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Report to Carson Reclamation Authority

Tuesday, May 08, 2018

Discussion

SUBJECT:

APPROVE A SECOND AMENDMENT TO THE AGREEMENT WITH RE|SOLUTIONS, LLC ("RES") LIMITING RES' LIABILITY TO CRA FOR ANY AND ALL CLAIMS ARISING UNDER OR OUT OF THE NEGLIGENT OR IMPROPER DESIGN OF THE PILES, SUBJECT TO CERTAIN LIMITATIONS

I. SUMMARY

For the reasons described below, this requested action limits RES's liability to the CRA for third party pile-design claims (bodily injury, property damage and repair/replacement) to $3 million for any and all claims arising under or out of the negligent or improper design of the piles that are to be installed on the Property. This arises out of the Development Management Agreement with RES, where the CRA is obligated to provide RES with the same liability insurance coverage as the CRA in all policies because of the nature of their work on behalf of CRA, but due to the fact that access to the Owner Protective Professional Indemnity ("OPPI") policy is unavailable to RES because RES is not in fact the property owner. The proposed limitation is a substitute for placing RES on the OPPI (or having to purchase additional insurance coverage for RES), allows CRA and CAM-Carson LLC (Macerich) receive the full benefit of the $25MM OPPI coverage, and provides RES a limited protection for the specific circumstance related to the design of the piles, and thus fulfilling CRA's obligations under the Development Management Agreement. There is no additional out-of-pocket cost to CRA for this arrangement.

II. RECOMMENDATION

1. AUTHORIZE the Executive Director to execute an amendment to the RES Development Management Agreement, in a form acceptable to Authority Counsel, limiting RES's maximum aggregate liability to CRA for any and all claims arising under or out of the negligent or improper design of the piles, and only for such matters, to Three Million Dollars ($3,000,000) provided that this limitation of liability shall not apply to (i) claims arising out of the willful misconduct or gross negligence of RES or its agents or employees; and/or (ii) the rights of CRA to obtain recovery under any of the insurance programs obtained by CRA pursuant to the Development Management

Agreement.

III. ALTERNATIVES

TAKE any other action the Reclamation Authority Board deems appropriate.

IV. BACKGROUND

The Environmental Remediation and Development Management Agreement dated July 26, 2017 ("Development Management Agreement") between RE |Solutions, LLC ("RES") and the Carson Reclamation Authority ("CRA") (Article V, Subsection 5.04(i)(iii)) provides that "*RES shall at all times be granted the same status as CRA (i.e. Named Insured, Additional Insured, etc.) on and under…*" the insurance programs obtained to support the RES Work at the Property (as those capitalized terms are defined in the Development Management Agreement). CRA is obtaining an Owner's Protective Professional Insurance Policy ("OPPI") naming only CRA and CAM-Carson LLC as the insureds.

An OPPI is designed to provide the property owner protection against professional liability claims. It will provide the CRA protection against claims made due to defective design, etc. but is restricted to providing protection for the bona fide owners, not contractors of owners, therefore, it's not available to RES. Under the Development Management Agreement, CRA is obligated to add RES to the OPPI. However, we have been advised by our insurance attorneys (at Greenberg Traurig) and the insurance brokers (JLT) of an issue with adding RES to the OPPI policy which originates under the "Insured versus Insured" exclusion. Such exclusion is incorporated into every OPPI policy form, and cannot be removed. The exclusion provides that, in the event there is an economic damage to an Insured that is alleged to result from work performed by or on behalf of RES, the policy requires that the Insured (i.e., CRA) makes a protective professional claim against the Contractor (potentially, RES or a subcontractor of RES). If RES is also an Insured on the policy, the "Insured versus Insured" exclusion prohibits this type of action from triggering the protective professional coverage and potentially jeopardizes the CRA's ability to recover against any subcontractor contracted under RES.

Furthermore, this coverage section requires that RES' policy responds first, if available, as the OPPI policy is not meant to provide professional liability coverage for any professional services firms on the project.

For the past several months, staff has been working with our insurance broker JLT, Greenberg Traurig and RES to resolve this matter. JLT has advised the CRA strongly not to name RES as an insured on the OPPI policy, because doing so could significantly restrict the protective coverage available to CRA under that program, noted above.

In early 2018 as we negotiated the Snyder Langston contract, it was determined that there is a gap in our PLI coverage specifically related to pile design. Pile *installation and fabrication* is covered under the CPL/PLI because of the pollution risk of working in the contaminated layer, but *design* is considered part of the vertical construction and excluded from the Tokio Marine ("TM") CPL/PLI program. The CRA's gap in coverage is covered by

the OPPI, but adding RES compromises the protection under the OPPI that is available to the CRA. Without the benefit of the OPPI program, RES is exposed to claims for negligent design of the pile systems, which are actually being designed by a number of other Snyder Langston subcontractors but are the main exclusion from the CPL/PLI policies. There are a number of circumstances that created this highly technical gap, including the fact that the current TM program was not quoted when the Development Management Agreement was executed so its precise scope of coverage was unknown at that time.

JLT's concerns stem from the fact that the OPPI is an "excess" program for project owners that is designed to provide coverage for owners in excess of the E&O coverage provided by their subcontractors. Although RES really functions in this project like an owner, when viewed through the lens of the OPPI they are merely another CRA subcontractor. Therefore, the "insured v. insured" exclusion in the OPPI would limit CRA's ability to seek recourse against them (and presumably their subcontractor tiers below them) in the event of a loss, thereby preventing CRA from recovering on the OPPI itself. If only CRA and CAM-Carson LLC are insureds under the OPPI program, this exclusion would not apply to bar coverage for work done by RES's subcontractors.

Staff has spent the past several months working with Greenberg Traurig, JLT and RES on alternative approaches to resolve this issue. We actively explored several options that included some variation of buying dedicated project-specific limits to RES's corporate E&O program in lieu of the OPPI. These would have given RES some, but not all, of the coverage that they might otherwise have had under the OPPI, and such an option could be unwieldy, time consuming and expensive for the CRA.

In the end, we concluded that the most expeditious and cost-effective approach is for CRA and RES to agree to contractually limit RES's liability for third party pile-design claims (bodily injury, property damage and repair/replacement) to $3 million. This approach allows CRA and CAM-Carson LLC to enjoy the full benefit of the $25MM OPPI coverage. This is the entire purpose of the OPPI program itself and offering RES this very narrow $3 million limitation of liability preserves for CRA more than 8 times that amount of coverage over the same risks. There is also no additional out-of-pocket cost to this arrangement for CRA, because it substitutes for the option of the CRA having to buy a new insurance program to address just this issue.

This proposed limitation for negligent or improper pile design would not apply to (i) claims arising out of the willful misconduct or gross negligence of RES or its agents or employees; and/or (ii) the rights of CRA to obtain recovery under any of the insurance programs obtained by CRA pursuant to the Development Management Agreement. All other terms and provisions of the Development Management Agreement will remain in full force and effect.

V. FISCAL IMPACT

None.

VI. EXHIBITS

Second Amendment to Development Management Agreement to be presented at the time of the meeting.

Prepared by: John S. Raymond, Executive Director