

Consent Item (A) 10-26-2023

Washington Metropolitan Area Transit Authority

Board Action/Information Summary

☒ Action ☐ Information

Document
Number:
205606

Resolution:
☒ Yes ☐ No

Presentation Name:

Approval to Indemnify CSX for Structural Priorities A&B Project

Project Manager:

Stephen Powers

Project Department:

Infrastructure

Purpose/Key Highlights:

Request Board approval to indemnify CSX as part of a construction agreement and grade crossing agreement for work part of the Structural Priorities Program A&B Project (CIP0348).

Interested Parties:

- CSX
- Contractor for Structural Package A is W.H. Schlosser

Background:

The Structural Priorities Program A&B Project requires the rehabilitation of five piers supporting the Minnesota Avenue aerial structure on CSX property. Package A began in April 2021 and is forecasted to completed at the end of calendar year 2025.

Package B will begin at a later date to be determined. The aerial structure crosses over CSX's Benning Yard located near the Minnesota Avenue Metro Station. WMATA requires access on to CSX property to complete the proposed work located on the western side of the yard-tracks and on a land-locked area between the yard tracks and CSX's mainline construction equipment and materials must use a grade crossing (built by CSX) over CSX's yard-tracks to access the land locked area. CSX requires WMATA to enter into a Construction Agreement and a Grade Crossing Agreement. Both agreements require WMATA to indemnify CSX.

Discussion:

Indemnification is required to advance the Structural Priorities Program A&B Project

Funding Impact:

No impact to funding.

Previous Actions:

Unknown

Next Steps:

Approval of indemnification is required to move forward.

Recommendation:

Approval to: indemnify CSX

SUBJECT: APPROVAL TO INDEMNIFY CSX TRANSPORTATION, INC.

RESOLUTION
OF THE
BOARD OF DIRECTORS
OF THE
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

WHEREAS, Resolution 2011-30, as amended, requires Board of Directors' approval for WMATA to indemnify a counterparty; and

WHEREAS, As part of the Structural Priorities Program A&B Project, WMATA is rehabilitating five piers for the Minnesota Avenue Metro Station aerial structure that will restore the piers to a state of good repair that are on property owned by CSX Transportation, Inc. (CSX); and

WHEREAS, CSX requires WMATA to enter into a Construction Agreement and Grade Crossing Agreement each of which contains a term that requires WMATA to indemnify CSX in substantially the form as shown in Attachment A;

NOW THEREFORE, be it

RESOLVED, That the Board authorizes the General Manager and Chief Executive Officer or his designee to indemnify CSX Transportation, Inc. as may be required in the Construction Agreement and Grade Crossing Agreement in substantially the form shown in Attachment A; and be it finally

RESOLVED, That in order to timely execute the Construction Agreement and Grade Crossing Agreement required to rehabilitate the five piers for the Minnesota Avenue Metro Station aerial structure, this Resolution shall be effective immediately.

Reviewed as to form and legal sufficiency,

/s/ _____
Patricia Y. Lee
Executive Vice President, Chief Legal Officer,
and General Counsel

