

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 15  
FOR THE MEETING OF: July 15, 2010**

## **TRANSBAY JOINT POWERS AUTHORITY**

### **BRIEF DESCRIPTION:**

Amending Contract No. 08-04-CMGC-000, Construction Manager/General Contractor (CM/GC) Services for the Construction of the Transbay Transit Center Building and Related Structures, with the joint venture of Webcor Builders and Obayashi Corporation (Webcor/Obayashi) to increase the time for preconstruction services to 110,800 hours, to modify retention requirements and clarify other contract language.

### **SUMMARY:**

- On March 12, 2009, the TJPA Board approved the award of the CM/GC contract, to Webcor/Obayashi, J.V. Under the contract, Webcor/Obayashi would bid, direct, and coordinate the construction of the Phase 1 elements of the Transit Center.
- Under the contract, Webcor/Obayashi bills a blended rate of \$122 per hour for preconstruction services including design and constructability reviews, cost estimating and value management, outreach to and prequalification of subcontractors, and preparation of trade packages for bidding from the design documents prepared. In the bidding documents for the CM/GC, a projection of 45,000 hours of preconstruction services was used as the basis for comparing proposals and the initial contract award.
- At the time of the contract award, the Phase 1 construction value was \$500,000,000, and the assumed start of construction was to be September 2009. Construction was expected to take five years and the bidding of trade packages was to occur over a three year period. On May 13, 2010, the TJPA Board adopted a Revised Baseline Budget and Schedule incorporating the construction of the train box into Phase 1. Under the revised schedule, the construction of the Transit Center will take seven years, and the bidding of construction trade packages will extend over five years as the construction proceeds. Thus the time for preconstruction services needs to be extended.
- During the preconstruction phase the TJPA and the CM/GC have noted items in the Agreement (Section 00 05 20) and the General Conditions (Section 00 07 00) requiring clarification or modification. In addition, the City and County of San Francisco has revised the Administrative Code provisions governing construction contract retention, and amendments to the CM/GC contract are proposed to conform to the current provisions of the Administrative Code.

### **EXPLANATION:**

When the CM/GC contract was originally awarded, proposers bid a blended rate for preconstruction services personnel. A projection of 45,000 hours of preconstruction services was stipulated in the bidding documents as a basis for comparing proposals and ultimately for the

initial contract award. Under the contract the successful proposer was to submit a work plan for preconstruction services for review and approval.

When the CM/GC contract was awarded in March 2009, the Architect was nearing the end of the Schematic Design Phase, and the planned start of construction was September 2009. The schedule for construction was subsequently revised to allow the construction of the train box in Phase 1, secure the ARRA funding award and incorporate input from the California High Speed Rail Authority (CHRSA) on the design of the rail approach and platforms. During the preconstruction period, Webcor/Obayashi has submitted draft projected work plans, but a final work plan was not negotiated or adopted as the schedule for the start of construction remained fluid, and preconstruction activities were authorized on shorter horizon Notices to Proceed (NTPs).

In the extended preconstruction phase Webcor/Obayashi has provided services in scope and duration beyond those anticipated when the Request for Proposals for CM/GC Services was originally drafted. Webcor/Obayashi has provided critical advice on the relative advantages, challenges, cost and duration of constructing the Transit Center from the top-down or bottom-up approach, and their input on the design of the Transit Center and the coordination of design documents has helped contain costs and reduce the potential for future changes during construction. Their work has been central to the TJPA's value management efforts, the validation of construction cost estimates, and the establishment of the Revised Phase 1 Baseline Budget and Schedule.

With the addition of the below grade construction of the Transit Center, the number and complexity of trade packages that Webcor/Obayashi will review, estimate, prepare and bid has increased, as has the period of time over which those packages will be bid. This included detailed analysis of the temporary framing needed to support the shoring and excavation and the development of traffic bridges and a working platform for the below grade construction.

With a confirmed date for the start of construction, Webcor/Obayashi developed an updated work plan for preconstruction activities that was reviewed by TJPA Staff and the PMPC team. A revised work plan, incorporating TJPA comment and direction, will be prepared. The proposed contract amendment reflects the projected effort for the balance of preconstruction services, a maximum of 110,800 hours. Preconstruction activities will be authorized through Notices to Proceed and managed against the revised work plan.

The contract amendment also addresses language that required clarification or modification. Specifically:

- Agreement Section 5.01C has been modified to clarify that contractor expenses shall be reimbursable so long as TJPA has given prior written approval for the cost.
- Agreement Section 5.04 has been corrected to reflect the proper deadline within which the contractor must make payments to subcontractors, which is ten days after receipt of payment from the TJPA, rather than thirty days.
- General Conditions Section 9.03 modifies the invoicing cycle for construction invoices. The section currently calls for invoicing through the 25<sup>th</sup> of each month. However, both TJPA and the contractor would prefer that invoicing go through the last day of each

month. The handling of retention has been deleted from this section as it has been added to a new section 9.04 immediately subsequent.

