Proposed Board Action
22-ECCB-003

Item Description:
Approval of use of project contingency funds in the amount of $210,000,000 to negotiate and execute a Settlement Agreement with Lunda McCrossan JV.

Resolution:
BE IT RESOLVED, that upon the final review and approval by the ECCB of the Settlement Agreement at a subsequent meeting and execution of the Agreement by the Metropolitan Council, the use of $210,000,000 in Project contingency for the Settlement Agreement is APPROVED.

Background:
On November 15, 2018, the Metropolitan Council awarded Civil Construction Contract to LMJV, in the amount of $799,514,338.22.

After the contract was awarded to LMJV there were changes to the Civil Construction Contract that were not part of the original contract scope. These changes include:

- The addition of the corridor protection barrier as part of an agreement with BNSF Railway;
- The addition of the Eden Prairie Town Center Station;
- Substantial changes to the design and construction of the Kenilworth tunnel; and
- Other additional impacts to the price and timing of the work under the civil construction contract.

These changes have impacted both the time required for LMJV to complete its work and the costs under the Civil Construction Contract. These changes will also delay the systems contractor, the start of revenue operations, and result in additional costs. The Council and LMJV have agreed that an additional approximately 34 months is needed to complete the civil construction and will enter into a separate zero-cost change order extending the Contract time. The change order will also establish completion dates and modify the sequence that construction segments are turned over to the systems contractor. The parties agree that 30 months of the approximately 34-month delay is due to changes by the Council. The parties dispute who is responsible for the remaining 4 months of delay.

The Council and LMJV do not agree on the total cost impacts of these disputes. The Council and LMJV are negotiating an agreement with a process to resolve the cost impacts of the new schedule and responsibility for the remaining 4 months of delay. The types of costs to be resolved include labor and equipment costs for the additional time to perform the work, labor and material escalation, open change orders, and impacts to the productivity of the work performed to date. The process will ensure that the additional costs are reasonable and supported by data while avoiding the potential for litigation.

The key terms include:

- If the parties are unable to resolve their disputes, they will engage in an evaluative mediation process.
The evaluative mediator will then work with the parties to resolve the differences in between submissions from the parties. If no resolution is reached, the evaluative mediator will issue an opinion.

If there are issues for which the parties cannot reach agreement, the parties will submit these issues to binding arbitration. The arbitrator will issue a binding award on the remaining disputes.

The Council will make two $20 million payments to LMJV within 60 days of execution to compensate LMJV for costs that it has already incurred because of the impacts described above. This amount is not disputed by the Council.

For other costs that are agreed to by the parties or ordered through arbitration the Council will make future payments as required in the agreement or ordered by the arbitrator.

Liquidated damages will be revised to reflect the revised completion date for civil construction.

This settlement is necessary to complete civil construction and expeditiously resolve the disputes related to the additional time required to perform the work while ensuring that LMJV’s claimed costs are properly vetted and documented. The revised completion date to civil construction will establish a date certain turnover to the follow-on systems contractor and inform an update to the start of revenue operations.

This resolution approves the use of $210,000,000 in contingency for the settlement agreement as described above, subject to final approval of the settlement agreement by the ECCB at a future meeting, after review of the settlement agreement and exhibits.