



**METROPOLITAN
TRANSPORTATION
COMMISSION**

Joseph P. Bort MetroCenter
101 Eighth Street
Oakland, CA 94607-4700
TEL 510.817.5700
TDD/TTY 510.817.5769
FAX 510.817.5848
E-MAIL info@mtc.ca.gov
WEB www.mtc.ca.gov

Memorandum

TO: TransLink Management Group

DATE: April 27, 2009

FR: Ann Flemer, Deputy Executive Director, Operations

RE: TransLink® Contract:

1. Assignment of TransLink® Contract by Motorola, Inc. to Cubic Transportation Systems.
2. Contract Revisions: Cubic

Summary

Since November 2003, when full rollout of TransLink® began, MTC has struggled with contract performance issues; a lawsuit against its prime contractor, Motorola; and project delays of 18 months to 3 years in delivering TransLink® to operators. Motorola's primary subcontractor, ERG Ltd., met with steadily worsening financial difficulties that called into question its ability to complete the design/build phase and to operate and maintain the system through the Contract term ending in 2019. In November 2008, ERG reorganized to manage its debt and potential liability from a lawsuit against Sydney Transport and is now Vix ERG, Ltd. Since then, ERG and Cubic Transportation Systems have reached an agreement for the purchase or license of the ERG assets relating to TransLink® by Cubic (see attached ERG media announcement) and have been negotiating with MTC staff the terms of a Contract novation that would allow Cubic to successfully take over the Contract, if an assignment from Motorola were agreed to. The TMG Contracts Working Group has met on two occasions to provide input to MTC staff on aspects of the negotiations affecting the transit agencies. The recommendations described in this memorandum reflect the input of that group.

MTC is therefore requesting that the TMG approve the following actions scheduled for Commission review and approval in May, pursuant to the Interagency Participation Agreement, Article II.B.7(a) and Appendix B, as amended:

1. An assignment of the TransLink® Contract by Motorola to Cubic, subject to the satisfaction of the closing conditions described in this memorandum;
2. Revisions to the TransLink® Contract as described in this memorandum, and to be further described at the TMG meeting, which will be embodied in a TransLink® Contract Change Order between MTC and Cubic, replacing the prior Contract in its entirety, effective upon assignment of the TransLink® Contract to Cubic.

The remainder of this memorandum and attachment provides further information in support of TMG's review of these actions. Additional detail will be presented at the TMG meeting.

Assignment Agreement

The final form of the Assignment Agreement is still under review by the parties. However, MTC, Cubic and ERG have agreed in concept to its substantive provisions, including that the assignment of the TransLink® Contract by Motorola to Cubic will only occur when specified closing conditions have been met. These closing conditions are:

- Purchase or license by Cubic from ERG of all of the assets required to complete the TransLink® Contract through its 2019 term
- Execution of Contract Revision Change Order with Cubic
- Agreement between MTC and Cubic on a satisfactory transition plan
- Achievement of BART Revenue Ready
- Resolution of the 4 outstanding claims between Motorola and MTC and a mutual waiver of claims among MTC, Motorola, ERG that includes claims against operators
- Settlement of the MTC v. Motorola declaratory judgment action and payment of attorneys' fees (\$138,695)
- TransLink® Management Group approval
- FTA notification and opportunity to exercise its right to concur
- Commission approval

Motorola received the draft Assignment Agreement for review early this week and is still considering the request for attorneys' fees.

Conformed Contract

In order for Cubic to successfully assume the responsibilities of the TransLink® Contractor, both parties (MTC and Cubic) required revisions and updates to the TransLink® Contract. Negotiations of the terms of the revised Contract have been underway since December 2008 and the results are summarized in Attachment 1. The TMG's concurrence and MTC's approval of these changes would be subject to the Commission's approval of the Assignment Agreement, including settlement of the MTC v. Motorola lawsuit, and to the satisfaction of the remaining closing conditions. The Effective Date of the Conformed Contract between MTC and Cubic, currently anticipated for June 1, 2009, would be the closing date of the Assignment Agreement.

