

THIS PRINT COVERS CALENDAR ITEM NO.: 13

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Central Subway Project

BRIEF DESCRIPTION:

Approving Modification No. 135 to Contract No. 1300, Third Street Light Rail Program Phase 2 - Central Subway Stations, Surface, Track and Systems with Tutor Perini Corporation, to resolve claims from subcontractor Hayward Baker/Bencor for costs of Additional Work for slurry wall construction and compensation grouting at the Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station in the amount of \$13,000,000, for a modified contract amount of \$989,721,753.32.

SUMMARY:

- The SFMTA awarded Contract 1300 to Tutor Perini Corporation (Tutor) in April 2013 to construct the Central Subway Stations, Surface, Track and Systems. Subcontractor Hayward Baker/Bencor (HBB), formerly known as Layne Christensen, a subcontractor to Tutor, performed slurry wall construction and compensation grouting at the Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station.
- HBB submitted 16 certified claims that it valued at \$20,891,371 arising from delays and additional work HBB was required to perform related to differing site conditions and related design changes.
- The SFMTA engaged Edgar Lopez, former City Architect for S.F. Public Works, as a consultant to negotiate the Claims. The SFMTA also independently estimated the fair and reasonable costs of the additional work, which informed the SFMTA's negotiations.
- The negotiated total value of this Contract Modification is \$13,000,000, of which \$9,950,000 will compensate HBB for the Claims, and \$3,050,000 will compensate Tutor's support of that Additional Work and financing costs.

ENCLOSURES:

1. SFMTA Board Resolution
2. Contract 1300 Modification No. 135
3. <https://www.sfmta.com/about-sfmta/reports/central-subway-final-seisseir> (Central Subway Final SEIS/SEIR and Mitigation Monitoring and Reporting Program)

APPROVALS:

DIRECTOR Jeffrey Tumlin

SECRETARY Caroline Celaya

DATE

December 29, 2020

December 29, 2020

ASSIGNED SFMTAB CALENDAR DATE: January 5, 2021

PURPOSE

Approving Modification No. 135 to Contract No. 1300, Third Street Light Rail Program Phase 2 - Central Subway Stations, Surface, Track and Systems with Tutor Perini Corporation, to resolve claims from subcontractor Hayward Baker/Bencor for costs of Additional Work for slurry wall construction and compensation grouting at the Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station in the amount of \$13,000,000, for a modified contract amount of \$989,721,753.32

STRATEGIC GOALS AND TRANSIT FIRST POLICY PRINCIPLES

Approval of the proposed resolution will support the following SFMTA Strategic Plan Goals:

Goal 4: Create a workplace that delivers outstanding service.

Objective 4.5: Increase the efficiency and effectiveness of business processes and project delivery through the implementation of best practices.

This action supports the following SFMTA Transit First Policy Principles:

2. Public transit, including taxis and vanpools, is an economically and environmentally sound alternative to transportation by individual automobiles. Within San Francisco, travel by public transit, by bicycle and on foot must be an attractive alternative to travel by private automobile and public transit.
8. New transportation investment should be allocated to meet the demand for public transit generated by new public and private commercial and residential developments.

DESCRIPTION

The SFMTA awarded Contract 1300 to Tutor Perini Corporation (Tutor) in April 2013, to construct the Central Subway Stations, Surface, Track and Systems. Hayward Baker/Bencor (HBB) (formerly known as Layne Christensen), a subcontractor to Tutor, performed slurry wall construction and compensation grouting at Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station.

HBB submitted 16 certified claims that it valued at \$20,891,371 for labor costs, delays, equipment (both rented and owned), freight, materials, subcontractors, field office, lost efficiency factor, and home office overhead arising from delays and additional work HBB performed due to differing site conditions and related design changes.

HBB and Tutor claimed the differing site conditions caused them to incur significant direct costs and indirect costs from cumulative delays and related inefficiencies. These unplanned events added delays to the schedule, slower production, and damage to equipment due to the nature of the differing site conditions.