- General Conditions Section 9.04 revises the retention language, per recent changes to the San Francisco Administrative Code. The revised language allows for early release of retention for subcontractors who have satisfactorily completed all of their work. Not only is the revised language in conformance with the City's Administrative Code, it also provides a mechanism to comply with federal requirements regarding release of retention to subcontractors who have finished work on a project.
- The remainder of the sections in Article 9 of the General Conditions have been renumbered to reflect the addition of a new Section 9.04 for retention. Language clarifying final completion and final payment has also been incorporated in Section 9.09

This is Contract Amendment No. 6 to the CM/GC Agreement. Amendments No. 1 – 5 were:

- Amendment No. 1 – incorporate SBE goal
- Amendment No. 2 – incorporate shoring wall/buttress testing program scope
- Amendment No. 3 – increase the duration of the bid bond and extend the time TJPA had to request the payment and performance bonds
- Amendment No. 4 – changes to the Agreement and the General Conditions requested by the U.S. DOT as part of the TIFIA loan approval process
- Amendment No. 5 – increase to cap for preconstruction hours, from 45,000 to 52,800

**RECOMMENDATION:**

Staff recommends that the TJPA Board of Directors authorize amending Contract No. 08-04-CMGC-000, Construction Manager/General Contractor (CM/GC) Services for the Construction of the Transbay Transit Center Building and Related Structures, with the joint venture of Webcor Builders and Obayashi Corporation, to increase the cap for preconstruction services to 110,800, to revise contract retention terms, and incorporate other clarifying contract language.

**ENCLOSURE:**

1. Resolution
2. Amended Contract Section

**TRANSBAY JOINT POWERS AUTHORITY  
BOARD OF DIRECTORS**

**Resolution No. \_\_\_\_\_**

WHEREAS, On June 20, 2008, the Transbay Joint Powers Authority (TJPA) issued a Request For Qualifications for TJPA Contract No. 08-04-CMGC-000, Construction Manager/General Contractor (CM/GC) Services for the Construction of the Transbay Transit Center Building and Related Structures including preconstruction services and construction administration services consistent with those of a general contractor; and

WHEREAS, On March 12, 2009, the TJPA Board adopted Resolution No. 09-004 authorizing the award of TJPA Contract No. 08-04-CMGC-000, CM/GC Services for the Construction of the Transbay Transit Center Building and Related Structures, Phase 1, to the joint venture of Webcor Builders and Obayashi Corporation (Webcor/Obayashi); and

WHEREAS, Under their bid, Webcor/Obayashi would bill a blended rate of \$122 per hour for preconstruction services including design and constructability reviews, cost estimating and value management, outreach to and prequalification of subcontractors, and preparation of trade packages for bidding from the design documents prepared; and

WHEREAS, At the time of award of the CM/GC contract, Phase 1 had a construction value of \$500,000,000, and the assumed start of construction was to be September 2009; and

WHEREAS, On May 13, 2010, the TJPA Board adopted a Revised Baseline Budget and Schedule incorporating the construction of the train box into Phase 1; and

WHEREAS, The schedule for construction was subsequently revised to allow the construction of the train box in Phase 1, secure funding and incorporate input from the California High Speed Rail Authority (CHRSA) on the design of the rail approach and platforms; and

WHEREAS, The construction of the Transit Center is scheduled to take seven years, and the bidding of construction trade packages will extend over more than five years; and

WHEREAS, During the preconstruction phase the TJPA and the CM/GC have noted items in the Agreement (Section 00 05 20) and the General Conditions (Section 00 07 00) requiring clarification or modification, including the deadline for paying subcontractors, the period of time to be covered in construction invoices, and that certain expenses may be reimbursed; and

WHEREAS, The City and County of San Francisco has revised the Administrative Code provisions governing construction contract retention; now, therefore, be it,

RESOLVED, That the TJPA Board of Directors authorizes amending Contract No. 08-04-CMGC-000, Construction Manager/General Contractor (CM/GC) Services for the Construction of the Transbay Transit Center Building and Related Structures, with the joint venture of Webcor Builders and Obayashi Corporation, to increase the time for preconstruction services to 110,800 hours, to revise contract retention terms, and incorporate other clarifying contract language.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of July 15, 2010.

\_\_\_\_\_  
Secretary, Transbay Joint Powers Authority

**AGREEMENT**  
**AMENDMENT NO. 06**  
**BETWEEN**  
**TRANSBAY JOINT POWERS AUTHORITY**  
**AND**  
**WEBCOR/OBAYASHI, J.V.**

THIS AMENDMENT for AGREEMENT is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ by and between the TRANSBAY JOINT POWERS AUTHORITY ("TJPA") and Webcor/Obayashi, J.V. (the "CM/GC"). By this Amendment No. 06, the TJPA and the CM/GC hereby modify the Agreement dated March 17, 2009 (the "Agreement"), only to the extent expressly provided in this Amendment No. 06. All other terms and conditions of the Agreement shall remain in full force and effect.

**Recitals**

**A.** On On March 12, 2009, the TJPA Board awarded the Agreement to the CM/GC to perform pre-construction and construction services for the Transbay Transit Center Building and Related Structures Project (the "Project"). Pre-construction services authorized in the award were limited to a maximum of 45,000 hours at a blended rate of \$122/hour.

**B.** In June 2009, the TJPA Board approved a resolution authorizing staff to direct Pelli Clarke Pelli Architects, Inc., to continue the design of the Transit Center with the expectation that the rail levels would be incorporated into Phase 1, and in August 2009, the TJPA applied for High Speed Rail (HSR) funding under the American Recovery and Reinvestment Act (ARRA) to fund construction of the rail levels of the Transit Center in Phase 1.

**C.** On January 28, 2010, United States Department of Transportation ("USDOT") Secretary LaHood announced his intent to allocate \$400 million for construction of the Train Box in the Transbay Transit Center, which was confirmed by letter from the USDOT on March 29, 2010, and on May 13, 2010, the TJPA board approved the Revised Phase 1 Baseline Budget and Schedule incorporating the ARRA funding and the construction of the Train Box rail levels of the Transit Center into Phase 1 of the Transbay Transit Center Program.

