



DATE: March 6, 2023

TO: Mayor and Members of the City Council

VIA: Stefan Chatwin, City Manager

FROM: Marlene Subhashini, Assistant City Manager  
Francine Magno, Senior Civil Engineer  
Paul Nagengast, Project Advisor, Regional Government Services

DEPARTMENT: Public Works

SUBJECT: APPROVING CONTRACT CHANGE ORDER NO. THIRTY-ONE (CCO #31) TO SHIMMICK CONSTRUCTION CO. INC., IN THE AMOUNT OF \$3,193,635.92; APPROVING AN ADDITIONAL \$300,000 TO CONSTRUCTION CONTINGENCIES; AND AUTHORIZING A BUDGET APPROPRIATION IN THE AMOUNT OF \$15 MILLION FOR THE LEVEE PROTECTION PLANNING AND IMPROVEMENTS PROJECT (CIP 327-657)

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### RECOMMENDATION

It is recommended that the City Council adopt the attached resolution authorizing:

1. The Mayor to execute Contract Change Order No. Thirty-one (CCO #31) to Shimmick Construction Co. Inc., (SCCI) in the amount of \$3,193,635.92 to achieve early interim milestones (phased trail openings) and the settlement of costs associated with pending change orders and claims due to inefficiencies for the Levee Protection Planning and Improvements Project (CIP 327-657) (Project); and
2. Adding \$300,000 to the construction contingency amount for the remaining work on the Project; and
3. A budget appropriation in the amount of \$15 million which includes the remaining \$5 million Measure P General Obligation (GO) Bonds and \$10 million in previously identified City CIP Fund 301 reserves funds to be included in the

budget for the Levee Protection Planning and Improvements Project (CIP 327-657).

## EXECUTIVE SUMMARY

SCCI, the Contractor for the Levee Improvements Project (Project), approached the City to disclose that altering their scheduling and path of execution to accommodate impacts caused by external factors affected their work productivity and their ability to complete the work in the manner anticipated and with resources assumed at contract bid in 2020. Considering the City's interest to not cause any delays in the trail openings, SCCI also brought forth an option to introduce early interim milestones to the current construction contract schedule. As a result, and after further discussion with the project team, a settlement package was proposed to facilitate a successful project closeout.

SCCI's proposal included the following components:

1. Settlement for costs associated with disputed inefficiency claims/impacts to date in the amount of \$1,109,375.54;
2. Costs associated with additional labor and resources needed to minimize potential delays to trail openings and accomplish early interim milestones (phased trail openings) than required by the project contract bid documents in the amount of \$1,182,668.12; and
3. All known pending change order requests as of February 1, 2023, in the amount of \$901,592.26.

The total costs for these three components as outlined above is \$3,193,635.92 and referred to as CCO #31.

Given that there is still approximately 15% of Project that remains to be completed, additional construction contingency monies are necessary to address any unknown/unanticipated issues arising out of the remaining items of work to be completed. Staff is recommending that an additional contingency amount of \$300,000 be added to the remaining \$219,364.71 construction contingency monies.

On June 5, 2018 Foster City voters passed a ballot measure (Measure P), authorizing the City to issue GO bonds in the amount of \$90 million to fund improvements to the City's levee system. On July 6, 2020, the City Council authorized the issuance of bonds in the principal amount not to exceed \$90 million to fund the levee project. The City issued \$85 million out of the \$90 million bond funds into the Levee Project (CIP 327-657). Additional funding beyond the \$85 million initial Project outlay of GO bond funds is necessary to cover the costs associated with CCO #31 and the additional construction contingency and therefore, staff is requesting a FY 2022-2023 appropriation of funds in order to continue to process contract amendments, contract change orders, and payments for the project, including CCO #31. The appropriation of remaining \$5 million in Measure P monies and \$10 million in City CIP Fund 301 reserves will provide the necessary funding to pay for the projected project expenses.

## BACKGROUND/ANALYSIS

### **Settlement of Claims due to Inefficiencies**

On October 11, 2022, SCCI met with the levee project team to discuss overall Project status. The items discussed included remaining key activities to take place, current areas of challenges, contractor claims related to inefficiencies, potential project schedule delays, close out discussions, and potential early interim milestone options.

At the meeting, it was discussed how altering SCCI's planned construction schedule of activities and execution plan to avoid potential delays in the work (further discussed below) resulted in alleged inefficiencies that could be compensated as a CCO. In addition, further discussions identified the ability to modify the Contract to include three (3) new early interim milestones that would allow for phased openings of the trail (that would be deemed safe for public use) earlier than contemplated in the original Contract and avoid potential delays. Accordingly, the project team requested SCCI to provide a proposal (Proposal) discussing the basis for and estimated cost of inefficiencies experienced by SCCI, as well as avoiding future delays and achieving potential new phased-opening interim milestones.

