

**SECOND AMENDMENT TO THE AGREEMENT**

**between**

**THE CITY OF LONG BEACH**

**and**

**POSILICO/BOVE JV**

**dated October \_\_\_, 2023**

The original agreement, dated January 25, 2023, (“Master Agreement”) made and entered into by and between the City of Long Beach, a municipal corporation with its principal offices located at One West Chester Street, Long Beach, New York 11561 (“CITY”) and Posilico/Bove JV, a New York State Corporation, with offices located at 1750 New Highway, Farmingdale, New York 11735 (“PBJV”), is hereby amended by and between the CITY and PBJV, pursuant to the explicit terms of this Amendment (“Second Amendment”).

**WHEREAS**, in September of 2019, the City of Long Beach (“CITY”) issued a Request for Bid Proposals, Specifications, Contract Forms and Documents for the City of Long Beach Critical Infrastructure Project;

**WHEREAS**, on or about October 17, 2019 PBJV submitted its proposal to the CITY;

**WHEREAS**, PBJV’s Bid was selected by the CITY and PBJV was awarded the contract therefore;

**WHEREAS**, the CITY and PBJV entered into the Master Agreement for the work and services provided for in CITY’s Bid;

**WHEREAS**, the CITY and PBJV entered into a First Amendment dated January 25, 2023 (“First Amendment”);

**WHEREAS**, pursuant to the terms of the Master Agreement, if changes in the base bid specifications after the contract is awarded results in savings, the CITY receives the entire benefit of any difference in price as a result of any substitution or specifications altered by a written change order;

**WHEREAS**, the CITY asked PBJV to investigate whether new materials, methods and means were available to complete the North Shore Critical Infrastructure Project after being informed by PBJV of the possibility;

**WHEREAS**, after investigation PBJV identified new materials, methods and means that were available to complete the North Shore Critical Infrastructure Project resulting in a substantial savings to the City and indirectly to the public; and

**WHEREAS**, PBJV was not under a contractual requirement to identify the new materials, methods and means to complete the North Shore Critical Infrastructure Project and the Parties wish to mutually take advantage of the benefits discovered with the supplemented materials, methods and means in completing the North Shore Critical Infrastructure Project.

**NOW LET IT BE RESOLVED**, that the CITY and PBJV agree as follows to this Second Amendment(s) and Supplement to the Master Agreement as set forth below:

## **A. SECOND AMENDMENT TO ORIGINAL AGREEMENT**

1. The preamble, recitals, and “WHEREAS” clauses above are incorporated into and are a material part of this Second Amendment Agreement.
2. Any and all terms, provisions, requirements, and/or obligations set forth in the Master Agreement, or the First Amendment, shall remain in full force and effect, unless expressly modified herein.
3. The language set forth in the Master Agreement, General Specifications – General Construction, ¶ 33, (P. 99) shall be changed and amended as follows:

- **Materials of Approved Equal**

Where items or materials are specifically identified herein by a manufacturer’s name, model or catalog number, only such specified items may be used in the contract documents, except as herein provided.

A contractor seeking to use materials other than those named in the contract documents, must apply in writing to the City’s Project Engineer. Approval for changes in specifications after the bids have been opened may be granted in the discretion of the City’s Project Engineer but only upon individual request of the actual bidding contractor. No blanket approval for substitution will be granted to suppliers, distributors or subcontractors. Unless requests for changes in the base bid specifications are received and approved prior to the opening of bids pursuant to paragraph 6 of the Conditions of Contract each successful Contractor will be held to furnish the specified items under each contract bid. After the contract is awarded changes in specifications shall be considered pursuant to the terms and conditions of paragraph 34 or 37 of the General Specifications. All alternate material, proposals must be accompanied by full descriptive and technical data on the item proposed, together with a statement of amount either of addition to or deduction from the bid price if the alternate is accepted. The City’s Project Engineer will be the sole judge of the efficiency and equality of any proposed material substitution. The City in its discretion may request certification as to the adequacy, equality and functionality of the proposed substitute in performing comparable duties as the material specified. Such certification must be signed by a New York State licensed, Professional Engineer.

In the case of a difference in price the City may, in its discretion, share the benefit of the difference of the cost involved in any substitution and the contract altered by a written change order, crediting the City with any savings so obtained.

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## **B. SUPPLEMENT TO ORIGINAL AGREEMENT**

### **VALUE ENGINEERING CHANGE PROPOSAL**

#### **I. GENERAL.**

The purpose of a Value Engineering Change Proposal (VECP) is to encourage the use of the Contractors' and their Subcontractors' ingenuity and experience in arriving at alternative, lower cost, and time saving construction methods for contract requirements with the intention of sharing the resulting direct cost savings between the City and the Contractor. The City encourages Contractors to submit a VECP on behalf of themselves and/or their Subcontractors. The City will share with the Contractor reasonable design costs related to the VECP. The direct cost savings is the difference between the construction savings and the reasonable design costs.