**D.** The inclusion of the Train Box in Phase 1 construction and the transition to a "bottom-up" construction sequence versus a "top-down" construction sequence has resulted in an extended duration for pre-construction services.

**E.** On May 26, 2010, the TJPA Executive Director executed Contract Amendment No. 05, increasing the maximum number of pre-construction service hours from 45,000 hours to 52,800 hours.

**F.** By this Amendment No. 06, the TJPA increases the authorization of pre-construction services to be performed by the CM/GC to a maximum of 110,800 hours.

**G.** Additionally, as the TJPA and the CM/GC are working through Pre-Construction Services and toward Construction of the Project, the parties have noted that various and

miscellaneous items in the Agreement (Section 00 05 20) and the General Conditions (Section 00 07 00) require clarification or modification.

## **Terms and Conditions**

**1. Modifications to Agreement (Section 00 05 20).** The parties acknowledge and agree that the Agreement (Contract Section 00 05 20), at paragraphs 5.01 and 5.04, is hereby modified to provide as follows. For purposes of convenience, the changes to the original language are indicated by redline strikeout (deletions) or underline (additions)

**5.01 Contract Sum.** The amount to be paid to the CM/GC for all Work performed under this AGREEMENT shall not exceed Six Hundred Million Dollars and No Cents (\$600,000,000.00). The Contract Sum is comprised of the following: (A) the Pre-Construction Services Fee and (B) the Construction Services Fee of (1) the aggregate value of the awarded Trade Work subcontracts (Direct Costs) and (2) the CM/GC Construction Services Fixed Fee (the "CM/GC Fee"). This not-to-exceed amount does not include any payments made to the CM/GC for allowed and approved expenditures from the CM/GC Contingency, described in Article 6 of this AGREEMENT, or Reimbursable Expenses, as described below. In the event that during the bidding of Trade Work Packages, the TJPA determines that the budgeted amount for the Trade Packages will or most likely will be exceeded, the TJPA shall have the right to direct the re-bid of certain Trade Packages to reduce the cost and shall, if necessary, have the right to terminate the Contract for its convenience. If, upon Final Completion of the Work, the final Contract Sum (less the Pre- Construction Services Fee and Contingency Payments) is less than the budgeted amount, the difference between the final Contract Sum and the not-to-exceed amount will accrue to the benefit of the TJPA.

The TJPA will adjust the value of the Contract Sum during the course of the Project to reflect the amount of: (a) the cost of Pre-Construction Services, (b) awarded Trade Work Subcontracts plus CM/GC Fee, and (c) any other changes in the Work that affect the value of the Contract.

A. **Pre-Construction Services.** The CM/GC will be paid for Pre-Construction Services based on the blended rate of \$122 (One Hundred Twenty-Two Dollars)/hour as set forth in the CM/GC's Project Fee Proposal Schedule (attached as Attachment B to this AGREEMENT), up to a maximum of 110,800 ~~45,000~~ hours. The blended hours rate includes all of the CM/GC's profit for Pre-Construction Services, and all costs incurred by the CM/GC profit for Pre-Construction Services, including but not limited to any materials, payroll, overhead and administrative costs, travel and living expenses, licenses, insurance, incidents, and any other fees or expenses incurred by CM/GC in providing Pre-Construction Services.

1. The TJPA, at its sole discretion, will assign Pre-Construction phase Work to CM/GC. The TJPA makes no representation that all 110,800 ~~45,000~~ hours will be required for Pre-Construction Services during the course of the Project.
2. The blended hourly rate shall apply to all members of CM/GC's team who provide Pre-Construction Services. Payment for Pre-Construction Services will be subject to CM/GC providing the TJPA with sufficient back-up documentation demonstrating to the TJPA's reasonable satisfaction that services were performed justifying payment at the agreed-upon hourly rate.

B. **Construction Services.** CM/GC will be paid for Construction Services on the Direct Costs of the Work, as described in subparagraph B.1, below, plus the CM/GC Fee for overhead, profit, and general conditions, as described in subparagraph B.2, below.

1. Direct Costs of the Work include, but are not limited to, the total costs for all awarded Trade Packages. Refer to Attachment 1 to this AGREEMENT for categories of Work included under Direct Costs.
2. The CM/GC Fee will be a Fixed Fee of \$39,050,000. The CM/GC Fee shall be invoiced at a rate of 7.81% of approved Direct Costs, provided that the total CM/GC Fee amount shall not exceed the Fixed Fee amount stated in the first sentence of this paragraph. The invoice rate shall remain in effect throughout the term of this Contract, as may be extended by written modification to include Phase II construction.

The CM/GC Fee includes all of CM/GC's overhead, profit, and general conditions fee for administering and coordinating Construction Services. Attachment 1 allocates to the CM/GC and to the TJPA certain anticipated costs. Other general condition costs which may or may not be specifically identified in Attachment 1 and which fall under the following categories of costs shall be the responsibility of the CM/GC and included in its Fee: (i) all field and home/regional office personnel including but not limited to principals, project managers, superintendents, supervisory foremen, estimators, project engineers, detailers, drafts persons, schedulers, consultants, watchpersons, payroll clerks, administrative assistants, and secretaries; (ii) all field and home/regional office expenses including but not limited to field trailers, parking, storage sheds, office equipment and supplies, telephone service, long-distance telephone calls, fax machines, computers and software, internet and e-mail services, temporary utilities, sanitary facilities and services, janitorial services, small tools and equipment with a cost under \$1,000 each, portable scaffolding, blocking, shoring equipment, job vehicles, security and fencing, conformance to all regulatory requirements including safety equipment and compliance with safety regulations, safety programs and meetings, cartage, warranties, record documents, and all related maintenance costs; (iii) administrative functions including but not limited to reviewing, coordinating, distributing, processing, posting, recording, estimating, negotiating, scheduling, schedule updating and revising, expediting, surveying, engineering, drawing, detailing, carting, cleaning, protecting the Work, and other incidental Work; and (iv) costs of insurance (including all premiums).