The Proposal submitted by SCCI indicated impacts to SCCI (inefficiencies) due to the need to mitigate Project delays by rescheduling work items at various locations different than their anticipated construction schedule and path of execution. These impacts to SCCI included thirty-five (35) Requests for Quotation (RFQs), twenty-one (21) design revisions, HOA irrigation changes, and the Caltrans access permit delay, that all allegedly disrupted SCCI's planned construction schedule and plan for execution of activities. SCCI assert that these disruptions required SCCI to alter its work approach from its original bid documents by bringing in additional resources to avoid delays and complete the Project, resulting in claimed cost impacts related to lost productivity due to performing the work out of sequence, in a piecemeal manner.

SCCI was arguably able to avoid potentially significant Project delays through rescheduling and changes in their execution of the work. SCCI submitted a "measured mile" analysis in their Proposal indicating both their methodology of analysis and estimated inefficiency cost impacts. The measured mile approach is an industry standard methodology to compare actual labor productivity achieved in an un-impacted portion of the Project against the productivity later achieved during the impacted and inefficient period (typically caused due to external factors). SCCI's analysis, was evaluated by the Project Construction Manager, Tanner Pacific Inc. (TPI) and an independent construction claims expert, Mark Resolve, Inc., for the City Attorney's Office. That review shows that SCCI prosecuted the work of the Project in ways to work around these impacts and delays and maintain the Project schedule, but that those efforts to work around these Project impediments arguably lowered SCCI's labor productivity, thus increasing SCCI's labor and other costs.

SCCI originally submitted a cost of \$1,523,531.85 for their total inefficiency claim. The

costs asserted by SCCI were within a reasonable expected range of costs for inefficiencies of the type asserted by SCCI in its Proposal. Although disputed, in an effort to compromise and waive its claims for past inefficiencies now, instead of waiting until the end of the Project, SCCI has proposed in negotiations with TPI that it will reduce its overall quantified inefficiency claim by \$510,802.00 and settle for \$1,109,375.54 in inefficiency impacts and waive and release its asserted claims.

### **Early Interim Milestones**

SCCI has indicated, together with restrictions to working in the bird nesting areas and weather, the inefficiencies experienced by SCCI has had a direct effect on the ability to complete Project milestones (Completion of Flood Protection Elements, Substantial Completion affecting phased trail openings and Final Completion) as specified by the number of calendar days to achieve milestones in the Contract documents. In order to minimize the potential for these milestones to be completed at a later date, including phased portions of the trail opening later, SCCI has proposed new early interim milestone dates (with new phased trail openings) to be completed sooner with additional effort by SCCI.

SCCI has submitted a cost of \$1,182,668.12 to account for the additional resources necessary to meet early interim milestones to avoid potential delays to Project milestones. TPI and Mark Resolve, Inc. have evaluated the Project schedule and costs to mitigate potential delays and achieve earlier phased trail openings. They have found the negotiated cost of \$1,182,668.12 to be reasonable and revised schedule to be achievable. The Project team anticipates other potential cost savings that could result from the proposed earlier phase completion.

In order to provide some guarantees to the City for SCCI to meet the early interim milestone dates outlined in CCO #31, the \$1,182,668.12 is broken into several components with possible deductions made if SCCI does not meet early interim milestone dates. The schedule below indicates how SCCI receives the monies and the amount of deductions taken per day if the milestone date(s) are not met. The deductions would only apply for failure to meet the phased opening milestone dates caused solely by SCCI fault or negligence. If the date is not met due to reasons such as weather or the City including but not limited to additional changes of work, design changes, differing site conditions, RFQ's or any unforeseen circumstances, then the deductions shall not apply and SCCI would still be paid per percentages indicated for each phase. If implemented, these deductions would continue until the milestone date is met or the Substantial Completion Date of October 2, 2023, at which point Liquidated Damages in the amount of \$5,000/day per the original contract would commence.

As an incentive to meeting the early interim milestone dates, the Proposal includes release of portions of SCCI's earned retention monies being held by the City. Portions of the retention monies would be released for each milestone date met up to a total of 50% of the monies. If the milestone date is not met, no percentage of retention is released

early. Release of some retention, with the City withholding 50% of the retention until acceptance of the Project at Final Completion, does not present an unreasonable risk to the City.

The following schedule indicates the early interim milestone dates for phased opening of the trail. The phased opening of the trail would only occur if it is deemed safe for public access. Other minor work or 'punch list' items would be completed by SCCI leading up to final completion date. Upon acceptance of the landscaping elements for each phase, non-mitigated and mitigated plant maintenance periods commence to ensure successful establishments for the landscaping planted.

