

BEFORE THE METRO CONTRACT REVIEW BOARD

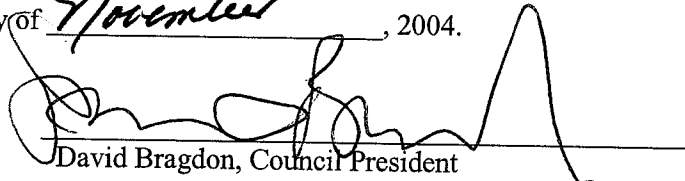
FOR THE PURPOSE OF AUTHORIZING) RESOLUTION NO. 04-3507
EXECUTION OF CHANGE ORDER NO. 30 TO)
CONTRACT NO. 900848 FOR WASTE)
TRANSPORT SERVICES FOR PROVISION OF A) Introduced by Michael Jordan, with the
\$2.5 MILLION DOLLAR PERFORMANCE BOND) concurrence of David Bragdon, Council
President

WHEREAS, the Waste Transport Service Contractor has requested substitution of a single performance bond in the amount of \$2.5 million for the current requirement of a \$1.3 million irrevocable letter of credit and a \$1.2 million corporate guarantee (or other security instrument as described in Change Order No. 25 to the Contract); and,

WHEREAS, as described in the accompanying staff report, such a substitution provides Metro with at least the same amount of performance protection as the current security requirements; now therefore,

BE IT RESOLVED that the Metro Council, sitting as the Metro Contract Review Board, authorizes the Chief Operating Officer to execute Change Order No. 30 to the Waste Transport Service contract, Contract No. 900848, in a form substantially similar to that set forth as the attached Exhibit "A."

ADOPTED by the Metro Council this 18th day of November, 2004.


David Bragdon, Council President

Approved as to Form:


Daniel B. Cooper, Metro Attorney



EXHIBIT "A"
Resolution No. 04-3507

CHANGE ORDER NO. 30
METRO CONTRACT NO. 900848

MODIFICATION TO THE CONTRACT BETWEEN
METRO AND CSU TRANSPORT, INC.
ENTITLED "WASTE TRANSPORT SERVICES"

This Change Order No. 30, dated as of the last signature date below (the "Effective Date of Change Order No. 30"), hereby amends Metro Contract No. 900848, entitled "Waste Transport Services," dated March 27, 1989, including all prior amendments (which contract and amendments are collectively referred to as the "Waste Transport Services Agreement").

In exchange for the promises and other considerations set forth in the Waste Transport Services Agreement and in this Change Order No. 30, the parties hereby agree as follows:

A. Purpose

The purpose of Change Order No. 30 is to modify the security for release of retainage provisions now found in Paragraph B.8.i. of Change Order No. 24 to the Waste Transport Services Agreement.

B. Provisions of Change Order No. 30

1. In lieu of the Irrevocable Letter of Credit for which provision is made in Paragraph B.8.i. of Change Order No. 24 to the Waste Transport Services Agreement, Contractor may provide a performance bond or other similar instrument of security in a form acceptable to Metro in the amount of \$1.3 million. Such bond or instrument may be combined with and added to any similar bond or instrument required under this Agreement.
2. Contractor agrees that the replacement or renewal of any security instrument required under this Agreement shall be effective at least 30 days before the expiration of any such replaced or renewed security instrument. Failure by Contractor to execute and deliver to Metro such replaced or renewed security instrument at least thirty (30) days before the expiration of any current security instrument shall constitute a default under this Agreement. To remedy such default, Metro shall have the right to retain one hundred percent (100%) of any and all payments due Contractor under this Agreement until the total amount of retainage is equal to \$2,500,000.00 or until the default is cured. This remedy shall be in addition to any other remedies for default to which Metro is entitled.

C. No Other Modifications

Except as modified herein, all other terms and conditions of the Waste Transport Services Agreement shall remain in full force and effect. Any conflict between the provisions of this Change Order No. 30, on the one hand, and the original Waste Transport Services Agreement, including other previous amendments and change orders, on the other hand, shall be resolved by reference to and reliance upon this Change Order No. 30.

CSU TRANSPORT, INC.

METRO

Signature

Gary I. Goldberg, President

Signature

Michael Jordan, Chief Operating Officer

Date

Date

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 04-3507, FOR THE PURPOSE OF AUTHORIZING EXECUTION OF CHANGE ORDER NO. 30 TO THE CONTRACT FOR WASTE TRANSPORT SERVICES FOR PROVISION OF A \$2.5 MILLION DOLLAR PERFORMANCE BOND

Date: October 21, 2004

Prepared by: Chuck Geyer

BACKGROUND

In March 1989, Metro entered into Contract No. 900848 for the provision of Waste Transport Services until December 2009. The original contract required the provision of performance and labor and materials bonds in the amount of \$2.5 million. In addition, Metro retained 5% of each monthly payment until a retainage fund of \$2.5 million was established. The bonds and retainage fund constituted the security instruments to protect Metro against defaults in the performance of the contract.