The CM/GC will perform all categories of Work included in the CM/GC Fee (see Attachment 1 to this AGREEMENT) and will not include any of this Work in any of the Trade Packages.

3. At the time of award of the final Phase I Trade Package, if the total Direct Costs are less than \$500,000,000, the TJPA may at its sole option and discretion either (a) add Direct Costs to bring the Contract Sum to \$500,000,000 or (b) negotiate with the CM/GC an equitable adjustment to the CM/GC Fee. If at any time the total Direct Costs are or anticipated to be greater than \$500,000,000, the TJPA may at its sole option and discretion to either (a) not proceed with Work associated with Direct Costs in excess of \$500,000,000 or (b) negotiate with the CM/GC a mutually agreeable fixed CM/GC Fee for the CM/GC services associated with the additional approved Direct Costs in conformance with 49 CFR 18.36(f), so long as the Direct Costs in excess of \$500,000,000 are not a result of any action or inaction of the CM/GC or could not have been reasonably avoided by the CM/GC through the exercise of due care and would constitute a material breach of the Contract Documents.

C. Reimbursable Expenses. The TJPA will reimburse the CM/GC for the actual, approved costs of copying and binding the Trade Packages, for permits and specified fees (see Attachment 1 to this AGREEMENT). To be eligible for reimbursement, ~~such these and other reimbursable~~ costs must have the prior written approval of the TJPA. The CM/GC shall not be entitled to any markup or fee on Reimbursable Expenses.

D. Bond Premiums. For the Phase I Performance and Payment Bonds (each in the amount of \$600,000,000 (see paragraph 9.03)), the TJPA shall reimburse the CM/GC's actual Phase I Performance and Payment Bond premium costs, up to the amount stated by the CM/GC in its Cost Proposal. The TJPA shall not be responsible for any CM/GC Fee on any bond premium costs. For any Phase II Performance and Payment Bonds, the TJPA shall reimburse the CM/GC its actual costs as a Reimbursable Expense.

#### **5.04** Prompt Payment to Trade Subcontractors.

A. Requirement. The CM/GC shall comply with the prompt payment to subcontractors requirements set forth in 49 CFR Section 26.29 and with all provisions of State law relating to the payment of subcontractors.

B. Payment for Satisfactory Work. The CM/GC shall make payment to each Trade Subcontractor for satisfactory performance of its subcontract no later than ~~thirtyten(3010)~~ days after receipt of payment from the TJPA.

C. Payment of Retainage. The CM/GC shall make full payment to each Trade Subcontractor, within thirty (30) days after the subcontractor's Work is satisfactorily completed, of all retainage withheld by the CM/GC pursuant to the relevant subcontract. Accordingly, the TJPA shall pay to the CM/GC the

incremental retainage held under the Contract General Conditions (Section 00 07 00), Article 9, for the Work of such Trade Subcontractor upon certification by the CM/GC as to the retainage amount. (49 CFR 26.29(b)(3).)

D. Reduced retainage. If the TJPA reduces retainage under the Contract Documents (see General Conditions Section 00 07 00, ¶9.03), the CM/GC must proportionately reduce retainage for its Trade Subcontractors.

**2. Modifications to Agreement (Section 00 07 00).** The parties acknowledge and agree that the Agreement (Contract Section 00 07 00), at Article 9, is hereby modified to provide as follows. For purposes of convenience, the changes to the original language are indicated by redline strikeout (deletions) or underline (additions).

### 1.01 DEFINITIONS

24. (with re-numbering of subsequent definitions) "Contractor": Refer to "CM/GC".

78. (with re-numbering of subsequent definitions) "Trade Subcontractor": Refer to "Subcontractor".

### 9.03 PROGRESS PAYMENTS AND RETENTION

A. Subject to the conditions set forth in these General Conditions, and to the authorization of the TJPA or the authorized representatives of the TJPA, payment shall be made upon demand of CM/GC and pursuant to the Contract Documents as follows.

B. On the 25th day of each month during periods of construction, CM/GC shall submit to the TJPA for review a ~~draft~~ Application for Payment for the Work completed as of the end of the current calendar month. On the first day of the following month, the CM/GC shall incorporate any comments by the TJPA as to the draft and submit a formal Application for Payment, on a form approved by the TJPA and signed by CM/GC, covering the Work completed by CM/GC in the previous month, as of the date of the Application and accompanied by such supporting documentation as specified in Division 1. For example, for work completed during the month of June, CM/GC shall submit a draft Application for Payment on June 25 (if the 25<sup>th</sup> falls on a Saturday, Sunday, or Holiday, then on the last business day before the 25th), with a final Application for Payment due on July 1 (if the first day of the month falls on a Saturday, Sunday, or Holiday, then on the next business day after the first day of the following month).