The value of the negotiated contract revisions is approximately \$34.7 million. Of this amount, approximately \$20 million will be funded through the SFMTA to deliver TransLink-only equipment for the Metro system, and \$14.7 million is for anticipated change orders for which funding is included in MTC's TransLink® project funding commitment in the adopted regional transportation plan (T2035). The negotiated revisions also provide for a total offset over the life of the Contract of \$8.4 million, including employer program revenue and a Contractor contribution of \$2 million to deliver BART parking.

Recommendation

MTC staff requests the TransLink Management Group to (1) approve the proposed assignment of the TransLink[®] Contract by Motorola to Cubic Transportation Systems, subject to the satisfaction of closing conditions specified in the assignment agreement; and (2) approve the revisions to the TransLink[®] Contract summarized in Attachment 1 and as further described at the TMG meeting, with added contract value of \$34.7 million, to be embodied in a Change Order between MTC and Cubic, replacing the prior Contract in its entirety, effective upon assignment.

J:\COMMITTEE\TransLink Mgmt Group\2009\Apr 09\SPECIAL MEETING\02 - TMG Memo TransLink_Contract_Assignment and Change Order.doc

Attachment 1

Key Contract Changes

1. Resolution of outstanding claims and disputes:
 - Price Adjustment: Apply 20% discount to adjustment of O&M prices (pursuant to Article 13.6 of the Contract) to reflect project delay.
 - Third Party Load Fee: Set Third Party Load fee at 1.75% and implement installation fee of \$3000 per site for third party retailer set-up. Redirect funding from 3rd Party load fees and merge with six separate fees to establish compensation for cardholder support services based on the volume of active cards. Establish bonuses and abatements based on service level standards.
 - Assurance payments: Begin at contract assignment until program reaches 20 million transactions/month.
 - Regional Cycle Test (\$247,414) and BART Delay of IIT ((\$273,117): Contractor drops claims and agrees to waiver of additional claims against all operators in exchange for elimination of rebates for non-TransLink transactions processed through Concord facility.
2. Move Final Acceptance from completion of Phase 2.5 to completion of Phase 2.4, following completion of VTA and SamTrans Revenue Ready, punch list, acceptance testing and conditional acceptance. MTC's rights to software vest at Final Acceptance.
3. Phase 2.5 (remaining operators) becomes Phase 3, to be defined in an MTC-issued change notice within 180 days of conformed contract. Remaining operators would be grouped into four installations by corridor, business rules and products would be defined by each corridor group based on existing fare products.
4. "Non-Transit Applications", including parking and other expanded uses of the TransLink[®] card, to be added by change order. Near term implementation to include the SFMTA pilot at five garages, followed by BART parking.
5. Employer Program: Establishes funding for start-up costs in exchange for reduced employer fees and shared revenue in excess of amount required to cover contractor expenses. Adds new web site functionality.
6. Refer to the following anticipated change orders:
 - Accelerate two program investments (device memory upgrade and transition to contactless cards) to position the program for anticipated customer card demand and transaction volumes.

- TransLink-only faregate equipment and development of next generation of vending equipment for limited use cards.
 - No-cost change order to improve data store.
 - Contractor to credit first \$2 million in BART parking change order back to MTC.
7. To strengthen penalties for contractor delay, revise the list of Mandatory Milestones to eliminate progress payments and to require full satisfactory delivery of each milestone prior to payment. Mandatory Milestones will be:
- Phase 2.4 Complete for VTA and SamTrans
 - Phase 2 Final Acceptance
 - Phase 3 Complete
 - Phase 3 Final Acceptance
 - SFMTA Parking Pilot
 - Employer Program

Anticipated Change Orders with Mandatory Milestones:

- Device Memory Upgrade
 - Contactless Cards
 - Regional Pass Accumulator
 - Muni Metro Equipment
8. Reevaluate transaction pricing in FY2011/12.
9. Reduce performance bond from \$40 million to \$10 million for Phase II to eliminate cost of over-bonding and increase Letter of Credit from \$1.5 million to \$3 million to align better with remaining design-build and future project risk. Require Phase III and other new design-build change orders to include bonding.

