



Board Report

File #: 2015-1304, File Type: Contract

Agenda Number: 20.

REVISED
AD-HOC CONGESTION REDUCTION COMMITTEE
NOVEMBER 18, 2015

SUBJECT: METRO EXPRESSLANES OPERATIONS AND MAINTENANCE

ACTION: AUTHORIZE THE CHIEF EXECUTIVE OFFICER (CEO) TO EXERCISE CONTRACT OPTION AND MODIFY CONTRACT

RECOMMENDATION

- A. AUTHORIZING the Chief Executive Officer (CEO) to exercise Option 4.3, Additional Year of Operation and Maintenance (O&M) - Year 3, Modification No. 63 for contract PS0922102333 with **Atkinson Contractors, LP (Atkinson) for Metro Expresslanes Operations and Maintenance** in the amount of \$3,072,000, increasing the total contract price from \$118,991,335 to \$122,063,335;
- B. AUTHORIZING the CEO to execute Contract Modification No. 64 for additional **O&M Support Costs** for Option Year 3 in the amount of \$10,383,408, increasing the total contract price from \$122,063,335 to \$132,446,743.
- C. AUTHORIZING the CEO to execute Contract Modification No. 65 for **Additional Transponders and Retail Packaging** in the amount of \$3,240,000, increasing the total contract price from \$132,446,743 to \$135,686,743.
- D. APPROVING an increase in Contract Modification Authority (CMA) for Contract PS0922102333, to Atkinson in the amount of \$17,203,063 increasing the total CMA from \$60,934,978 to \$78,138,041 to cover the costs of the recommended Contract Modifications above, and any pending and future changes listed in the Contract Modification/Change Order Log (Attachment C).
- E. AMENDING the FY16 budget by \$5,915,257 representing the current fiscal year portion of the above contract modifications.

Record will reflect that Metro legal counsel is working to take appropriate action regarding patent infringement lawsuit.

ISSUE

In December 2010, Atkinson was awarded a Design, Build, Operate and Maintain (DBOM) contract for the Metro ExpressLanes project that included all activities needed to implement and operate the ExpressLanes through the demonstration period. The DBOM contract included various options including five, one year options for operation and maintenance beyond the demonstration period, but none of these was authorized at the time of contract award. The exercising of the second of the one-year options was approved by the Board on October 23, 2014 and expires on February 23, 2016.

In April 2014 the Board authorized the CEO to continue operation of the Metro ExpressLanes and on September 21, 2014 the Governor signed Senate Bill (SB) 1298 (Hernandez) making the I-10 and I-110 ExpressLanes permanent. The ExpressLanes continue to be a successful program with over 426,000 accounts opened and 461,000 transponders distributed since opening in November 2012. To continue the operation of the ExpressLanes, staff is asking the Board to approve the exercising of the third of the five one-year options to extend O & M to February 23, 2017.

DISCUSSION

Recommendation A: Additional Year of O & M

In February 2014, Metro successfully completed the demonstration period and entered into the first of five one-year options for continued ExpressLanes O & M. In April 2014, the Board approved the continued operation of the ExpressLanes and on September 21, 2014, the Governor signed Senate Bill (SB) 1298 (Hernandez) extending the Metro ExpressLanes program indefinitely. Since Option Year Two will expire in February 2016, staff is requesting Board authorization to enter into the third one-year option for O & M.

Recommendation B: Additional O & M Support

The recommended funding action is required due to the successful launch of the ExpressLanes and includes many activities driven mainly by customer and non-customer demand - additional account support for new accounts, costs for mailing of customer correspondence and violations and fees related to the processing of payments.

The base O & M contract for the ExpressLanes includes customer service related activities for up to 100,000 transponders, which was the target for the demonstration period. However, there are currently in excess of 461,000 transponders in circulation (461% above the base target) exceeding all expectations for the program and requiring more effort related to customer service than originally included in the base contract. The distribution of additional transponders results in establishment of new accounts that require order fulfillment and additional staffing support by the contractor to service these accounts. Servicing activity includes answering calls, handling correspondence, responding to customer inquiries, postage, and processing transactions.

Correspondingly, the overwhelming success of the Metro ExpressLanes has increased violation

processing beyond the original contract numbers, generating additional costs associated with license plate image processing, postage and mailing, phone services, and responding to online inquiries.

In addition, resources will continue to be needed for the maintenance of the tolling equipment and real-time traffic monitoring utilizing “EarthCam” cameras and staffing of the Traffic Management Center for incident management and monitoring of all toll-related systems. The Contract Modification in Recommendation B addresses this additional operational support required to operate and maintain the ExpressLanes through the balance of O & M Option Year 3.

Recommendation C: Additional Transponders and Retail Packaging

Since there continues to be steady growth in transponder distribution at a rate of 10,000 -15,000 transponders issued per month, additional funds will be required to purchase transponders. The recommended funding action ensures that the supply of transponders continues to be sufficient to fulfill customer orders and keeps us in the queue for manufacturing as this is a long lead item. The current order of transponders concludes in February 2017. This recommendation allows the purchase of additional transponders and retail packaging to continue to February 2018.