1. The monthly value of lump sum Work shall be estimated by CM/GC pursuant to the schedule of values prepared in accordance with Paragraph 9.02. CM/GC's estimates need not be based on strict measurements but shall consist of good-faith approximations and shall be proportional to the total amount, considering payments previously made, that becomes due for such Work satisfactorily completed in accordance with the requirements of the Contract Documents.

2. Progress payments on account of Unit Price Work shall be based on the number of units of Work satisfactorily completed as determined by the TJPA and the unit prices Bid by CM/GC, adjusted as specified in Paragraph 6.08 for the actual quantities of Work performed.

3. Progress payments on account of allowances shall be made for such sums as may be acceptable to the TJPA and including costs as specified in Division 1. Prior to final payment, an appropriate Change Order will be issued as directed by the TJPA Representative to reflect actual amounts due CM/GC on account of Work covered by allowances, and the Contract Sum will be adjusted accordingly.

4. Except as provided in subparagraph 9.03I, no allowance will be made for materials or equipment not incorporated into the Work.

C. The Application for Payment shall identify the amount of CM/GC's total earnings to date.

D. Monthly progress payment amounts to CM/GC shall be based upon completed Work or percentages of Work completed prior to the end of the payment period, *i.e.*, the previous calendar month. A detailed payment application procedure will be transmitted to CM/GC by the TJPA following the formal approval of the schedule of values.

E. Monthly Applications for Payment shall be based on information developed at monthly progress meetings and shall be prepared by CM/GC ~~as specified in Division 1~~. Submission of acceptable monthly progress schedule updates for same period as the Application for Payment shall be a condition precedent to making progress payment Applications. No partial progress payment shall be made to CM/GC until all cost information requested by the TJPA is submitted and reviewed.

F. As soon as practical after estimating the progress of the Work, the TJPA will pay to CM/GC in a manner provided by law an amount ~~equal to 90 percent of the value~~, based upon Contract prices, of labor and materials incorporated in the Work at the Site until midnight of the ~~25th~~last day of the ~~current~~previous month, less ~~the appropriate retention~~ and the aggregate of the amount of previous payments. Payments, however, may be withheld at any time that the Work, in the TJPA's estimation, is not proceeding in accordance with the Contract, or as otherwise provided in Paragraph 9.05.

~~1. When the TJPA determines that the Work is 50 percent or more complete, that CM/GC is making satisfactory progress, and that there is no specific cause for greater withholding, the TJPA, at its sole option and discretion and upon the written request of CM/GC, may (a) release part of the retention to the CM/GC so that the amount held in retention by the TJPA, after release to CM/GC, is reduced to not less than 5 percent of the total value of the labor and materials furnished, and the TJPA shall proceed to retain 5 percent of any subsequent progress payment under the contract; or (b) continue to hold the already withheld retention amount, up to 5 percent of the total contract price, and shall not deduct further retention from progress payments.~~

~~2. When the TJPA determines that the Work is 98 percent or more complete, the TJPA may reduce retention funds to an amount equal to 200 percent of the estimated value of work yet to be completed, provided that the contract is free of offsets by the TJPA and is free of stop notices, forfeitures, and other charges.~~

~~3. The TJPA shall endeavor to make progress payments for undisputed amounts within 15 business days, but no later than 45 business days, of receiving a ~~payment request~~ a final Application for Payment for the previous month and the required documentation including, without limitation, certified payrolls. In no event shall the TJPA become liable for interest or other charges for late payment except as set forth in San Francisco Administrative Code section 6.22(J)(57).~~

G. No inaccuracy or error in said monthly estimates shall operate to release CM/GC or its sureties from damages arising from such Work or from the enforcement of each and every provision of the Contract Documents, and the TJPA shall have the right to correct any error made in any estimate for payment.

H. In accordance with the provisions of section 22300 of the California Public Contract Code, CM/GC will be permitted to substitute securities for any moneys withheld by the TJPA to ensure performance under the Contract under the following conditions:

1. At the request and expense of CM/GC, securities listed in section 16430 of the California Government Code, bank or savings and loan certificate of deposits, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the TJPA and CM/GC which are equivalent to the amount withheld under the retention provisions of the Contract Documents shall be deposited with the TJPA Controller who shall then pay such moneys to CM/GC. Upon satisfactory completion of the Project and all Work under the Contract, the securities shall be returned to CM/GC.

2. CM/GC shall be the beneficial owner of the securities substituted for moneys withheld and shall receive any interest thereon.

3. CM/GC shall enter into an escrow agreement with the TJPA Controller according to Section 00 06 30 ("Escrow Agreement for Security Deposits in Lieu of Retention"), specifying the amount of securities to be deposited, terms and conditions of conversion to cash in case of default of CM/GC, and termination of escrow upon completion of the Contract.