Upon execution of CCO #31, the payment of \$1,182,688.12 shall be broken into the following components:

- The City to provide SCCI guaranteed down payment in the amount of \$257,939.71 and will be incorporated into the following subsequent Progress Payment Request (PPR) by SCCI for payment.
- The remaining \$924,728.41 shall be paid based upon meeting the early interim milestone dates with safe opening of the trail to the public per the percentages and amounts indicated in each of the three (3) phases. Deductions shall be made in the amounts indicated for each phase if, solely due to SCCI, milestone dates are not met and continue until phased milestones have been met or October 2, 2023, Substantial Completion, whichever occurs first.
- Phase 1-Bird Nesting Restriction Area; Southern End to Shorebird Park (STA 343+00 to STA 202+20)
  - Interim Milestone Date: March 27, 2023
  - Forty Percent (40%) of \$924,728.41 which is \$369,891.37
  - Deduction Amount Beyond March 27, 2023: \$1,700/day
  - Twenty Percent (20%) of Retention Monies Released
  - Non-Mitigated Plant Maintenance Period (March 27-July 25, 2023)
  - Mitigated Plant Maintenance Period (March 27, 2023-March 27, 2024)
- Phase 2-Beach Park Boulevard; Shorebird Park to San Mateo Bridge (STA 202+20 to STA 100+00)
  - Interim Milestone Date: May 31, 2023
  - Thirty Percent (30%) of \$924,728.41 which is \$277,418.52
  - Deduction Amount Beyond May 31, 2023: \$1,500/day
  - Fifteen Percent (15%) of Retention Monies Released
  - Non-Mitigated Plant Maintenance Period (May 31, 2023-Sept 28, 2023)
  - Mitigated Plant Maintenance Period (May 31, 2023-May 30, 2024)
- Phase 3-North of San Mateo Bridge (STA 100+00 to STA 0+00)
  - Interim Milestone Date: July 31, 2023
  - Thirty Percent (30%) of \$924,728.41 or \$277,418.52

- Deduction Amount Beyond July 31, 2023: \$1,500/day
- Fifteen Percent (15%) of Retention Monies Released
- Non-Mitigated Plant Maintenance Period (July 31, 2023-Nov 27, 2023)
- Mitigated Plant Maintenance Period (July 31, 2023-July 29, 2024)

Currently, SCCI can assure that their subcontractors meet the milestone dates since SCCI contractually requires their subcontractors to commence/finish work according to SCCI schedule. It is in SCCI and their subcontractors' best interest to finish the work and have available their resources for the next job opportunity. If SCCI has completed the work prior to the Final Completion Date of January 10, 2024, SCCI will request the City to accept the work and file a Notice of Completion.

### **Settlement of Pending Contract Change Orders**

Initially there was an identified \$1.5 million in supported costs associated with non-formalized change orders and/or change order requests from SCCI that are not a part of, and separate from the inefficiency claim costs and costs associated with meeting early interim milestones that were included in the Proposal from SCCI. Requests for change orders from SCCI throughout the Project work period are reviewed by TPI to determine if compensable as extra work or not. TPI has reviewed documentation from SCCI's time and material work sheets or other materials and has determined that these items are compensable as extra work. The \$1.5 million in change orders and/or change order requests were negotiated by TPI. SCCI has agreed to settle in the amount of \$901,592.26 for these known pending extra work items through February 1, 2023.

### **Construction Contingency**

Of the original construction contingency amount of \$9 million, \$219,364.71 is remaining. Additional construction contingency monies are necessary to finish the Project on time and for potential change orders that could occur with the remaining known work to be completed. Unused contingency monies not expended are returned to the Project fund.

While it is challenging to predict unknown events and/or unforeseen costs for potential change orders, an estimated value can be determined by estimating potential known issues with remaining work similar compared to other portions of the Project that have included changes and additions in prior CCO's. For example, SCCI has been issued CCO's for unsuitable material or unknown buried object(s) when excavating for retaining walls throughout the Project, and unknown differing site conditions such as this remain a potential unknown extra cost.

