

RESOLUTION NO. 21-030

BOARD OF EDUCATION OF THE BERKELEY UNIFIED SCHOOL DISTRICT AUTHORIZING CHANGE ORDER

WHEREAS, on or about May 1, 2020, the Berkeley Unified School District ("District"), after formal public bidding, entered into a contract with W.A. Thomas Co., Inc. for furnishing of all labor, materials, mechanical workmanship, transportation, equipment and services necessary to expand the kitchen/cafeteria at John Muir Elementary School at 2955 Claremont Avenue in Berkeley, California ("Project");

WHEREAS, the original contract amount was \$2,065,000; and the Change Orders have increased the contract amount by \$268,450. ("Contract Price");

WHEREAS, this project was originally designed in 2019, and there have been an unusual number of hidden conditions, and additional improvements to the building in the time period planned,

WHEREAS, the project had a relatively high percentage of costs from added scope due to the change in the intended use of the facility and the condition of

WHEREAS, the project had a relatively high percentage of costs due to design changes and requirements approved by the Governing Board;

WHEREAS, there was an improvement that it was sensible to do as a part of this project while the areas were exposed;

WHEREAS, the District and Contractor have held initial negotiations on the proposed additional change orders to date for the project and those changes coupled with those already agreed will likely exceed the 10% threshold;

WHEREAS, District staff believes that the final negotiated Change Order price to perform the work will be reasonable;

WHEREAS, District staff believes that rebidding the project while the job was underway and awarding it to an entity other than the Contractor would have created massive disruption and a potential claim with the Contractor on completing his base scope of work;

WHEREAS, District staff believes that a new contractor performing the Work would have caused waste and delay, which would be at the expense of the District;

WHEREAS, District staff believes that bringing in new contractors to perform any of this work would have created coordination and interference problems with the Contractor;

WHEREAS, District staff believes that if the District were to have bid any of this Work to another Contractor, the prices of those bids would be more than the price of Contractor's Change Order because Contractor is already mobilized on the Project and Contractor's costs to perform the project and would remain lower than other contractors' who may bid on the Work;

WHEREAS, Public Contract Code section 20111 states that a school district is required to competitively bid any public works project with a contract value over \$15,000;

WHEREAS, Public Contract Code section 20118.4 states that a school district may, "authorize the contractor to proceed with performance of the change or alteration [to a contract] without the formality of securing bids, if the cost so agreed upon does not exceed the greater of: (a) The amount specified in Section 20111 ...; or (b) Ten percent of the original contract price";

WHEREAS, notwithstanding Public Contract Code sections 20111 or 20118.4, California courts allow a narrow exception to the public bidding law in circumstances in which it would be futile, undesirable or impractical and would cause additional delay and additional cost (*Los Angeles Dredging Company v. City of Long Beach* (1930) 2 Cal. 348; *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 645.);

WHEREAS, California law provides that, "Where competitive proposals work an incongruity and are unavailing as affecting the final result or where they do not produce any advantage . . . the statute requiring competitive bidding does not apply." (*Hiller v. City of Los Angeles* (1961) 197 Cal.App.2d 685, 694.);

WHEREAS, bidding any portion of the added Work will not affect the final result to the District except to further increase the cost of the Project; and

WHEREAS, bidding the increased scope of the Work would not have produced an advantage to the District;

NOW THEREFORE, the Board of Education of the Berkeley Unified School District hereby resolves, determines, and finds the following:

1. That the foregoing recitals are true.
2. For the reasons stated above, public bidding of the increased scope of Work would not have produced an advantage to the District, and would produce a net burden and distinct disadvantages to the District.
3. Based on the foregoing, it would be incongruous, futile, and unavailing to publicly bid the increased scope of Work.
4. That the District's Board hereby approves the already negotiated Change Orders to accept the increased cost of the Project and to resolve several outstanding disputes concerning added Work without further advertising for or inviting of bids, and authorizes

the Superintendent and designees to take all steps and perform all actions necessary to execute and implement that Change Order.

PASSED AND ADOPTED by the Board of Education of the Berkeley Unified School District, City of Berkeley, County of Alameda, State of California, this 17th day of February 2021, by the following vote:

AYES:

NOES:

ABSENT OR NOT VOTING:

ATTEST:

Clerk of the Board of Education of the
Berkeley Unified School District