I. Pursuant to section 6.22J of the San Francisco Administrative Code, payment for material or equipment procured by CM/GC but stored on or off the Site and not incorporated in the Project will not be allowed, subject to the following exception:

1. The TJPA will make payment for material or equipment procured by CM/GC and not incorporated in the Project if the material or equipment is (i) unique to the Project; and (ii) either stored on the Site or at an off-Site location approved in advance and in writing by the TJPA. Should the TJPA agree to make payment for such material or equipment, all of the following shall apply:

- a. CM/GC shall submit to the TJPA proof of off-Site material purchases, including bills of sale, invoices, or other documentation warranting that CM/GC has received the materials free and clear of all liens, charges, security interests, and encumbrances.
- b. Title to stored material shall be vested in the TJPA at time of delivery to the Site or off-Site warehouse.
- c. CM/GC shall obtain a negotiable warehouse receipt, endorsed over to the TJPA, for material stored in an off-Site warehouse. No payment will be made until endorsed receipts are delivered to the TJPA.
- d. CM/GC, at no additional cost to the TJPA, shall insure stored material against theft, fire, loss, vandalism, and malicious mischief, and shall deliver the policy or certificate of such insurance to the TJPA Representative naming the TJPA as additional insured. Insurance shall not be cancelable for at least 30 days and cancellation shall not be effective until certificate thereof is given to the TJPA.
- e. CM/GC shall furnish to the TJPA written consent from CM/GC's sureties approving the advanced payment for materials stored off Site.
- f. The maximum prepayment allowed by the TJPA shall be 75 percent of the fair market value of the item being considered. The TJPA shall be the sole judge of fair market value.
- g. CM/GC shall protect stored materials from damage. Damaged materials, even though paid for, shall not be incorporated into the Work.
- h. Stored materials shall be available for inspection by the TJPA.
- i. CM/GC shall deliver stored materials to the Site.
- j. After delivery of stored materials to the Site, if any inherent or acquired defects are discovered therein, such defective material shall be removed and replaced with suitable materials at no additional cost to the TJPA.
- k. In the event of loss of or damage to paid materials, CM/GC shall be responsible for replacing the lost or damaged materials at its own cost and shall be responsible for all delays incurred on the Project as a result of such loss or damage.
- l. Nothing in this subparagraph 9.03I shall relieve CM/GC of its responsibility for incorporating materials in the Work that conform to the requirements of the Contract Documents.

J. The granting of any progress payment, or the receipt thereof by CM/GC, shall not constitute acceptance of the Work or any portion thereof and shall in no way lessen the liability of CM/GC to replace unsatisfactory Work or material, though the unsatisfactory character of such Work or material may not have been apparent or detected at the time such payment was made.

K. It is mutually understood and agreed that the TJPA may withhold from any payment otherwise due CM/GC such amounts as may be necessary to protect the TJPA to ensure completion of the Project pursuant to the requirements of this Contract. The failure or refusal of the TJPA to withhold any moneys from CM/GC shall in no way impair the obligations of any surety or sureties under any bonds furnished under this Contract.

1. If any payment or portion of payment is withheld by the TJPA, CM/GC will be notified in writing of the cause(s) of such action.

L. Only Change Orders and undisputed portions of Unilateral Change Orders completely approved and executed by the TJPA shall be included on the payment authorization, and only that portion of the Change Order Work actually performed shall be submitted for payment. CM/GC shall submit a breakdown for each Change Order by Change Order number on its Application for Payment.

M. Submission of Electronic Certified Payrolls. No monthly progress payments will be processed until CM/GC has submitted weekly certified payrolls to the TJPA for the applicable time period. Certified payrolls shall be prepared pursuant to Section 1770 et seq. of the California Labor Code for the period involved for all employees and owner-operators, including those of Subcontractors and Suppliers of all tiers, for all labor and materials incorporated into the Work.

1. CM/GC shall submit certified payrolls to the TJPA electronically via the TJPA-selected Project Reporting System ("PRS"), an Internet-based system accessible on the World Wide Web through a web browser. The CM/GC and each Subcontractor and Supplier will be assigned a log-on identification and password to access the PRS.

2. Use of the PRS may require CM/GC, Subcontractors and Suppliers to enter data relating to weekly payroll information including, but not limited to, employee identification, labor classification, total hours worked and hours worked on this project, and wage and benefit rates paid. CM/GC's payroll and accounting software may be capable of generating a "comma delimited file" that will interface with the PRS software.
3. The TJPA will provide basic training in the use of the PRS at a scheduled training session. CM/GC and all Subcontractors and Suppliers and/or their designated representatives must attend the PRS training session.
4. CM/GC shall comply with the requirements of this subparagraph 9.03M at no additional cost to the TJPA.
5. The TJPA will not be liable for interest, charges or costs arising out of or relating to any delay in making progress payments due to CM/GC's failure to make a timely and accurate submittal of certified payrolls.

#### **9.04 RETENTION**

A. The TJPA shall hold 10 percent in retention from each progress payment. The TJPA shall administer retention in conformance with Administrative Code section 6.22J.

B. When the TJPA determines that the Work is 50 percent or more complete, that CM/GC is making satisfactory progress, and that there is no specific cause for greater withholding, the TJPA, at its sole option and discretion and upon the written request of CM/GC, may (a) release part of the retention to the CM/GC so that the amount held in retention by the TJPA, after release to CM/GC, is reduced to not less than 5 percent of the total value of the labor and materials furnished, and the TJPA shall proceed to retain 5 percent of any subsequent progress payment under the contract or (b) continue to hold the already withheld retention amount, up to 5 percent of the total contract price, and shall not deduct further retention from progress payments.

C. When the TJPA determines that the Work is 98 percent or more complete, the TJPA may reduce retention funds to an amount equal to 200 percent of the estimated value of work yet to be completed, provided that the contract is free of offsets by the TJPA and is free of stop notices, forfeitures, and other charges.

D. The TJPA shall release the balance of retention only upon the following conditions: (i) the CM/GC has reached Final Completion as provided in paragraph 9.09, below, and (ii) the Contract is free of offsets by the TJPA for liquidated damages and defective work and is free of stop notices, forfeitures, and other charges.