On occasion, the contract plans and specifications may not adequately depict the work necessary to complete the work. The VECP should be compared to a realistic estimate of the work required.

#### **II. CONCEPTUAL PROPOSAL SUBMITTAL AND REVIEW PROCEDURE**

The conceptual proposal is intended to expedite the initial review of a VECP idea, as well as minimize the Contractor's initial capital investment and risk in developing the VECP. This procedure allows the Contractor to submit a conceptual plan, and only requires the City to assess the general merits and technical feasibility of the proposal. The contractual requirements, detailed reviews, and cost analysis at this juncture should receive a lower level of scrutiny, compared to the level of review if the conceptual VECP is approved and a formal proposal is necessary.

The Contractor will submit an original and three copies of the conceptual VECP to the City for review and approval.

The Contractor shall:

1. Identify need for coordination with Regional Groups (Design, Environmental, Structures, Traffic, ROW, Utilities, et. al.). Generally, the Project Designer should always be contacted.
2. Assess value and benefits vs. impacts and feasibility, and provide a written summary of same to the City.
3. Assign a coordinator to manage the process of obtaining timely and appropriate reviews from the City and any affected agencies, offices, and or departments.
4. Provide a copy of the conceptual proposal to the City and discuss it with the City Engineer.

The City shall:

1. Review the technical merits and feasibility of any and all proposed changes, and has final discretion whether to exercise any such proposed changes in its sole discretion.

The conceptual proposal should explain the proposed, equivalent, alternative method of construction. This should include a description of how the Contractor intends to implement it, the impact on the project schedule, the estimated design costs, the estimated construction savings, and other benefits and impacts. If the VECP impacts the Work Zone Traffic Control (WZTC), general information on the revised WZTC plan will be necessary. The initial estimates should have sufficient information for the City to determine the cost-effectiveness of the VECP. If the proposal requires the ordering of materials, the Contractor should obtain documentation from material supplier(s) to justify the cost and availability of the materials.

At the time of the evaluation of the conceptual proposal, the City will determine the ability to process the VECP in a timely and effective manner. The City's Department of Public Works will be responsible for assisting the Contractor in determining the capabilities of the City to properly evaluate proposals. That assessment should include the staffing resources including, Consultant designers, schedule, City priorities, and the need for the City or the Contractor to hire consultant resources if applicable.

After review of the conceptual proposal, and approval from the City's Department of Public Works, the City Engineer will notify the Contractor in writing of the City's decision to either (a.) grant conceptual approval and request the Contractor to develop a formal proposal, (b.) request more information, or (c.) reject the VECP. Conceptual approval may commit the City to pay a share of further costs. A Request for more information means the additional effort is at the Contractors risk.

### **III. FORMAL PROPOSAL SUBMITTAL AND REVIEW PROCEDURE.**

A formal proposal may be submitted jointly with the conceptual proposal. This will most likely expedite the review process. However, a combined conceptual and formal submittal is at the Contractor's risk, as payments towards any reimbursable expenses are contingent on the City's approval of the conceptual proposal and determination of whether the expenses are reasonable. VECP that are relatively simple and clearly provide a benefit to the project are the best candidates for a combined submittal. It is feasible that a combined submittal receives conceptual approval but not formal approval if the City approves the basic concept, but additional information or alterations need to be made to the formal proposal before it can be formally approved.

The Contractor will submit an original and three copies of a formal proposal to the City Engineer with a cost analysis, complete plans, specifications, field change sheets, shop drawings, the approved current project schedule and the proposed project schedule, etc. A Professional Engineer's stamp and signature is required on any significant engineering changes. The City Engineer will provide guidance to the Contractor concerning the City's requirements for submitting field change sheets and shop drawings. The formal proposal will be reviewed and evaluated in accordance with the City standards, specifications, and guidelines. The City may reject the VECP any time during its review, without any obligation to the Contractor. The Contractor may decide to cancel pursuit of a proposed VECP at any time by so notifying the City in accordance with the Standard Specifications.

The VECP should clearly identify any new pay items. Agreed prices must be reached before the formal VECP is approved. Force accounts for VECP work are not allowed.

The Contractor and City will work closely to expedite the review and evaluation of the formal proposal. As the VECP can alter the progress schedule, the time impact should be considered. Depending on how time-related contract provisions are stated, there could be significant effects. The time-related contract provisions could reference specific dates or just an amount of time not tied to specific dates. Always check any time-related contract provisions to determine the effect the VECP will have on them and if they should to be altered.

Much of the information that is submitted for the formal VECP is the same information that is required for the VECP change order review. The CO review process should be relatively quick and simple, because the majority of information will have already been reviewed and the major concerns addressed during the conceptual and formal VECP reviews.

#### **IV. DESIGN COST**

It is not expected that every VECP will have a design cost associated with it. Reimbursable design may be performed by a Contractor-hired consultant, directly by the Contractor, or a combination of the two. The VECP information in the formal proposal and Change order should contain documentation which verifies the design expenditures.

