

**Washington Metropolitan Area Transportation Authority
Board Action/Information Summary**

Action
 Information

MEAD Number:
99908

Resolution:
 Yes No

PURPOSE

To obtain approval from the Board of Directors to indemnify the contractor repairing rail car lifts at Greenbelt Yard.

DESCRIPTION

The lifts that were installed when the Greenbelt Yard was built and used to raise rail cars for the performance of certain maintenance/repair activities, have been deemed unusable. In September 2007 the Board of Directors approved the complete replacement of the original lifts and that effort is underway. However, due to the scope of the project, two years will elapse before the first replacement lift can be used. In the interim it will be necessary to repair some of the original lifts so that married pairs of cars can be raised. The FY07 budget included funding for the interim repairs of the Greenbelt Yard lifts.

The original manufacturer of the lifts refused WMATA's request for assistance in repairing them. As a result, the existing Metro Matters Yards contract with Hensel Phelps was modified and Hensel Phelps will perform the repairs. Hensel Phelps has raised concerns about potential exposure to a lawsuit by the original supplier over Hensel Phelps working on their equipment and has requested indemnification from WMATA for legal fees and any judgment for patent infringement by the original manufacturer. Hensel Phelps will be required to carry accident and liability insurance; the indemnification would cover legal fees and patent infringement judgments only. The indemnification reads as follows:

In the event Contractor is the recipient of any claims or causes of action which are asserted relating to the work called for by this change order based on an alleged infringement of patent rights, intellectual property rights, or other appropriation or infringement of trade secrets, then WMATA agrees to reimburse Contractor for its reasonable attorney's fees, expert witness fees and other costs incurred in defending Contractor from such claims or causes of action up to a maximum of \$200,000. Additionally WMATA agrees to indemnify the Contractor

from any adverse final judgments, arbitration awards or settlements which are paid by Contractor which result from any claims or causes of action which are asserted relating to the work called for by this change order based on an alleged infringement of patent rights, intellectual property rights, or other appropriation or infringement of trade secrets.

WMATA shall not be obligated to indemnify Contractor where (a) any settlement of a claim, suit or proceeding is made without WMATA's written consent unless required by final decree of a court of competent jurisdiction; or (b) any admission of liability or guilt by the Contractor made without WMATA's written consent.

Since this contractor is in the best position to effectuate repairs in an expeditious manner and requires this indemnification to proceed with repairs at the agreed-upon price, staff recommends that the Board approve the indemnification of Hensel Phelps.

Prior Approvals

On June 15, 2006, the Board approved the WMATA FY07 budget funding the repair of the lifts.

FUNDING IMPACT

Not definable.

RECOMMENDATION

That the Board of Directors approve the indemnification of the contractor repairing rail car lifts at Greenbelt Yard.