insists on a price which exceeds the MTA’s independent estimate by more than 5%, the contractor will be required to provide more detailed cost and pricing data “as is reasonably required by the contract administrator to support the contractor’s price.” Any such additional data will be certified as accurate by the contractor and will be subject to an audit by the MTA if the price exceeds \$100,000.
- The revised version also contains minor terminology and other changes from the previous version to more clearly set forth the requirements of the ordinance.

As previously set forth, if this process does not result in agreement as to the value of the change, the matter will be resolved through litigation or any other agreed to dispute resolution process.

The law requires that an ordinance not be approved at the first meeting where it is presented to the Board for consideration. Therefore, the proposed ordinance is being introduced this month and will be presented for final adoption at the next Board meeting.

POLICY IMPLICATIONS

The proposed ordinance would create a revised and somewhat streamlined process for pricing construction change orders. Because detailed cost and pricing data will no longer be required for every change order, the documentation supporting some change orders will not be as detailed as it currently is for all

change orders. However, this difference in the level of documentation should not be significant since detailed cost and pricing data will be eliminated only in those instances when the contractor's proposed price for a change and the MTA's estimate are in substantial agreement.

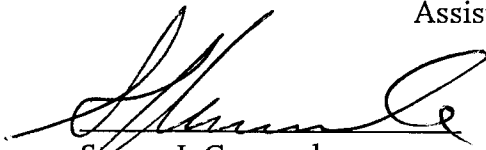
ALTERNATIVES CONSIDERED

The MTA could continue with no revisions to its current process for pricing change orders. However, the proposal is recommended since it will help to streamline the change order pricing process while not compromising the ability of the MTA to appropriately value the change order work.

FINANCIAL IMPACT

It is anticipated that the adoption of this ordinance will result in some modest budget savings since there should be a reduced number of detailed audits of certified cost and pricing data.

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ATTACHMENT: Proposed Construction Contract Change Order Ordinance

AN ORDINANCE AMENDING TITLE 4, CONTRACTING, OF THE MTA
ADMINISTRATIVE CODE RELATING TO THE PROCESSING OF
CONSTRUCTION CONTRACT CHANGE ORDERS

Be it ordained by the Board of Directors of the Los Angeles County

Metropolitan Transportation Authority:

SECTION 1: Chapter 4-15 is added to the MTA Administrative Code to read as follows:

4-15-010 Purpose and Coverage. The purpose of this Chapter is to adopt a change order procedure as required by Public Utilities Code §130243. The MTA construes the term “change order” as used in §130243 as referring only to a modification of the work to be performed under a contract for construction of a public works project, where the modification of work will result in an increase in the cost to the MTA over the then current base contract amount as modified by any already approved change orders. It is the intent of the MTA that any other contract modification, regardless of how that modification is described or denominated, is not a “change order” as that term is used in Public Utilities Code §130243, and is not subject to this chapter.

4-15-020 Identification of Changes. Whenever any party proposes a change to a construction contract which will involve the expenditure of MTA funds above the amounts contemplated by the existing contract, the MTA contract administrator shall consult with the MTA General Counsel, and technical experts if necessary, to determine whether the proposed change includes work within the scope of the statement of work in the base construction contract as modified by already approved change orders. If it is determined that the proposed change includes work within the scope of the statement of

work in the base construction contract as modified by already approved change orders, the requested change order shall be denied. If it is determined that the proposed change includes work which is not covered by the statement of work in the base construction contract as modified by already approved change orders, the change order shall be priced as set forth in this chapter.

4-15-030 Establishing the Price for a Construction Change Order. When a change to a construction contract is identified, as set forth in section 4-15-020, the value for the change shall be established as follows:

A. If the contract was awarded as a design-build contract, the MTA will submit to the contractor a change notice describing the scope of the proposed change.

1. If the MTA determines that the cost to complete the work described in the change notice can be determined based upon an evaluation of the scope of the work set forth in the change notice and without the need for detailed plans and specification, the total price for the proposed change, including both design and construction, will be included in a single change order. The actual price to be paid for the change order work will be determined in accordance with paragraphs C, D, E and F.

2. If the cost to complete the work described in the change notice cannot reasonably be determined without detailed plans and specifications, the price for the design of the proposed work and the price to fully complete the work as set forth in the design will each be set forth in separate change orders. The actual price to be paid for each change order will be determined in accordance with paragraphs C, D, E and F.

B. If the contract was awarded as a design-bid-build contract the MTA shall submit to the contractor a change notice describing the scope of the proposed change which shall include plans and specifications describing the specific work to be done under the proposed change order in sufficient detail to reasonably permit the contractor to evaluate the cost of the additional work and to complete it if approved. The actual price to be paid for the change order will be determined in accordance with paragraphs C, D, E and F.