Staff recommends an additional \$300,000 in contingency monies to be added to the \$219,364.71 in remaining construction contingency monies for the Project (as of February 1, 2023). The updated total contingency amount of \$519,364.71 would be available for any potential change orders for the final 15% of contract work listed below:

- Excavating for Retaining Walls in Phase III

- Grading
- Planting
- Signage and Striping
- Guardrails and Handrails
- Access Point (AP) 9 Bridge Conform
- AP 3 Ramp/Beach Access
- Requests from HOA or Recreational Water Users (RWU)
- Gateshead Park Restoration

## **Summary**

Together, the settlement of potential inefficiency claims (\$1,109,375.54), an early completion of interim milestones (phased trail openings) (\$1,182,668.12) and the additional agreed cost for change orders and change order requests as of February 1, 2023 (\$901,592.26), as CCO #31 is \$3,193,635.92. Staff recommends City Council approve CCO #31 in the amount of \$3,193,635.92 for the Levee Protection Planning and Improvements Project (CIP 327-657). Staff is also recommending that the City Council authorize an additional \$300,000 to be added to the construction contingency for the Project. City Council would approve any change order greater than \$250,000. The City Manager would still be authorized to approve any change orders up to \$250,000 and would provide to the City Council a detailed breakdown of change orders.

## California Environmental Quality Act

An Environmental Impact Report was prepared for the Levee Protection Planning and Improvements Project (State Clearinghouse No. 2016012012).

## FISCAL IMPACT

### **Contract Change Order No. 31**

With the execution of CCO #31, the total contract change orders costs to date are summarized below:

CCO Nos. 1-30	\$ 8,780,635.29
CCO No. 031	<u>\$ 3,193,635.92</u>
Total	\$11,974,271.21

### **Future Construction Contingency**

The current construction contingency is \$219,364.71. The additional requested \$300,000 will increase the total construction contingency for the project to \$519,364.71.

### **Budget Appropriation**

On May 21, 2018, the City Council established a construction contingency in the amount of \$10 million should the project costs overrun beyond the \$90 million bond measure that was under consideration at the time. The \$10 million comes from General Fund Reserves or any identified alternative sources of funding.

On June 5, 2018 Foster City voters passed a ballot measure (Measure P), authorizing the City to issue GO bonds in the amount of \$90 million to fund improvements to the City's levee system.

On July 6, 2020, the City Council, authorized the issuance of bonds in the principal amount not to exceed \$90 million to fund the entire project. The City issued \$85 million out of the \$90 million bond funds into the Levee Protection Planning and Improvements Project (CIP 327-657), with the understanding there remains \$5 million in GO bonds if needed.

Staff is requesting the City Council's approval of a \$15 million supplemental budget appropriation for the Levee Protection Planning and Improvements Project (CIP 327-657). The source of funding will consist of the issuance of the remaining \$5 million of GO Bonds that is to be repaid (principal and interest) from ad valorem property taxes. It will take approximately 3 months to complete the bond sale. The remaining source of funding is via the transfer of the previously identified \$10 million of City CIP Fund 301 reserves to Levee CIP Fund 327. Any non-GO Bond monies not expended for this Project will be returned to the originating funding source (City CIP Fund 301) and available for other City Projects.

The current project Estimate At Completion (EAC) is \$87,698,372.97. With the addition of the latest amendments and change orders, including the TPI Contract Amendment previously approved at the February 21, 2023 City Council meeting, the projected EAC is \$93,586,719.70 as shown below. The EAC assumes that all existing contracts will be paid in full. This includes the three main contracts for construction, design, and construction management, the minor contracts for other supporting services (outreach, surveying, right of way, etc.) and all miscellaneous costs associated with the levee project (permits, etc). It also assumes that all potential change orders that have been identified will be paid in full. This is a maximum estimate based on what is known to date.

This Budget Appropriation is requested due to the Project EAC being greater than the initial Project outlay of \$85 million. It is requested that the additional \$15 M in funding be approved by the City Council to account for any unforeseen items that could arise towards the end of the project, that have not been identified by the contractor, construction manager, or City, and are not currently being tracked as a potential change in the current EAC.

Estimate at Completion (To Date)_	\$87,698,372.97
TPI Contract Amendment #2 (Approved on 2/21/23)	\$ 2,394,710.81
CCO #31	\$ 3,193,635.92
<u>Additional Construction Contingency</u>	<u>\$ 300,000.00</u>
<b>Total Projected EAC</b>	<b>\$ 93,586,719.70</b>



### CITY COUNCIL VISION, MISSION, AND VALUE/PRIORITY AREA

The Levee Improvements Project is in alignment to the City Council's adopted Vision and Mission statements, in that it seeks to create a sustainable environment through infrastructure improvements for current and future generations to come. This item is also directly related to the "Facilities and Infrastructure" Value/Priority Area. The key outcome is to make substantial progress toward an improved levee on time and budget to protect the community and critical infrastructure from storms and high tide.

### ATTACHMENTS:

Attachment 1 - Resolution

Attachment 2 – Contract Change Order No. 031