In May 1999, the Metro Council approved Change Order No. 24 that released retainage to the Contractor and allowed the substitution of a letter of credit (LOC) in the amount of \$4.1 million that decreased annually to a base amount of \$1.3 million. The intent of the change order was to assist the Contractor in maintaining its financial viability while providing a reduction in rates charged to Metro.

In January 2001, the Metro Council approved Change Order No. 25 that required the provision of a security instrument acceptable to Metro in the amount of \$1.2 million (the Contractor chose to provide a corporate guarantee from its corporate parent) in exchange for allowing a change in ownership. The \$1.2 million corporate guarantee was in addition to the \$1.3 LOC. These security instruments were continued under Change Order No. 26 in which Metro consented to the change of ownership to the current Waste Transport Contractor - CSU, Inc.

CSU has requested that it be permitted to substitute a performance bond in the amount of \$2.5 million for the existing security instruments. The substitution has two primary benefits to CSU. By eliminating the letter of credit, CSU can increase its line of credit with its financial institution by a corresponding amount. Since provision of a corporate guarantee to Metro must be listed as a liability, substituting a bond for the guarantee significantly improves the financial reports of CSU and its corporate parent.

Description of Security Instruments

The following description of security instruments is provided to assist in assessing whether Metro should grant the substitution.

Corporate Guarantee

A corporate guarantee is a pledge by the contractor (or in the case of this contract, CSU's corporate parent that has more resources than CSU) to assure the unconditional performance of the contract. Such a security instrument unconditionally guarantees payment of all actual damages by the contractor that occur as a result of any default by the contractor that results in any loss to the owner (in this case Metro, up to a limit of \$1.2 million).

The current contract with the Waste Transport Contractor contains similar language under its general default language. The value of the additional corporate guarantee is to strengthen this right, and to link it explicitly to the corporate parent.

It is expected that Metro would still need to pursue the payment of such damages through legal actions or negotiations with or without the corporate guarantee.

Letter of Credit (LOC)

An irrevocable letter of credit is a security instrument provided by a financial institution (in the case of CSU - Mellon Bank). The financial institution agrees to pay up to the amount of the LOC if the owner (Metro) submits a request for payment testifying that the contractor is in breach. Such requests must be in conformance with the language of the LOC, including a statement that all other remedies have been exhausted prior to submitting a claim. The amounts requested are to reflect Metro's actual damages from the contract breach. In the event of contract breaches that result in termination, the full amount of the LOC would be due.

In theory the LOC is straightforward. Metro would submit its claim for payment based on actual damages and the financial institution would make payment. In practice, disputes over the extent of the breach, the value of such damages and whether all other remedies have been exhausted are likely to complicate the collection of such payments.

Performance Bond

A performance bond is akin to the contractor taking out an insurance policy for the faithful performance of the contract. Under a performance bond, the company providing the bond and the contractor sign a pledge to promptly remedy any default of the contract, up to the face amount of the bond.

The bond company must hire the personnel, equipment, etc. to cure such defaults unlike a LOC that anticipates directly paying Metro damages. In practice, Metro could be paid by the bond company to cure the default.

ANALYSIS/INFORMATION

1. Known Opposition

None.

2. Legal Antecedents

Metro Code section 2.04.058 (b), Public Contract Amendments, requires approval of this change order by the Metro Council.

3. Anticipated Effects

The change order would substitute a performance bond in an amount of the existing corporate guarantee plus the existing LOC. In addition the change order requires that the performance bond be renewed at least thirty (30) days prior to expiration. If the bond is not renewed, Metro may withhold payments until the instrument is renewed or Metro has retained the value of the instrument - \$2.5 million. It is anticipated that the substitution reduces Metro's risk of defaults related to the performance of the contract.

This is because a third party would be financially liable for ensuring performance of the contract and Metro has a financial remedy in the event of non-renewal.

This is not the case under either the corporate guarantee or LOC. While the LOC would provide Metro with funds to cover its increased costs for nonperformance (up to the limit of the LOC), Metro would have to take actions such as hiring a replacement contractor to ensure performance. The LOC was probably a more appropriate security interest when Change Order 24 was executed, since that created significant financial risk. Now that the risk is related to performance and operations, a performance bond can provide adequate security.

As pointed out above, while the corporate guarantee provides Metro with explicit rights to recover actual damages from the corporate entity providing the guarantee, litigation would probably still be necessary. The performance bond theoretically ensures performance before such damages are incurred.

4. Budget Impacts

None.

RECOMMENDED ACTION

The Chief Operating Officer has no objection to the approval of Resolution No. 04-3507.