Tutor presented HBB's claim as a certified pass-through contractor claim, which the SFMTA initially denied October 1, 2018. The project's Dispute Resolution Board (DRB) concluded that

claims 52, 53, 55, 56 and 57, involving differing site conditions at Chinatown Station, all had merit. Project staff and consultants conferred and determined that the logic the DRB applied to the claims it reviewed would also merit the other HBB claims. The SFMTA, Tutor and HBB subsequently negotiated the disputed costs, arriving at a reduced settlement amount.

To negotiate the claims, the SFMTA engaged Edgar Lopez, a licensed architect with over 30 years of professional experience in the design and construction of public works projects, to review and negotiate HBB's claims. Dan Kass, P.E., a consultant to the SFMTA and expert in construction claims and cost estimating, also reviewed HBB's claims and supporting documents. The City Attorney hired Gene Lash, a forensic accountant and expert in construction cost analysis, to review HBB and Tutor's bid documents and cost records, and project accounting records to confirm claimed expenditures and costs. Mr. Lash conducted forensic "spot" audits of HBB's transactions and cost claims, with attention to estimated labor hours to actual labor hours supported by daily reports and certified payroll. These reviews revealed the following cost issues, which reduced HBB's claims and resulted in the negotiated proposed contract modification to resolve the claims:

- a. Labor Adjustments
HBB included both overstated labor hours and overstated labor rates based on review of the certified payroll records. According to certified payroll records, the average claimed labor rate of \$65.45 was overstated by 5.1% as its actual labor rate was \$62.29.
- b. Equipment Adjustments
HBB's claims inappropriately priced its equipment at operating rates and claim excessive standby costs during periods of claimed day. In addition, HBB's calculation of equipment rates for specialized equipment included unsubstantiated costs and understated estimates of yearly working hours. HBB represented its equipment costs at \$7,734,194. After adjusting their equipment costs due to overstated rates, the cost of equipment was negotiated down to \$6,138,729.
- c. Subcontractor Adjustments
HBB's claims included costs from a European based hydro mill operator. HBB incorrectly applied a foreign exchange calculation resulting in a \$2,872 understated amount in their claims.
- d. Field Office Adjustments
HBB's claims included a field office cost based on inconsistent methods and unsubstantiated costs of \$3,294,138. Based on review of actual costs, the field office cost was successfully negotiated down to \$567,544.
- e. Labor Efficiency Factor
HBB's claims included \$31,686 for lost efficiency. This amount was unsubstantiated and, as a result, it was denied.
- f. Home Office Overhead Adjustments
HBB's claims included an unsubstantiated 28% mark up for Home Office Overhead totaling \$3,853,253. This amount was denied during the negotiations.
- g. Markup Adjustments
As a result of denying certain costs and reducing others through the negotiations, HBB's markups were lowered from \$2,723,917 to \$1,301,298 and subsequently revised to \$1,221,947.

The negotiated total value of this Contract Modification is \$13,000,000, of which \$9,950,000 will compensate HBB for the claims, and \$3,050,000 will compensate Tutor’s support of that Additional Work and financing costs.

As set out in the following table and discussed in detail below, the negotiated settlement amount totaled \$13,000,000.

Certified claim #	Location	Amount Claimed	Negotiated Amount
Direct Costs:			
47, 58, 59, 74, 94, 96, 117 and 143	YBM	\$ 3,199,034	\$ 2,093,189
52, 53, 55, 56, 57 and 81	CTS	\$ 1,726,078	\$ 1,099,509
89 and 111	UMS	\$ 6,094,951	\$ 4,964,361
		\$ 11,020,063	\$ 8,157,059
Indirect Costs:			
Field Office		\$ 3,294,138	\$ 570,994
Home Office 28%		\$ 3,853,253	\$ 0
Mark-up 15%		\$ 2,723,917	\$ 1,221,947
	HBB Total	\$ 20,891,371	\$ 9,950,000
Contractor’s Support Cost		\$ 2,531,467	\$ 1,846,143
Contractor’s Mark-up		\$ 2,336,047	\$ 1,203,857
	Tutor Total	\$ 4,867,514	\$ 3,050,000
Total Costs:			
	Total (HBB and Tutor)	\$ 25,758,885	\$ 13,000,000

The Contract Modification describes the payment items for each of the stations: Yerba Buena Moscone Station (YBM), Chinatown Station (CTS), and Union Square Market Street Station (UMS). The negotiated costs listed in the table above consist of Direct and Indirect costs. For clarity, the indirect costs in the table above have not been divided by station. The detailed costs records for each station are on file at the Project office, which are summarized in the following table, with the total final settlement of \$13,000,000.

