

June 14, 2021

Jeffrey Tumlin, Director of Transportation
Tom Maguire, Director, Streets Division
San Francisco Municipal Transportation Agency (SFMTA)
1 South Van Ness Avenue, 7th Floor
San Francisco, CA 94103

**Subject: Contract 1300, Third Street Light Rail Program, Phase 2
Central Subway – Stations, Surface, Track and System
SFMTA Violations of Contract Modifications No. 137-138**

Dear Mr. Tumlin and Mr. Maguire,

You must be well aware of the total breakdown in communication and administration on the Central Subway Project (Project). There are multiple issues on the Project which must be resolved in order to reach Substantial Completion. Finger pointing will not resolve any of them, it is matter of who is in charge. It appears that the City Attorney has now become a specialist in this critical integration and completion phase. I have met with Nadeem Tahir almost every week for over a year and on several occasions with Tom Maguire. Nothing is moving. We await trains to complete this final phase and SFMTA Operations will not provide them.

Abbett Electric, a small SBE has been severely affected by numerous changes as part of the over 200 Change Orders issued by the SFMTA since January 20, 2021. As we know, whether small or large, a change order affects the sequence and planning of work. The latest shock has been the declaration by the SFMTA of no payments for changes prior to February 15, 2021. Please see the attached email from Tom Maguire acknowledging the existence of Omnibus 3 minutes before the presentation to the Board on March 2, 2021 at 11:27 am and prior to approval of CMOD 137. At this particular SFMTA Board meeting, the existence of remaining changes which were unpaid was disclosed.

As previously discussed, since the execution of Change Modifications (CMOD) Nos 137 and 138 a number of issues have arisen that necessitate immediate resolution. Tutor Perini Corporation (TPC) and the SFMTA worked diligently on the CMODs and TPC expected that the SFMTA would honor its commitments. However, TPC is compelled to provide notice to the SFMTA that it is unable to perform changed work without the test trains. There are also a number of issues raised below that remain unresolved.

Delays due to Changes:

Both CMOD 137 (effective as of January 20, 2021) and CMOD 138 (effective as of February 15, 2021) excluded any change impacts issued after their respective effective dates. The SFMTA and TPC addressed in the meeting of May 27th, 2021 that there have been in excess of two-hundred plus change directives to the Project since the effective dates reference herein. At this meeting, we all discussed and

agreed that the changes issued by the SFMTA since the effective dates severely impacted the Substantial Completion Date of March 31st, 2021 by a number of months.

SFMTA Operations Refusal to Provide Test Train:

Several Contract Specifications require SFMTA to provide a test train to verify Track and Overhead Catenary System conformance. These tests are a condition for Substantial Completion per the Contract. SFMTA Operations refuses to provide this test train despite TPC's repeated requests. The SFMTA alleges that it cannot run trains until after Substantial Completion and Acceptance by the SFMTA Project Administration. TPC cannot assist the SFMTA with its internal issues. TPC can only notify the SFMTA of delays to the Contract requirements for testing due to the SFMTA's refusal to provide the test train.

SFMTA Refusal to grant Substantial Completion:

CMOD 137 allowed for dynamic train testing in the tunnel by SFMTA Operations by March 31st, 2021. Any other element of work not completed by this date, that did not impact the train testing, would be "moved to the Punchlist", as stated on many occasions by the SFMTA. CMOD 137 modified both the Substantial Completion and schedule requirements for the Project. Although the task force, composed of members from both TPC and SFMTA teams, developed work-arounds to the changes that impacted full compliance to allow for expedited train testing while the change impacted work was completed, SFMTA has to this date refused to comply with CMOD 137. It appears that both SFMTA Operations and its ATCS contractor Thales have refused to comply with CMOD 137 and instead have demanded full compliance to completion and acceptance of the change impacted work in CMOD 137 Appendix A.

Time Extension:

To date, SFMTA has refused to grant a time extension to accommodate the Substantial Completion and Final Acceptance dates agreed to in CMOD 137. Although SFMTA does not deny the above noted impacts, SFMTA has failed to designate a new date.

"Omnibus No. 3":

Both CMOD 137 and 138 exclude SFMTA's non-contractual method of Change Administration on the Project termed "Omnibus CMODs". While in several emails the list of change impacts that had not been compensated prior to the Effective Dates in CMODs 137 and 138 were documented as not included, SFMTA has elected to deny what it knows to be true and formally stated to TPC that all "Omnibus 3" Changes issued prior to the Effective Dates would be null and void. Relevant and applicable law does not allow for an Agency to direct a contractor to perform additional work and then knowingly refuse to compensate the contractor. The SFMTA's violation of the law is unacceptable and the subject of filed Claims on the Project.

Retention Release:

In our meetings with the SFMTA to finalize CMOD 137, SFMTA agreed to the full release of retention held on the Project. SFMTA was delaying release of the retention due to the magnitude of change impacts to the Project. SFMTA documented the retention release in full in its Letter to TPC dated February 10th, 2021. SFMTA additionally requested to borrow roughly \$28M in funds agreed to be paid in CMOD 137 for an extended period of time. TPC was relying on the agreed release of the \$27M in retention to help facilitate the requested borrowing of funds by SFMTA. SFMTA has since refused to

honor its agreement to release the retention, causing financial harm to the contractor. Additionally, the Contract requires a release of near \$20M in retention held based on work complete, regardless of the agreement reached. SFMTA has inflated the value of work remaining by not diminishing allowances for early work in the tunnels. The SFMTA refuses to relinquish allowance funds as it utilizes the funds to pay for directed changes until its delayed reimbursement through its flawed Omnibus CMOD process.

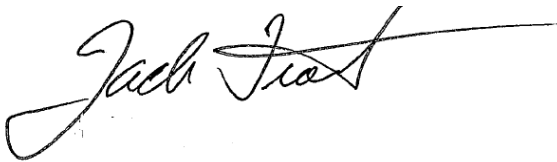
COVID:

CMOD 137 specifically excluded reimbursement to the contractor(s) for indirect costs and impacts caused by the COVID related directives from the San Francisco County Health Director which allowed SFMTA to achieve “essential project” status. SFMTA agrees that the contractor had to expend costs to follow the directives but argues it can pay the contractor “only to the extent funds are made available from a non-City and County of San Francisco source”. It is indisputable and in the public record that SFMTA did in fact receive COVID related funding from the Federal Government through the American Rescue Plan Act signed into law in March of 2021. Although the City of San Francisco was designated to receive millions in funding, SFMTA has refused to honor its commitments to the contractor(s) to reimburse impact costs.

Based on the issues raised in this letter, the SFMTA has failed to honor the terms of the Contract Modifications. Instead of working with TPC to modify the CMODS and despite our repeated requests to the SFMTA that it honor its CMOD commitments, SFMTA has refused to work cooperatively and reasonably with its contractor. As a result, TPC is compelled to provide notice to the SFMTA that it is unable to perform changed work without the test trains. Reasonable and agreeable terms for completion and compensation need to be reached immediately.

Please feel free to call me if you have any questions or wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink that reads "Jack Frost". The signature is written in a cursive style with a long horizontal line extending to the right.

Jack Frost
President/COO and CEO of Civil Group

CC: SFMTA Board of Directors
TPC: Steve Pavoggi, Pat Jennings

Encl: Email from Tom Maguire