C. Regardless of whether a proposed change is to be added to the contract under a single change order as described in paragraphs A.1 or B., or two change orders as described in paragraph A.2., the MTA and the contractor will separately determine the appropriate value of each proposed change. The MTA independent estimate of the value of the proposed change shall be made by its estimating unit. The MTA independent estimate shall be a determination of the estimated cost to the contractor to complete any necessary design work and the actual construction work for the proposed change, plus any contractor markup allowed by the base construction contract. The cost of design and cost of construction may be determined through separate change orders as described in paragraph A.2. If separate change orders are issued, the change order for the construction work shall not be issued until sufficient design work has been completed to enable a reasonable estimate of the cost of the construction work. To the extent federal cost principles are applicable to the change order, the separate cost elements that comprise the estimate shall be consistent with federal cost principles. The MTA independent estimate of the value of the proposed change shall be audited for accuracy, completeness and consistency with federal cost principles, if applicable, by the MTA management audit

services unit if the amount of the independent estimate exceeds \$100,000. The MTA independent estimate of the value of the proposed change shall be provided to the MTA contract administrator, but shall be kept confidential and not provided to the contractor.

D. The contractor shall submit to the MTA contract administrator the contractor's proposed price to perform all of the work under the proposed change. The contractor's price shall include a submittal of certified cost and pricing data in the form of the separate cost elements, including profit, which make up the contractor's proposed price. The contractor's proposed price may be for the cost of construction as described in paragraph B for a design-bid-build contract, or, in the case of a design-build contract, may be for the cost of design, the cost of construction, or the cost of both, depending upon whether the MTA selects, at its sole discretion, to issue one change order for both design and construction as described in paragraph A.1., or separate change orders for design and construction, respectively, as described in paragraph A.2. The MTA contract administrator shall conduct an analysis which compares the separate cost elements in the contractor's proposal with the separate cost elements in the MTA independent estimate. If the contract administrator finds that the contractor's and the MTA's separate cost elements are reasonably consistent and that the contractor's total price for the change does not exceed by more than five percent the MTA independent estimate determined pursuant to paragraph C., the change order(s) shall be issued, or recommended to the Board of Directors if beyond the approval authority of MTA staff, at the price proposed by the contractor.

E. If the contract administrator finds that the contractor's separate cost elements are not reasonably consistent with those in the MTA independent estimate, or

that the contractor's proposed price for the change exceeds by more than five percent the MTA independent estimate determined pursuant to paragraph C., the contractor shall be offered the opportunity to execute a change order to do the work in the proposed change for a price equal to, and consistent with the cost elements in, the MTA independent estimate. If the contractor rejects this offer and demands a higher price for the change, the contractor shall submit to the MTA such additional cost and pricing data to support the contractor's price as is reasonably required by the contract administrator to support the contractor's price. Any such additional cost and pricing data submitted by the contractor must be certified by the contractor as current, complete and accurate. If the contractor's proposed price exceeds \$100,000, the MTA's management audit services unit shall conduct an audit of the cost and pricing data required by the contract administrator and submitted by the contractor. If upon review and audit, if required, of the contractor's certified cost and pricing data, the MTA determines that the contractor's proposed value for the change is reasonable, the change order shall be issued, or recommended to the Board of Directors if beyond the approval authority of MTA staff, at the value proposed by the contractor.

F. If after the completion of the procedures set forth above, the MTA and the contractor are not able to agree on the price for the change, the price shall be determined through further negotiations or, if necessary, through legal action or any alternative dispute resolution process which the parties have agreed to utilize. In order to allow continuation of work under the construction contract during any period where a dispute as to the value of the change is being resolved, the MTA may issue a unilateral change

order in the amount of the MTA independent estimate of the value of the proposed change as determined pursuant to paragraph C.

G. Nothing in this chapter shall prevent the MTA from using any alternative method allowed by law for pricing a proposed change order, if the MTA, in its sole discretion, determines that such alternative method is in the best interest of the MTA, will produce a price which reasonably reflects the actual value of the work, and the method of valuation set forth in this chapter is impractical under the circumstances.

4-15-040 Administrative Policies. The CEO may develop administrative policies not inconsistent with this chapter, governing the change order review and approval process, which may include, but are not limited to, policies establishing reasonable time deadlines for the completion of the administrative steps set forth in this chapter.

SECTION 2:

Publication of Ordinance. Upon adoption, this Ordinance shall be signed by the Chair of the Board of Directors of the Los Angeles County Metropolitan Transportation Authority. The Board Secretary shall cause the publication of this Ordinance once, within fifteen days of its adoption, in a newspaper of general circulation printed and published within the area served by the Los Angeles County Metropolitan Transportation Authority and the Board Secretary shall attest to such adoption and publication of this Ordinance.

Dated: _____
Chair, Board of Directors

Date Adopted by Board of Directors: _____

Date Published: _____

Attested to:

Dated: _____
Board Secretary