



● **Board of Directors**
Legal and Claims Committee

10/12/2010 Board Meeting

8-6

Subject

Report on the status of the Foxfire Constructors, Inc. v. W.A. Rasic Construction Company, et al., Superior Court of Orange County Case No. 30-2009-00118788; and authorize an increase in the maximum amount payable under contract with Construction Management Services by \$8,800 to an amount not to exceed \$238,800

Description

In July 2007 pursuant to Specifications No. 1589 Metropolitan entered into Contract No. 1651 with W.A. Rasic Construction Company, Inc. (WAR) for construction of the north reach of the Perris Valley Pipeline (PVP-N). In February 2009 WAR's tunneling subcontractor filed litigation against WAR for non-payment (*Foxfire Constructors, Inc. v. W.A. Rasic Construction Company, et al.*). WAR subsequently filed a cross-complaint against both Foxfire for delay and against Metropolitan alleging delay and a variety of other construction-related claims. WAR failed to meet any of the contract milestones and Metropolitan withheld over \$3 million in liquidated damages from final payment. WAR's cross-complaint sought both the release of the liquidated damages and an additional \$10 million of compensation for a total of over \$13 million. A three-party mediation was conducted with a professional mediator on August 19 and 20. The mediation was not successful although shortly after the mediation, Rasic and Foxfire settled their dispute.

Staff provided a report on this matter at the September 2010 Board meeting and requested authorization to increase the legal services contract for Theodora Oringer Miller & Richman PC (TO), outside counsel in this matter, by \$500,000. Staff also requested authorization to make a statutory (998) settlement offer to WAR in the amount of \$3,750,000. Both requests were granted by the Board.

On September 15, 2010, outside counsel made the 998 offer to WAR. After some discussion regarding the manner in which the resolution of the case would be documented, WAR accepted the offer. The parties entered into a settlement agreement pursuant to which Metropolitan paid \$3,750,000 to WAR and both parties will dismiss their respective complaints with prejudice concluding this litigation. It is staff's belief that the mediation was instrumental in obtaining the acceptance of the subsequent settlement offer. As a result of the settlement, little if any of the \$500,000 authorized for the TO contract will be used.

Construction Management Services (CMS) is a construction claims consulting firm that was retained by Metropolitan to assist in preparation for the mediation and it was staff's intent to use their services if this matter went to trial. In May 2010 the Board authorized a contract with CMS for \$230,000. It was staff's intent that this amount would be sufficient through mediation. If the matter did not settle, staff would have requested board authorization for additional funds for the CMS contract to take the matter through trial.

CMS's work involved two primary areas of analysis: WAR's delay claims and an analysis of WAR's financial data as it related to its bid, the work performed and the claims asserted by WAR. This involved a detailed analysis of daily inspection reports to document the status of the job and completion of various milestones for every day from commencement of work to contract completion as well as a detailed financial analysis. This analysis revealed that WAR had made misstatements in its claims regarding the completion of milestone events and inappropriately altered the as-built schedule. Their work further revealed that WAR made money on the job, many of its claims were not supported by its bid or expenditure records and that there was no evidence that WAR

lost money on the specific work items that were the basis of its claims. CMS was the primary presenter for Metropolitan at the mediation. Shortly before the mediation, staff discovered film clips that demonstrated WAR's disorganization and poor means and methods on a portion of the construction that was completed several months late. At staff's request, CMS prepared a video for the mediation demonstrating the poor means and methods with audio by the inspector tied to the time elapsed to complete the work. This was shown at the mediation and was very effective. When CMS prepared their invoice after the August mediation, it was discovered that they had exceeded their contract maximum by \$8,800. CMS is a small company. It performed excellent work in a short time in response to Metropolitan's requests. Staff requests that the Board authorize an increase in their contract maximum by \$8,800 to fully compensate them for the work completed in preparation for the mediation.

Policy

Metropolitan Water District Administrative Code Section 6431: Authority to obtain expert assistance

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities (Section 15378(b)(2) of the State CEQA Guidelines). In addition, the proposed action is not subject to CEQA because it involves other government fiscal activities, which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Section 15378(b)(4) of the State CEQA Guidelines).

The CEQA determination is: Determine the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15378(b)(4) of the State CEQA Guidelines.

Board Options

Option #1

Adopt the CEQA determination and authorize an increase of \$8,800 in the maximum amount payable in the contract with Construction Management Services to an amount not to exceed \$238,800.

Fiscal Impact: \$8,800

Business Analysis: Fully compensates claims consultant for work requested by staff

Option #2

Do not authorize additional funds for the contract with Construction Management Services.

Fiscal Impact: No obligation to pay \$8,800

Business Analysis: The firm that was instrumental in developing evidence for mediation of the litigation would not receive full payment.

Staff Recommendation

Option #1


 Karen L. Tachiki
 General Counsel

9/29/2010

Date