

**FOURTH AMENDMENT TO  
DESIGN-BUILD SERVICES CONTRACT  
FOR THE NORMAN Y. MINETA SAN JOSE INTERNATIONAL AIRPORT  
TERMINAL AREA IMPROVEMENT PROGRAM  
BETWEEN  
THE CITY OF SAN JOSE  
AND  
HENSEL PHELPS CONSTRUCTION CO.**

This FOURTH AMENDMENT TO CONTRACT is entered into this \_\_\_\_ day of \_\_\_\_\_, 2009, by the CITY OF SAN JOSE ("CITY"), a municipal corporation, and Hensel Phelps Construction Co., a Delaware corporation ("Design-Builder").

**RECITALS**

WHEREAS, on October 17, 2006, CITY and Design-Builder entered into an agreement entitled "DESIGN-BUILD SERVICES CONTRACT FOR THE NORMAN Y. MINETA SAN JOSE INTERNATIONAL AIRPORT TERMINAL AREA IMPROVEMENT PROGRAM" ("CONTRACT"); and

WHEREAS, on February 1, 2008, CITY and Design-Builder entered into a First Amendment to the CONTRACT to: (a) increase the Contract Not to Exceed ("NTE") Amount to fund additional design and construction costs for the expanded CONRAC Parking Garage; (b) extend the Project Element Acceptance Deadline for the CONRAC Parking Garage; and (c) revise the Profit Allocation (Appendix 4A) to account for changes in the Project since the CONTRACT was executed and to account for the added compensation for the CONRAC Parking Garage; and

WHEREAS, on February 26, 2008, CITY and Design-Builder entered into a Second Amendment to the CONTRACT to: (a) increase the Contract NTE Amount to fund additional design and construction costs for the expanded CONRAC Parking Garage; and

WHEREAS, on June 17, 2008, CITY and Design-Builder entered into a Third Amendment to the CONTRACT to: (a) increase the Contract NTE Amount by \$27,933,000 for a total Contract NTE Amount of \$692,110,382 (inclusive of Change Orders 1 through 36), to fund additional design and construction costs for improvements to Terminal A referred to as the Terminal Equity Project; and (b) allow for the release of retention for structural steel for Terminal B prior to 50% completion of the Terminal B Project Element; and

WHEREAS, CITY and Design-Builder desire to further amend the CONTRACT to: (a) revise the provisions regarding the use and distribution of contingency funds in Design-Build Task Orders; (b) revise the provisions regarding the withholding of Retainage in Design-Build Task Orders; and (c) allow for the commencement of equipment Warranties in Terminal A prior to Project Element Acceptance of the Terminal A Modifications Project Element;

NOW, THEREFORE, the parties agree to amend the CONTRACT as follows:

**SECTION 1.** SECTION 11.1.2, "Warranty Term" is amended and restated to read as follows

### **"11.1.2. Warranty Term**

The Warranty term for each Project Element shall commence upon acceptance thereof by City or the appropriate Person that will own such element. Except as may be extended below, the Warranties regarding each element of a Project Element shall remain in effect until one year after Project Element Acceptance. Notwithstanding the preceding, for the Terminal A Modifications Project Element only, the Warranty term for installed mechanical equipment and electrical equipment only shall commence upon the date City commences to operate any such equipment for its intended use in Terminal A at any time prior to Project Element Acceptance. If City determines that any of the Work has not met the standards set forth in this Section 11.1 at any time within the Warranty term, then Design-Builder shall correct such Work as specified below, and repair any damage to the Project as other property of City to the extent caused by the failure of the work to meet the standards set forth in this Section 11.1, even if the performance of such corrective work extends beyond the stated warranty term. City and Design-Builder shall conduct a walkthrough of the Site prior to expiration of the Warranty term and shall produce a punch list of those items requiring Warranty Work.

Design-Builder warrants the following Work for two years against faulty materials and workmanship: curtainwall, mechanical equipment, electrical equipment, roofing, façade insulation and safing, metal panels within wall system, sprayed fire-resistive materials, elastomeric joint sealants, finish hardware locksets, finish hardware exit devices, glazed aluminum system, impact-resistant wall-protection units, fire suppression systems, chillers and fluorescent hybrid or magnetic ballasts.

The following materials shall have a 10-year Manufacturer Warranty: panel system, including sealant, aluminum and steel finishes, perforated metal sails, finish hardware door closers, insulated glass, glazed aluminum systems, including sealants, gaskets and aluminum finishes, carpet, shade hardware, including fabric and aluminum steel coatings, and fire tube boilers."

**SECTION 2.** SECTION 12.1.4, "Design-Builder Contingency" is amended and restated to read as follows:

**"12.1.4 Design-Builder Contingency**

**12.1.4.1** Each Project Element will have two Design-Builder controlled contingencies. Concurrent with the establishment of each Design-Build Task Order Price, the parties shall negotiate a Design Development Contingency and a Construction Contingency (collectively the "Design-Builder Contingency"). The Design-Builder Contingency shall be identified as a separate line item in each Task Order, but shall be treated as separate from the Task Order Price.

**12.1.4.2** Once determined, the Design-Builder Contingency shall be treated as a single contingency fund. Subject to Section 12.2.5, the Design-Builder Contingency is intended to pay for allowable costs pursuant to Appendix 20 in excess of the Task Order Price. Except as provided in Section 12.1.4.4, the Design-Builder Contingency may not be moved to other Task Orders.

**12.1.4.3** Subject to Section 13, if at any time the Design-Builder Contingency for any Design-Build Task Order does not contain sufficient funds to pay all eligible expenses, Design-Builder shall be solely at risk for any additional costs incurred under the Design-Build Task Order.