The submission of VECP design cost is a professional service fee submission, not a Consultant Agreement. The task is to determine the validity of the design cost, not to manage the design consultant or Contractor. However, the documentation requested should be adequate to verify the design cost expenditures and their reasonableness. Even though the design cost is not part of a Consultant Agreement and the associated procedures do not apply.

The amount and complexity of design changes associated with the VECP will be considered when reviewing the proposed design cost. Reimbursable design costs are specific to engineering changes (design, plan sheet development, quantity computations, etc.). The City is the sole judge in determining the reasonableness of the proposed design cost. The design costs should not exceed the construction savings, because this results in no overall direct cost savings to the City. However, if the VECP provides an acceptable benefit other than a direct cost savings, e.g. time savings, or safety improvements, approval of the VECP may be considered.

For all VECP, it is important to confirm the various design expenditures submitted are within acceptable ranges. Check for unrealistic staff hours, wage rates, and overhead charges. Check that the staffing hours are not unbalanced (example: the highly paid project manager claims 60 hours, while the lower paid design engineer and technician claim 2 hours each). When a higher title person performs work below that which expected for the title, the salary rate should be adjusted downward to the appropriate level.

As a guideline, the bulk of the design/engineering work should be charged at wage rates comparable to what an hourly pay rate would be for a Civil Service PS&T salary grade 15 to 24. Work performed as a project manager, principle engineer level, or other high-level position (ASCE or NSPE Engineer V level or higher) may exceed these rates, but the number of hours

worked should not be excessive. For engineer technician work, wage rates should be comparable to what an hourly pay rate would be for a Civil Service PS&T salary grade 18 or less. Overhead rates normally range from 100% to 140% of the direct salary costs, although higher rates are not uncommon. Design performed directly by the Contractor is not eligible for overhead. If the wage rates and/or the overhead rate submitted are questionable, the determination whether to pay any such excessive cost is solely within the City's discretion, and Contractor waives any right to claims for Breach of Contract associated therewith.

There are maximum reimbursement rates for certain direct non-salary expenditures (lodging, mileage, and meal expenditures). In general, the rates are the same as the allowances for City employees.

#### **V. VECP CHANGE ORDERS.**

The Contractor will be reimbursed for 50% of the VECP construction savings and 50% of the VECP reasonable design costs. If the design cost submitted is judged to be excessive and unreasonable, only 50% of the design cost the City deems reasonable will be reimbursed. Costs incurred to develop the VECP submission (savings analysis, project scheduling, conceptual revisions, etc.) will not be considered part of the VECP design cost, and will not be reimbursed.

The Value Engineering Change Proposal, with contract pay item changes, the VECP Savings, and the VECP Design, should be submitted in a single change order (CO), and should not be combined with other changes. If multiple Value Engineering Change Proposal efforts are being progressed on a contract, each VECP should be submitted as its own CO. Different pay items for VECP Savings and VECP Design should be used for separate VECPs. Item descriptions should clearly differentiate between the various VECP.

Adjustments may be made to the original VECP CO in a subsequent CO. Any CO that includes adjustments to VECP pay items should include an updated summary of the VECP construction savings, reasonable design costs, and direct cost savings. Show this information as a total as well as broken down into Department and Contractor savings/costs. Also show the original amounts approved under the formal proposal. Identify in the summary all previous COs used to process the VECP.

If the VECP alters the unit price for pay items (i.e. agreed prices), the cost difference between paying for the items at the VECP unit prices and paying for the items at the original unit prices should be calculated and accounted for when determining the final VECP construction savings. Work already completed and paid for at the original unit prices prior to the authorization of the VECP CO should not be included in this calculation.

Include new contract pay items as well as existing contract pay items to be deleted in the same CO to clearly show the amount of the savings realized. If there is a reason to not delete quantity of an item because it is also used elsewhere, include that in the CO explanations.

#### **VI. PAYMENTS**

If the VECP work actually costs more or less than authorized in the CO, the VECP construction savings should be adjusted accordingly. If the actual Value Engineering work ends up costing

the same or more than it would have if the VECP was not implemented, no VECP construction savings should be paid to the Contractor, but the Contractor should not be assessed any fiscal penalties specific to VECP. Other fiscal penalties not specific to the VECP, such as time-related contract provisions (incentives/disincentives, A+B, project delay, etc.) may still be assessed as appropriate. Any adjustments to the VECP construction savings reimbursement do not affect the VECP design cost reimbursement.

**IN WITNESS WHEREOF**, the parties hereto have executed this Second Amendment to the Master Agreement, effective as of the later date of the last signing party below.

**POSILICO/BOVE JV:**

By: \_\_\_\_\_

Sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2023

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

Date: \_\_\_\_\_

**CITY OF LONG BEACH:**

By: \_\_\_\_\_

Sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2023

Name: Ronald J. Walsh, Jr.

Title: Acting City Manager

\_\_\_\_\_  
Notary Public

Date: \_\_\_\_\_