E. The CM/GC may apply for early release of retention for Work performed by subcontractors. The CM/GC shall make such application in writing and shall certify the following:

1. That the Work by the subcontractor is completed and satisfactory;
2. The total final contract amount paid to the subcontractor (excluding retention); and
3. The amount of retention associated with the Work performed by the subcontractor.

CM/GC acknowledges and agrees that the release of retention under this subparagraph shall not reduce the responsibilities or liabilities of the CM/GC or its surety(ies) under the Contract or applicable law.

#### **9.0405 PAYMENT AUTHORIZATION**

A. The TJPA will, after receipt of CM/GC's Application for Payment, approve such amount as the TJPA determines is properly due.

B. Payment will be issued by the TJPA based on the TJPA's determination that the Work has progressed satisfactorily to the point stated in the application for payment. Payment will not be a representation that the TJPA has:

1. inspected the Work exhaustively to check that the quality or quantity are in conformance to the requirements of the Contract Documents; or
2. reviewed CM/GC's means, methods, techniques, sequences or procedures of construction; or
3. ascertained how or for what purpose CM/GC has used money paid, or determined that title to any of the Work, materials, or equipment has passed to the TJPA free and clear of any liens.

#### **9.0506 WITHHOLDING PAYMENT; DELAYED PAYMENT AND CM/GC SUSPENSION OF WORK**

A. The TJPA may decide not to authorize payment, in whole or in part, to the extent reasonably necessary to protect itself if, in the TJPA's judgment, the determination required by subparagraph 9.04B cannot be made. If the TJPA does not authorize payment in the amount of the application, the TJPA will notify CM/GC of the reasons for withholding payment. The TJPA may also decline to authorize payment based on subsequently discovered evidence, and the TJPA may nullify the whole or a part of a payment previously issued, for one or more of the following reasons:

1. The TJPA determines the existence of Non-conforming Work or completed Work that has been damaged, requiring correction or replacement.
2. Third party claims have been filed, or there is reasonable evidence indicating probable filing of such claims.
3. The TJPA determines that the Work cannot be completed for the unpaid balance of the Contract Sum.
4. The Contract Sum has been reduced by Change Orders.
5. Damage has occurred to the TJPA or another CM/GC.
6. The TJPA determines that the Work will not be completed within the Contract Time and that the current unpaid balance and retention will not be adequate to cover liquidated damages for the anticipated delay.
7. The TJPA determines that CM/GC persistently fails to perform the Work in accordance with the Contract Documents (including, but not limited to, any of the causes enumerated under subparagraph 14.01A).
8. The TJPA determines that CM/GC fails to submit timely PCO cost proposal breakdowns in accordance with the Contract Documents.
9. The TJPA determines that CM/GC fails to submit timely progress schedules, revised schedules, schedule updates and reports in accordance with the Contract Documents.
10. The TJPA determines that CM/GC fails to maintain timely updated Contract Documents or record documents.
11. The TJPA determines that CM/GC fails to submit certified payroll records in accordance with the Contract Documents.
12. The TJPA determines that CM/GC fails to comply with any other requirements of the Contract Documents.

B. In the event that, due to no fault of the CM/GC, the TJPA fails to issue an undisputed progress payment within the time provided in the Agreement (Section 00 05 20, Article 5), the CM/GC may upon 15 days' written notice to the TJPA suspend Work until TJPA issues the undisputed progress payment. The CM/GC may submit a Change Order Request under Article 6 of these General Conditions for actual, documented costs associated with the suspension. The CM/GC may also submit a Notice of Delay and seek an Extension of Time for the suspension period as provided under Article 7 of these General Conditions.

#### **9.0607 PARTIAL UTILIZATION**

A. Whenever the Work, or any part thereof, is in a condition suitable for use in the opinion of the TJPA, and the best interest of the TJPA requires such use, the TJPA may make a written request for CM/GC to permit the TJPA to take possession of and use the Work, or a part thereof, at no additional cost to the TJPA. When so used, maintenance and repair due to ordinary wear and tear caused by the TJPA will be made at the TJPA's expense. The use by the TJPA of the Work or part thereof shall in no case be construed as constituting completion or acceptance of Non-conforming Work. Unless otherwise provided elsewhere in the Contract Documents, such use shall neither relieve CM/GC of any of its responsibilities under the Contract, nor act as a waiver by the TJPA of any of the conditions thereof.

B. Such partial utilization may commence at any time as determined by the TJPA, except that the insurers providing property insurance shall have acknowledged notice thereof and in writing effected any changes in insurance coverage necessitated thereby.

- C. If CM/GC agrees that such part of the Work is Substantially Complete, CM/GC shall notify the TJPA in writing and request a joint inspection of that part of the Work. Within 7 days from receipt of CM/GC's written notification, CM/GC and the TJPA shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record its status of completion.
- D. Partial utilization of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.
- E. CM/GC shall perform final cleaning of such partially utilized Work as specified in the Division 1 when directed to do so by the TJPA.