Recommendation D: Additional CMA

The additional CMA request of \$17,395,772, when combined with previous Board Approved CMA remaining, will be used to authorize Recommendations A, B and C (O & M Option Year Three, associated O & M Support costs and Additional Transponders and Retail Packaging) as well as additional pending Modifications.

Staff requests authorization to increase the CMA which will serve as a management tool for staff to issue contract modifications to compensate the contractor for additional costs incurred for the completion of the above projects.

Lawsuit

In August 2015 a patent infringement lawsuit was filed against Metro by Transport Technologies LLC alleging that the system used to monitor the number of passengers in cars using ExpressLanes on the I-110 and I-10 freeways (including the FasTrak transponders, roadside interrogators, and network infrastructure) infringes its patent.

Pursuant to express provisions in the contract, on September 7, 2015, Metro demanded that Atkinson defend the action and provide indemnity against the infringement lawsuit. On September 8, 2015 Atkinson notified Metro that it was rejecting the demand, citing a section of the contract that provides that indemnification does not apply “to any Goods manufactured to the detailed design of Metro,” claiming that Metro designed the tolling system. Metro firmly disputes this allegation and will be filing a cross-complaint against Atkinson alleging breach of contract as a result of its failure to defend and

indemnify the agency.

While Atkinson has agreed to submit a pre-trial motion on Metro's behalf to have the suit dismissed, Atkinson has notified Metro that it will not defend Metro and provide indemnity against the lawsuit should the pre-trial motion be unsuccessful. In response, Metro will be filing a cross complaint against Atkinson alleging breach of contract as a result of its failure to defend and indemnify the agency. On November 19, 2015 Metro was informed that since the filing of that lawsuit, and following further discussions, Atkinson has agreed to accept our defense in exchange for dismissing the lawsuit. We are working on the details of how the defense will be handled, and whether and when we will dismiss our lawsuit.

A Request for Proposal (RFP) was released in August 2015 to assist Metro in developing the requirements for the new O & M contract. Staff is currently in the process of selecting a consultant for this effort.

The additional year of O & M also necessitates the funding of Contract Modifications and an increase in the CMA to ensure uninterrupted customer service and ExpressLanes operations. To ensure that there is no interruption in services, staff requests authority be granted to the CEO to execute a Contract Modification for the additional O&M support costs for Option Year 3.

DETERMINATION OF SAFETY IMPACT

Approval of these recommendations will improve safety for Metro ExpressLanes patrons.

FINANCIAL IMPACT

The funding of \$5,915,257 for some of the increase in CMA will be added to the FY16 budget in cost center number 2220, Congestion Reduction, and split between project numbers Project 307001 (ExpressLanes I-110) and Project 307002 (ExpressLanes I-10).

Because this is a multi-year program, the cost center manager and Executive Officer, Congestion Reduction will be responsible for budgeting the remaining CMA in future years.

IMPACT TO BUS AND RAIL OPERATING BUDGET

The funding for this action will come from toll revenues generated from the Metro ExpressLanes operation. No other funds were considered for this activity because these funds are specifically approved for the Metro ExpressLanes operations. This activity will not impact ongoing bus and rail operating costs.

ALTERNATIVES CONSIDERED

The Board may decline to approve the recommended actions. This is not recommended as staff cannot immediately re-procure a new contractor to operate and maintain the ExpressLanes and ensure uninterrupted operations.

Another alternative is to award a sole source, emergency contract for the remaining option years to Xerox (the primary sub-contractor to Atkinson that currently operates and maintains the toll system) which will most likely require re-negotiation of all rates under the existing contract and result in higher costs. As a result, staff does not recommend this option.

NEXT STEPS

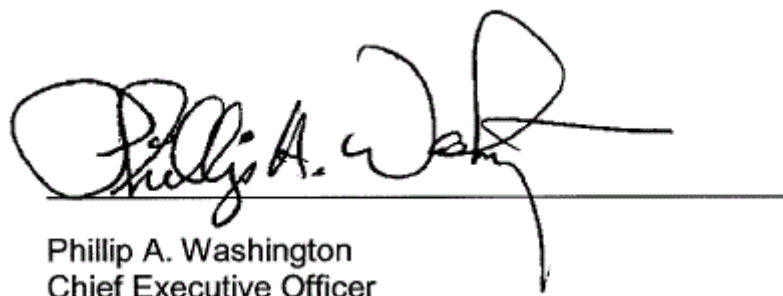
Upon approval of the Contract Modifications, staff will take the necessary steps to amend the budget, notify the contractor of the exercising of Option Year Three for O & M and execute all required Contract Modifications for Option Year Three O & M.

ATTACHMENTS

- A. Procurement Summary
- B. DEOD Summary
- C. Contract Modification Authority Summary

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