

REGIONAL TRANSIT ISSUE PAPER

| Agenda Item No. | Board Meeting Date | Open/Closed Session | Information/Action Item | Issue Date |
|-----------------|--------------------|---------------------|-------------------------|------------|
| 11 | 06/24/13 | Open | Action | 6/4/13 |

Subject: Approving the Settlement Agreement and Mutual Release for the Contract for Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor with Stacy & Witbeck, Inc.

ISSUE

Whether or not to Approve the Settlement Agreement and Mutual Release for the Contract for the Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor Project with Stacy & Witbeck, Inc.

RECOMMENDED ACTION

Adopt Resolution 13-06-___ Approving the Settlement Agreement and Mutual Release for the Contract for Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor with Stacy & Witbeck, Inc.

FISCAL IMPACT

| | | | |
|--|---|---------------|-----------------|
| Budgeted: | Yes | This FY: | \$ 1,955,645.80 |
| Budget Source: | Capital (Downtown-Natomas-Airport Light Rail Extension) | Next FY: | \$ N/A |
| Funding Source: | Local/Revenue Bonds* | Annualized: | \$ N/A |
| Cost Cntr/GL Acct(s) or Capital Project #: | 404.08.01 | Total Amount: | \$ 1,955,645.80 |
| Total Budget: | \$ 49,762,000 | | |

* Funding Sources and Amounts

| | |
|--------------------------|--|
| Measure A Sales Tax | \$43,001,190 |
| Revenue Bonds | \$ 5,090,772 |
| State Transit Assistance | \$ 535,214 |
| City of Sacramento | \$ 1,120,945 (Reimbursement for utility undergrounding work) |
| County of Sacramento | \$ 13,879 (Reimbursement for underground tank remediation) |

DISCUSSION

On September 14, 2009, the Board conditionally awarded a Design-Build (DB) contract for the Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor Project; now known as the Green Line to the River District Project (GL-1). Notice to Proceed was issued to Stacy & Witbeck, Inc. (SWI) on November 30, 2009.

Approved:

Presented:

Final 06/19/13
General Manager/CEO

Director, Construction Management

| Agenda Item No. | Board Meeting Date | Open/Closed Session | Information/Action Item | Issue Date |
|-----------------|--------------------|---------------------|-------------------------|------------|
| 11 | 06/24/13 | Open | Action | 6/4/13 |

Subject: Approving the Settlement Agreement and Mutual Release for the Contract for Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor with Stacy & Witbeck, Inc.

During the course of the DB process, numerous issues developed that SWI believed warranted additional compensation. Staff has worked with SWI to qualify and quantify the impact of the various issues. The resolution of the contested issues was discussed with the Board on February 25, 2013, as consisting of two actions, the first being the resolution of specific items as detailed in Contract Change Order No.41, and the second being a final Settlement Agreement.

On February 25, 2013 the Board approved Contract Change Order No. 41. Contract Change Order No. 41 dealt with several open issues and, in addition, moved the completion milestones for the Contract to August 27, 2011 for milestone C1, September 25, 2011 for C2, and November 24, 2011 for C3.

Since that time, staff has continued discussions with SWI to identify the remaining activities to be completed and negotiated the compensation for the closeout of the DB Contract. The Settlement Agreement and Mutual Release details the remaining obligations of SWI and identifies those items that RT asserts are non-conforming but will accept as complete. The cost for SWI to cure all of the alleged non-conforming items has been estimated by RT staff at approximately \$500,000; however, there is disagreement among the parties as to whether some of the items are, in fact, non-conforming.

In addition, as part of the Settlement Agreement, RT would forgo any claim for liquidated damages for delayed completion of the work. Even with the adjusted completion milestones set out in Contract Change Order No. 41, there was a delay of approximately 293 days in achievement of Completion Milestone C2 (revenue operations). Completion Milestone C3 (Final Acceptance) still has not been achieved and will not be achieved until SWI completes the outstanding “punchlist” work and other obligations set out in the Settlement Agreement and Mutual Release. Liquidated damages are established in the Contract at \$9,000.00 per day for Completion Milestone C2 and \$1,500.00 per day for Completion Milestone C3. Assuming all of the delays could be attributed to SWI, there would be outstanding liquidated damages of over \$3 million. However, there is also dispute regarding the cause of the delays. Because SWI’s daily extended overhead costs are in excess of the liquidated damages amount, allocating the delay equally to RT and SWI, which is a potential outcome of any legal action surrounding the delay, could lead to additional liability for RT for SWI’s extended overhead costs.

The Agreement would increase the total compensation for DB contract to an amount not to exceed \$42.1 million. The remaining balance due (\$1,955,645.80) would be paid to SWI within 60 days after filing of a “Notice of Completion”, which will be done when SWI completes all of its obligations under the Agreement.

After the “release” is effective, SWI would remain liable for certain categories of claims, including: (a) claims and defenses relating to enforcing the terms of the Settlement Agreement; (b) claims relating to latent construction defects under Section 337.15 of the California Code of Civil Procedure discovered after the Effective Date; (c) claims for breach of warranty with respect to any product, material, or workmanship furnished for the MOS1 Project; and (d) claims by third

| Agenda Item No. | Board Meeting Date | Open/Closed Session | Information/Action Item | Issue Date |
|-----------------|--------------------|---------------------|-------------------------|------------|
| 11 | 06/24/13 | Open | Action | 6/4/13 |

Subject: Approving the Settlement Agreement and Mutual Release for the Contract for Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor with Stacy & Witbeck, Inc.

parties that are subject to the indemnity provisions of the DB Contract, including all claims, demands, rights and causes of action asserted by subcontractors and suppliers of any tier, and any of their employees or agents for monies for materials, equipment or labor supplied on behalf of SWI to the MOS1 Project.

Staff recommends approval of the Settlement Agreement and Mutual Release for the Contract for Design-Build of the Minimal Operable Segment (MOS-1) for the Downtown-Natomas-Airport Rail Corridor Project with SWI.

RESOLUTION NO. 13-06-_____

Adopted by the Board of Directors of the Sacramento Regional Transit District on this date:

June 24, 2013

APPROVING THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE FOR THE CONTRACT FOR MINIMAL OPERABLE SEGMENT (MOS1) FOR THE DOWNTOWN-NATOMAS-AIRPORT RAIL CORRIDOR PROJECT WITH STACY & WITBECK, INC.

BE IT HEREBY RESOLVED BY THE BOARD OF DIRECTORS OF THE SACRAMENTO REGIONAL TRANSIT DISTRICT AS FOLLOWS:

THAT, the Settlement Agreement and Mutual Release for the Contract for Design-Build of the Minimal Operable Segment (MOS 1) for the Downtown-Natomas-Airport Rail Corridor Project between Sacramento Regional Transit District (therein "RT") and Stacy and Witbeck, Inc. (therein "Design-Builder"), whereby the parties agree to increase the total consideration for the Contract to \$42,100,000 and, upon completion of all outstanding work, agree to waive any and all claims, demands, actions, liabilities, damages and causes of action, whatsoever, including costs and attorneys' fees, in regard to, or in any way arising from or relating to the MOS1 Project, with certain specified exceptions, as further set forth therein, is hereby approved.

THAT, the General Manager/CEO is hereby authorized and directed to execute said Settlement Agreement and Mutual Release.

PATRICK HUME, Chair

A T T E S T:

MICHAEL R. WILEY, Secretary

By: _____
Cindy Brooks, Assistant Secretary