Total	YBM	CTS	UMS
\$ 2,093,189.00	\$2,093,189.00		
\$ 1,099,509.00		\$1,099,509.00	
\$ 4,964,361.00			\$ 4,964,361.00

\$ 8,157,059.00	\$2,093,189.00	\$1,099,509.00	\$ 4,964,361.00
\$ 570,994.00	\$ 146,523.00	\$ 76,966.00	\$ 347,505.00
\$ -	\$ -	\$ -	\$ -
	\$2,239,712.00	\$1,176,475.00	\$ 5,311,866.00
\$ 1,221,947.00	\$ 313,565.00	\$ 164,709.00	\$ 743,673.00
\$ 9,950,000.00	\$2,553,277.00	\$1,341,184.00	\$ 6,055,539.00
\$ 1,846,143.00	\$ 473,740.00	\$ 248,846.00	\$ 1,123,557.00
\$ 1,203,857.00			
	\$ 127,664.00	\$ 67,059.00	\$ 302,777.00
	\$ 59,421.00	\$ 31,213.00	\$ 140,928.00
	\$3,214,102.00	\$1,688,302.00	\$ 7,622,801.00
	\$ 88,645.00	\$ 46,563.00	\$ 210,237.00
	\$ 33,193.00	\$ 17,435.00	\$ 78,722.00
\$ 3,050,000.00	\$ 782,663.00	\$ 411,116.00	\$ 1,856,221.00
\$13,000,000.00	\$3,335,940.00	\$1,752,300.00	\$ 7,911,760.00

SUPPORTING DOCUMENTATION

Mr. Lopez, Mr. Lash and Mr. Kass reviewed Tutor and HBB documents, including certified claims, SFMTA correspondence directed to the Contractor, Contractor Job Cost Reports, Direct Labor Rates, Direct Labor Hours, HBB’s, certified payroll records, relevant sections of Contract 1300 (focused on compensable claims requirements stated in General Provisions including sections 6.04 C, and 6.04.B).

STAKEHOLDER ENGAGEMENT

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The proposed actions will facilitate the timely completion of the Project, which will benefit stakeholders. During HBB's performance of slurry wall construction and compensation grouting at Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station, extensive outreach and stakeholder communications were conducted. These outreach activities will continue until the completion of the project.

ALTERNATIVES CONSIDERED

The Board could direct staff to re-negotiate these items. If renegotiation fails, then mediation could be attempted and if that fails, then litigation would be the final option.

ENVIRONMENTAL REVIEW

The Central Subway Final Supplemental Environmental Impact Statement / Supplemental Environmental Impact Report (Central Subway SEIS/SEIR) evaluated the environmental impacts of the Central Subway project, including construction of the subway stations. On August 7, 2008, the San Francisco Planning Commission certified the Final SEIR (Case No. 1996.281E). On August 19, 2008, the SFMTA Board of Directors approved Resolution 08-150 adopting Central Subway Project Alternative 3B as the Locally Preferred Alternative, the California Environmental Quality Act (CEQA) Findings, Statement of Overriding Considerations, and the Mitigation Monitoring and Reporting Plan.

Modification No. 135 to Contract No. 1300 as described herein falls within the scope of the Central Subway SEIS/SEIR.

The Central Subway SEIS/SEIR is on file with the SFMTA Board of Directors, may be found in the records of the Planning Department at <https://sfplanning.org/> and 49 South Van Ness Avenue, Suite 1400 in San Francisco, and is incorporated herein by reference.

FUNDING IMPACT

The source of funds to pay for this contract modification will come from SFMTA capital reserve funds.

OTHER APPROVALS RECEIVED OR STILL REQUIRED

No other approvals are required.

The City Attorney's Office has reviewed this calendar item.