ATTACHMENT A
CONSTRUCTION AGREEMENT

11. Indemnification

- 11.1 Generally. To the maximum extent permitted by applicable law, Agency Contractors shall indemnify, defend, and hold CSXT and its affiliates harmless from and against all claims, demands, payments, suits, actions, judgments, settlements, and damages of every nature, degree, and kind (including direct, indirect, consequential, incidental, and punitive damages), for any injury to or death to any person(s) (including, but not limited to the employees of CSXT, its affiliates, Agency or its Contractors), for the loss of or damage to any property whatsoever (including but not limited to property owned by or in the care, custody, or control of CSXT, its affiliates, Agency or its Contractors, and environmental damages and any related remediation brought or recovered against CSXT and its affiliates), arising directly or indirectly from the negligence, recklessness or intentional wrongful misconduct of the Contractors, Agency, and their respective agents, employees, invitees, contractors, or its contractors' agents, employees or invitees in the performance of work in connection with the Project or activities incidental thereto, or from their presence on or about CSXT's property. The foregoing indemnification obligation shall not be limited to the insurance coverage required by this Agreement, except to the extent required by law or otherwise expressly provided by this Agreement.
- 11.2 Compliance with Laws. Agency shall comply, and shall require its Contractors to comply, with any federal, state, or local laws, statutes, codes, ordinances, rules, and regulations applicable to its construction and maintenance of the Project. Agency's Contractors shall indemnify, defend, and hold CSXT and its affiliates harmless with respect to any fines, penalties, liabilities, or other consequences arising from breaches of this Section.
- 11.3 "CSXT Affiliates". For the purpose of this Section 11, CSXT's affiliates include CSX Corporation and all entities, directly or indirectly, owned or controlled by or under common control of CSXT or CSX Corporation and their respective officers, directors, employees and agents.
- 11.4 Notice of Incidents. Agency and its Contractor shall notify CSXT promptly of any loss, damage, injury or death arising out of or in connection with the Project work.
- 11.5 Survival. The provisions of this Section 11 shall survive the termination or expiration of this Agreement.

ATTACHMENT B
GRADE CROSSING AGREEMENT

14. Risk, Liability, Indemnity:

- 14.1 Licensee, recognizing that Licensor's operations and any use of Licensor's property, tracks and right-of-way involves increased risks, expressly assumes all risk of loss and damage to, and waives any right to ask or demand damages for, Property of Licensee, or any part thereof, at the Crossing, including loss of or interference with the use of service thereof, regardless of cause, including: (A) any fault, failure or negligence of Licensor in the construction, operation or maintenance of the Crossing or in rail operations on or over the Crossing; and/or (B) any fire, regardless of the source or origin thereof. For this Section, the term "Property of Licensee" shall include property of third parties situated or placed upon Licensor's right-of-way by Licensee or by such third parties at request of or for the sole benefit of Licensee.
- 14.2 Licensee, with the recognition above, and as further consideration for the grant of this crossing right, also assumes all liability for, and releases and agrees to defend, indemnify, protect and save Licensor harmless from and against:
- a. all loss of or damage to any other property, including property in the care, custody or control of Licensor and of third parties, now situated or which may be placed at the Crossing or adjacent thereto, and the loss of or interference with any use or services thereof; and
 - b. all loss and damage on account of injury to or death of any and all person (including but not limited to employees, invitees and patrons of the parties hereto) on the Crossing; and
 - c. all claims and liability for such loss and damage and cost and expenses thereof; arising out of, resulting from, or connected in any manner with the construction, reconstruction, maintenance, existence, use, condition, repair, change, relocation or subsequent removal of said Crossing, any parts thereof or appurtenant structures, regardless of cause, even if occurring or resulting from the sole or joint fault, failure or negligence of Licensor, including such loss, damage or injury: (i) caused in whole or in part by the fault, failure or negligence of Licensor; or (ii) caused in whole or in part by the fault, failure or negligence of Licensee; or (iii) resulting from the creation of this license and additional hazards that this Crossing imposes upon Licensor's operations.
- 14.3 For the purposes of these Liability and Indemnity provisions only, all persons, including the employees of Licensor (flaggers, supervisors, etc.) and of

Licensee, or employees of any independent or subcontracting third parties engaged in any construction or maintenance activities at the Crossing, in any of the work described in this Agreement, shall be deemed to be the sole contractors of Licensee while so engaged.

- 14.4 All obligations of Licensee hereunder to release, indemnify and hold Licensor harmless shall also extend to officers, agents and employees of Licensor, and to companies and other legal entities that control, or are controlled by, subsidiaries of or are affiliated with Licensor, as well as any railroad that operates over the right-of-way on which the Crossing is located, and their respective officers, agents and employees.
- 14.5 Licensee shall promptly (within thirty (30) days) advise Licensor in writing, by Certified Mail of any claims made against Licensee and/or Licensor, and/or its operating lessee, under this Agreement or from use of the Crossing.