**12.1.4.4** At any time prior to Task Order Completion, the parties may agree by Task Order amendment to split all or any portion of the then unused Design-Builder Contingency for any such Task Order between City and Design-Builder on a 75/25% basis, respectively. Any such split of unused Design-Builder Contingency under this Section 12.1.4.4 shall hereinafter be referred to as "Early Design-Builder Contingency Release."

**12.1.4.5** In the event money remains unused in a Design-Builder Contingency upon Task Order Completion, the unused money can be applied as follows:

(a) If the Project Element will be divided into two or more Design-Build Task Orders, Design-Builder may elect to transfer all or any portion of the

unused Design-Builder Contingency to increase the Design-Builder Contingency of one or more subsequent Design-Build Task Orders for the same Project Element;

(b) Either party may elect to split all or any portion of the unused Design-Builder Contingency between City and Design-Builder on a 75/25% basis, respectively; or

(c) By mutual agreement between the parties all or any portion of the unused Design-Builder Contingency may be moved to increase the Design-Builder Contingency of a different Project Element. ”

**SECTION 3.** APPENDIX 2, “Modifications to Standard Specifications,” Section 9-1.06, “Partial Payments,” is amended and restated to read as follows:

“The City, once in each month, shall cause an estimate in writing to be made by the Engineer. The estimate shall include the total amount of Work done to the time of such estimate, and, for Design-Build Task Orders, the value thereof based on the agreed-upon Schedule of Values. The estimate shall also include any amounts payable for mobilization.

The City shall retain 10 percent of such estimated value of the Work done, except that at any time after 50 percent of the Work has been completed, if the Engineer finds that satisfactory progress is being made, the City may reduce the total amount being retained from payment pursuant to the above requirements to 5 percent of the total estimated value of said Work and may so reduce the amount retained from any of the remaining partial payments to 5 percent of the estimated value of such work. From such time that the parties have agreed to Early Design-Builder Contingency Releases in a total amount of at least Ten Million Dollars (\$10,000,000) under Section 12.1.4.4 above, the City shall reduce the total amount being retained to 5 percent of such estimated value of the Work done, and shall so reduce the amount retained from any of the remaining partial payments to 5 percent of the estimated value of such Work, except that at any time after 50 percent of the Work has been completed, if the Engineer finds that satisfactory progress is being made, the City may reduce the total amount being retained from payment pursuant to the above requirements to 2.5 percent of the total estimated value of said Work and may so reduce the amount retained from any of the remaining partial payments to 2.5 percent of the estimated value of such Work

Retention for subcontracted structural steel Work for the Terminal B Phase 1 Project Element will be reduced provided that the subcontracted work has reached completion. Release of retention for subcontracted structural steel Work for the Terminal B Phase 1 Project Element may be made regardless of the overall Design Build Task Order percent complete.

In addition, on any partial payment made after 95 percent of the Work has been completed, the City may reduce the amount withheld from payment pursuant to the requirements of this Section 9-1.06, to such lesser amount as the Engineer determines is adequate security for the fulfillment of the balance of the Work and other requirements of the Contract (but in no event will said amount be reduced to less than 125 percent of the estimated value of the Work yet to be completed as determined by the Engineer). Such reduction will only be made upon the written request of the Contractor and shall be approved in writing by the surety on the Performance Bond and by the surety on the Payment Bond. The approval of the surety shall be submitted to the City: the signature of the person executing the approval for the surety shall be properly acknowledged and the power of attorney authorizing him/her to give such consent must either accompany the document or be on file with the City.

The Engineer may at any time and in the Engineer's sole discretion reinstate the retention at the full 10 percent of the value of the Work performed upon notice to the Contractor. The Contractor shall immediately repay to the City all amounts paid to the Contractor in excess of the 10 percent retention. If the Contractor fails to repay the amount due within a reasonable time, the City may, in addition to all of the other remedies available to it, withhold such amount from future partial payments made to the Contractor.

The City shall pay monthly to the Contractor, while carrying on the Work, the balance not retained, as aforesaid, after deducting therefrom all previous payments and all sums to be kept or retained under the provisions of the Contract. No such estimate or payment shall be required to be made when, in the judgment of the Engineer, the Work is not proceeding in accordance with the provisions of the Contract, or the total value of the Work done since the last estimate amounts to less than \$5,000.

No such estimate or payment shall be construed to be an acceptance of any defective Work or improper materials.

Attention is directed to the express prohibition against payment to unlicensed contractors contained in Public Contract Code Section 10164,

the provisions of which are set forth in Section 7-1.01C, "Contractor's Licensing Laws."

The estimates of the Engineer shall be final and conclusive evidence of the amount of Work performed by the Contractor under this Contract, and shall be taken as full measure of compensation to be received by the Contractor.

Before any partial payment or the final payment is made, the Contractor may be required to submit satisfactory evidence that the Contractor is not delinquent in payments to employees or creditors for labor and materials incorporated into the Work.

The Contractor shall maintain and provide to the City, with each partial payment request, certified payrolls for all of its employees and those employees of Contractor's Subcontractors."

**SECTION 4.** All of the terms and conditions of the original CONTRACT not modified by this Fourth Amendment shall remain in full force and effect.

RD:KF  
4/17/2009

WITNESS THE EXECUTION HEREOF on the day and year first written above.

"CITY"

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal  
corporation

\_\_\_\_\_  
KEVIN FISHER  
Sr. Deputy City Attorney

By \_\_\_\_\_  
LEE PRICE, MMC  
City Clerk

"Design-Builder"

HENSEL Phelps construction co., a  
Delaware corporation

By \_\_\_\_\_  
Name: Jon W. Ball  
Title: Vice President