RECOMMENDATION

Staff recommends that the SFMTA Board of Directors approve Modification No. 135 to Contract No. 1300, Third Street Light Rail Program Phase 2 - Central Subway Stations, Surface, Track

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and Systems with Tutor Perini Corporation, to resolve claims from subcontractor Hayward Baker/Bencor for costs of Additional Work for the slurry wall construction and compensation grouting at the Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station in the amount of \$13,000,000, for a modified contract amount of \$989,721,753.32.

SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY
BOARD OF DIRECTORS

RESOLUTION NO. _____

WHEREAS, The SFMTA contracted with Tutor Perini Corporation (Tutor) to construct the Central Subway Stations, Surface, Track and Systems under Contract No. 1300. Hayward Baker/Bencor (HBB), formerly known as Layne Christensen is a subcontractor to Tutor that performed slurry wall construction and compensation grouting at Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station; and,

WHEREAS, HBB submitted 16 certified claims that it valued at \$20,891,371 for labor costs, delays, equipment (both rented and owned), freight, materials, subcontractors, field office, lost efficiency factor, and home office overhead arising from delays and additional work HBB performed due to differing site conditions and related design changes; and,

WHEREAS, The City Attorney engaged a forensic accountant to audit Contractor's and HBB's records to confirm claimed costs and expenditures, and the SFMTA engaged Edgar Lopez, former City Architect for S.F. Public Works, as a consultant to negotiate the Claims, and the SFMTA also independently estimated the fair and reasonable costs of the additional work and effort, which informed the SFMTA's negotiations; and,

WHEREAS, The negotiated total value of this Contract Modification is \$13,000,000, of which \$9,950,000 will compensate HBB for the Claims, and \$3,050,000 will compensate Tutor's support of that Additional Work and financing costs; and,

WHEREAS, The Central Subway Final Supplemental Environmental Impact Statement/Supplemental Environmental Impact Report (Central Subway SEIS/SEIR) evaluated the environmental impacts of the Central Subway Project, including construction of the subway stations; on August 7, 2008, the San Francisco Planning Commission certified the Final SEIR (Case No. 1996.281E); on August 19, 2008, the SFMTA Board of Directors approved Resolution 08-150 adopting Central Subway Project Alternative 3B as the Locally Preferred Alternative, the California Environmental Quality Act (CEQA) Findings, Statement of Overriding Considerations, and the Mitigation Monitoring and Reporting Plan; and,

WHEREAS, Modification No. 135 to Contract 1300 described herein comes within the scope of the Central Subway SEIS/SEIR; and,

WHEREAS, The Central Subway SEIS/SEIR is on file with the SFMTA Board of Directors and may be found in the records of the Planning Department at <https://sfplanning.org/> and 49 South Van Ness Avenue, Suite 1400 in San Francisco, and is incorporated herein by reference; now therefore, be it

RESOLVED, That the SFMTA Board has reviewed and considered the Central Subway Supplemental Environmental Impact Statement/Supplemental Environmental Impact Report (SEIS/SEIR) and record as a whole, and finds that the Central Subway SEIS/SEIR is adequate for the Board's use as the decision-making body for the actions taken herein relative to construction of the Project, and incorporates the California Environmental Quality Act findings by this reference as though set forth in this Resolution; and be it further

RESOLVED, That the SFMTA Board of Directors approves Contract Modification No. 135 to Contract No. 1300, Third Street Light Rail Program Phase 2 - Central Subway Stations, Surface, Track and Systems with Tutor Perini Corporation, to resolve claims from subcontractor Hayward Baker/Bencor for costs of additional work for the slurry wall construction and compensation grouting at the Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station in the amount of \$13,000,000, for a modified contract amount of \$989,721,753.32.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting of January 5, 2021.