#### **9.0708 SUBSTANTIAL COMPLETION**

- A. CM/GC shall notify the TJPA in writing when CM/GC considers that the Work is Substantially Complete and request that the TJPA inspect the Work and prepare a Notice of Substantial Completion. Completion of start-up services and submittal of warranties, guarantees, and record documents shall be a condition precedent to requesting an inspection for Substantial Completion. Attached to CM/GC's request for a Substantial Completion inspection shall be a preliminary list of items to be completed or corrected before Final Completion.
- B. Within 2 working days from receipt of CM/GC's written notification, the TJPA will make an inspection to determine whether the Work is Substantially Complete. If the TJPA determines that the Work is not Substantially Complete, the TJPA will provide CM/GC with a Deficiency List that lists all Items that shall be corrected or completed before the TJPA considers the Work Substantially Complete.
- C. Once CM/GC has completed all items on the Deficiency List, CM/GC shall request a second inspection by the TJPA to verify that the Work is Substantially Complete. If the TJPA determines that the Work is not Substantially Complete, the TJPA will follow the same procedure as for the first inspection as described in subparagraph 9.07B. CM/GC shall reimburse the TJPA for costs incurred by the TJPA and its consultants related to all additional inspections necessary to achieve Substantial Completion.
- D. As a condition precedent to Substantial Completion, CM/GC shall obtain a temporary certificate of occupancy from the TJPA's Department of Building Inspection or other equivalent agency having jurisdiction over the Work in the event that such temporary occupancy permit or equivalent permit is necessary for the TJPA to utilize the Work for the purposes for which it is intended.
- E. When the TJPA determines that the Work is Substantially Complete, the TJPA will issue a Notice of Substantial Completion, which shall establish the Substantial Completion date.
- F. At the time of delivery of the Notice of Substantial Completion, the TJPA will deliver to CM/GC (i) a Completion List identifying deficient items to be corrected by CM/GC prior to Final Completion; and (ii) a written determination as to the division of responsibilities regarding close-out requirements including, but not limited to, security, operation, safety, maintenance, heat, utilities, insurance and warranties.

#### **9.0809 FINAL COMPLETION AND FINAL PAYMENT**

- A. When CM/GC considers all Work complete, including all items of Work on the punch list and all closeout requirements, CM/GC shall notify the TJPA in writing and request that the TJPA issue a certificate of acceptance.
- B. Within 5 working days of receipt of CM/GC's written notice, the TJPA will verify whether all Completion List items are completed. If the TJPA finds that any of the Completion List items are not complete, the TJPA will notify CM/GC in writing. CM/GC shall promptly take actions necessary to complete such Completion List items.
- C. Once CM/GC ~~considers complete all items~~~~completes all items~~ on the Completion List, CM/GC shall notify the TJPA in writing and request a second inspection. If the TJPA finds the Completion List items are still not complete, CM/GC shall be responsible for all costs for conducting such additional inspections incurred by the TJPA and its consultants before Final Completion. The cost of such inspections shall not be considered a delay cost and

shall be charged in addition to any liquidated damages which may become due as a result of the CM/GC's failure to achieve Final Completion within the time prescribed in Section 00 05 20, as may be modified by change order under the terms and conditions of the Contract Documents. All such costs of the TJPA and its consultants shall be deducted from amounts which are due or become due to progress payments owed CM/GC.

D. While Completion List work is outstanding, the TJPA may, at its option, pay CM/GC any earned Contract funds, including retention, subject to offset for the following: (i) funds subject to forfeiture or withholding for prevailing wage violations and/or stop notice claims and/or funds to be withheld as otherwise required by law or court order; (ii) an amount not to exceed 200 percent of the total estimated cost of labor and materials to correct any Non-conforming, unacceptable, or incomplete Work; and (iii) amounts assessed for liquidated damages.

~~E.~~ After CM/GC has completed to the satisfaction of the TJPA all Completion List items and close-out requirements in accordance with the Contract Documents, the TJPA will issue a written certificate of acceptance as required by section 6.22(K) of the San Francisco Administrative Code stating that the Work is acceptable, and CM/GC may submit the final application for payment. TJPA shall endeavor to issue the final payment within 35 days after approval of the final application.

~~E. The remaining value of the Work performed under this Contract, if unencumbered, shall be paid within 35 days after the date of the Final Completion, except that the TJPA may withhold from the final payment an amount not to exceed 200 percent of the cost of Non-conforming or unacceptable Work and amounts assessed as liquidated damages. Acceptance by CM/GC of said final payment shall constitute a waiver of all Claims against the TJPA arising under the Contract Documents. As a condition precedent to final payment, CM/GC shall furnish a "release" pursuant to the following subparagraph 9.08F.~~

F. CM/GC and each assignee under any assignment in effect at the time of final payment shall, if required by the TJPA, execute and deliver at the time of final payment, as a condition precedent to final payment, a release in form and substance satisfactory to, and containing such exemptions as may be found appropriate by the TJPA, discharging the TJPA and the TJPA's consultants, and their directors, officers, members, employees, agents and authorized representatives of all liabilities, obligations and Claims arising under this Contract.

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IN WITNESS WHEREOF, the parties hereto have executed this contract Amendment No. 06 on the day first mentioned above.

TRANSBAY JOINT POWERS AUTHORITY

\_\_\_\_\_  
Maria Ayerdi-Kaplan  
Executive Director

Transbay Joint Powers Authority

Transbay Joint Powers Authority  
Board of Directors  
Resolution No. \_\_\_\_\_  
Adopted: \_\_\_\_\_

Attest:

\_\_\_\_\_  
Secretary, TJPA Board

Approved as to Form:

Dennis J. Herrera, City Attorney

By \_\_\_\_\_  
Deputy City Attorney

\_\_\_\_\_  
CM/GC

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitle Covered Employees to certain minimum hourly wages and compensated and uncompensated time off.

I have read and understood paragraph 55, the TJPA's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

Webcor/Obayashi, Joint Venture

\_\_\_\_\_  
Company Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
City, State, ZIP

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Federal Employer ID Number