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency

BILATERAL CONTRACT MODIFICATION NO. 135

SFMTA Contract No. 1300 Stations, Surface, Track & Systems

Contractor: Tutor Perini Corporation
530 Bush Street, Suite 302
San Francisco, CA 94108

Contract Modification No. 135 – UMS: Slurry wall construction and compensation grouting at the Chinatown Station, compensation and jet grouting at Union Square Market Street Station, and slurry wall construction at Yerba Buena Moscone Station

This Bilateral Contract Modification No. 135 (“Modification”), resolves Contractor’s Certified Contract Claims Nos. 47, 52, 53, 55, 56, 57, 58, 59, 74, 81, 89, 94, 96, 111, 117 and 143 for labor costs, delays, equipment (both rented and owned), freight, materials, subcontractors, field office, lost efficiency factor, and home office overhead arising from delays to the Work and Additional Work that Hayward Baker/Bencor (HBB) (formerly Layne Christensen) performed due to differing site conditions and related design changes. HBB and Tutor Perini Corporation (Tutor or Contractor) claimed the differing site conditions caused it and HBB to incur significant direct costs and indirect costs from cumulative delays and related inefficiencies, which delayed and caused inefficiencies to the Work and damaged equipment.

The Contract is hereby modified as follows:

1. Compensation: The following new Contract Pay Item are added to compensate for the Claims:

Pay Item	Description	Agreed Amount
CM 135-01	YBM – Subcontractor’s CCC 47, 58, 59, 74, 94, 96, 117 and 143 with markups, and Contractor’s Direct and Support Costs with markups	\$ 3,335,940.00
CM 135-02	CTS – Subcontractor’s CCC 52, 53, 55, 56, 57 and 81 with markups, and Contractor’s Direct and Support Costs with markups	\$ 1,752,300.00
CM 135-03	UMS – Subcontractor’s CCC 89 and 111 with markups, and Contractor’s Direct and Support Costs with markups	\$ 7,911,760.00

Total Net Amount of this Contract Modification Increase: \$ 13,000,000.00

Previous Contract Amount \$ 976,721,753.32

New Revised Contract Amount: \$ 989,721,753.32

2. Excluded Claims: This Modification does not resolve Contractor’s claims for additional compensation for Contractor extended direct costs of support, which are comprised of costs for Traffic Control, Survey, Quality Control, Stormwater Treatment Plan, Vibration, Dust, Noise and Settlement Monitoring, General Maintenance; Toilets, Traffic Plans and Engineering, Permits. The SFMTA and Contractor each reserves all rights and defenses regarding the Excluded Claims.
3. Claims Release: Except as specifically stated herein, the compensation (time and cost) set forth in this Contract Modification comprises the total compensation due to Contractor and HBB, and its subcontractors’ and suppliers, as a result of the events giving rise to the Contract Modification and for

the Claims and Additional Work described herein, including any impact on unchanged Work. The execution of this Contract Modification constitutes an accord and satisfaction of any claim for additional compensation or time for the Additional Work and Claims described in this Contract Modification, and Contractor on behalf of itself, and all Subcontractors and Suppliers, specifically waives and releases any and all claims rights or interest, including but not limited to legal and equitable claims for direct, indirect, and overhead costs, delay, impact, interest, disruption, loss of efficiency or other extraordinary or consequential costs arising from or related to the Work described in this Contract Modification 135, the Claims, and in Contractor's Certified Claims Nos. 47, 52, 53, 55, 56, 57, 58, 59, 74, 81, 89, 94, 96, 111, 117, and 143, with exception and reservation of the Excluded Claims described in the preceding section of this Modification.

4. Except as specifically stated herein, all other terms and conditions of the Contract remain unchanged. Any modification of the Contract must be expressed and in conformance with the General Provisions and Special Provisions.

Signatures on next page.

In Witness Whereof, this Modification has been executed in San Francisco, California as of this day

TUTOR PERINI CORPORATION

CITY AND COUNTY OF SAN FRANCISCO

Accepted

Recommended

By:

By:

Patrick Jennings
Project Manager
Tutor Perini Corporation

Nadeem S. Tahir, P.E.
Deputy Director 1
Program Director, Central Subway Project
San Francisco Municipal Transportation Agency

Approved

By:

Jeffrey Tumlin
Director of Transportation
San Francisco Municipal Transportation Agency

Authorized By:

Municipal Transportation Agency Board of Directors

Resolution No: _____

Adopted: _____

Attest: _____

Secretary, SFMTA Board of Directors

APPROVED AS TO FORM:

Dennis J. Herrera
City Attorney

By:

Robert K. Stone
Deputy City Attorney