



Board Report

File #: 2015-1304, **File Type:** Contract

Agenda Number: 20.

REVISED
AD-HOC CONGESTION REDUCTION COMMITTEE
NOVEMBER 18, 2015

SUBJECT: METRO EXPRESSLANES OPERATIONS AND MAINTENANCE

ACTION: AUTHORIZE THE CHIEF EXECUTIVE OFFICER (CEO) TO EXERCISE CONTRACT OPTION AND MODIFY CONTRACT

RECOMMENDATION

- A. AUTHORIZING the Chief Executive Officer (CEO) to exercise Option 4.3, Additional Year of Operation and Maintenance (O&M) - Year 3, Modification No. 63 for contract PS0922102333 with **Atkinson Contractors, LP (Atkinson) for Metro Expresslanes Operations and Maintenance** in the amount of \$3,072,000, increasing the total contract price from \$118,991,335 to \$122,063,335;
- B. AUTHORIZING the CEO to execute Contract Modification No. 64 for additional **O&M Support Costs** for Option Year 3 in the amount of \$10,383,408, increasing the total contract price from \$122,063,335 to \$132,446,743.
- C. AUTHORIZING the CEO to execute Contract Modification No. 65 for **Additional Transponders and Retail Packaging** in the amount of \$3,240,000, increasing the total contract price from \$132,446,743 to \$135,686,743.
- D. APPROVING an increase in Contract Modification Authority (CMA) for Contract PS0922102333, to Atkinson in the amount of \$17,203,063 increasing the total CMA from \$60,934,978 to \$78,138,041 to cover the costs of the recommended Contract Modifications above, and any pending and future changes listed in the Contract Modification/Change Order Log (Attachment C).
- E. AMENDING the FY16 budget by \$5,915,257 representing the current fiscal year portion of the above contract modifications.

Record will reflect that Metro legal counsel is working to take appropriate action regarding patent infringement lawsuit.

ISSUE

In December 2010, Atkinson was awarded a Design, Build, Operate and Maintain (DBOM) contract for the Metro ExpressLanes project that included all activities needed to implement and operate the ExpressLanes through the demonstration period. The DBOM contract included various options including five, one year options for operation and maintenance beyond the demonstration period, but none of these was authorized at the time of contract award. The exercising of the second of the one-year options was approved by the Board on October 23, 2014 and expires on February 23, 2016.

In April 2014 the Board authorized the CEO to continue operation of the Metro ExpressLanes and on September 21, 2014 the Governor signed Senate Bill (SB) 1298 (Hernandez) making the I-10 and I-110 ExpressLanes permanent. The ExpressLanes continue to be a successful program with over 426,000 accounts opened and 461,000 transponders distributed since opening in November 2012. To continue the operation of the ExpressLanes, staff is asking the Board to approve the exercising of the third of the five one-year options to extend O & M to February 23, 2017.

DISCUSSION

Recommendation A: Additional Year of O & M

In February 2014, Metro successfully completed the demonstration period and entered into the first of five one-year options for continued ExpressLanes O & M. In April 2014, the Board approved the continued operation of the ExpressLanes and on September 21, 2014, the Governor signed Senate Bill (SB) 1298 (Hernandez) extending the Metro ExpressLanes program indefinitely. Since Option Year Two will expire in February 2016, staff is requesting Board authorization to enter into the third one-year option for O & M.

Recommendation B: Additional O & M Support

The recommended funding action is required due to the successful launch of the ExpressLanes and includes many activities driven mainly by customer and non-customer demand - additional account support for new accounts, costs for mailing of customer correspondence and violations and fees related to the processing of payments.

The base O & M contract for the ExpressLanes includes customer service related activities for up to 100,000 transponders, which was the target for the demonstration period. However, there are currently in excess of 461,000 transponders in circulation (461% above the base target) exceeding all expectations for the program and requiring more effort related to customer service than originally included in the base contract. The distribution of additional transponders results in establishment of new accounts that require order fulfillment and additional staffing support by the contractor to service these accounts. Servicing activity includes answering calls, handling correspondence, responding to customer inquiries, postage, and processing transactions.

Correspondingly, the overwhelming success of the Metro ExpressLanes has increased violation

processing beyond the original contract numbers, generating additional costs associated with license plate image processing, postage and mailing, phone services, and responding to online inquiries.

In addition, resources will continue to be needed for the maintenance of the tolling equipment and real-time traffic monitoring utilizing “EarthCam” cameras and staffing of the Traffic Management Center for incident management and monitoring of all toll-related systems. The Contract Modification in Recommendation B addresses this additional operational support required to operate and maintain the ExpressLanes through the balance of O & M Option Year 3.

Recommendation C: Additional Transponders and Retail Packaging

Since there continues to be steady growth in transponder distribution at a rate of 10,000 -15,000 transponders issued per month, additional funds will be required to purchase transponders. The recommended funding action ensures that the supply of transponders continues to be sufficient to fulfill customer orders and keeps us in the queue for manufacturing as this is a long lead item. The current order of transponders concludes in February 2017. This recommendation allows the purchase of additional transponders and retail packaging to continue to February 2018.

Recommendation D: Additional CMA

The additional CMA request of \$17,395,772, when combined with previous Board Approved CMA remaining, will be used to authorize Recommendations A, B and C (O & M Option Year Three, associated O & M Support costs and Additional Transponders and Retail Packaging) as well as additional pending Modifications.

Staff requests authorization to increase the CMA which will serve as a management tool for staff to issue contract modifications to compensate the contractor for additional costs incurred for the completion of the above projects.

Lawsuit

In August 2015 a patent infringement lawsuit was filed against Metro by Transport Technologies LLC alleging that the system used to monitor the number of passengers in cars using ExpressLanes on the I-110 and I-10 freeways (including the FasTrak transponders, roadside interrogators, and network infrastructure) infringes its patent.

Pursuant to express provisions in the contract, on September 7, 2015, Metro demanded that Atkinson defend the action and provide indemnity against the infringement lawsuit. On September 8, 2015 Atkinson notified Metro that it was rejecting the demand, citing a section of the contract that provides that indemnification does not apply “to any Goods manufactured to the detailed design of Metro,” claiming that Metro designed the tolling system. Metro firmly disputes this allegation and will be filing a cross-complaint against Atkinson alleging breach of contract as a result of its failure to defend and

indemnify the agency.

While Atkinson has agreed to submit a pre-trial motion on Metro's behalf to have the suit dismissed, Atkinson has notified Metro that it will not defend Metro and provide indemnity against the lawsuit should the pre-trial motion be unsuccessful. In response, Metro will be filing a cross complaint against Atkinson alleging breach of contract as a result of its failure to defend and indemnify the agency. On November 19, 2015 Metro was informed that since the filing of that lawsuit, and following further discussions, Atkinson has agreed to accept our defense in exchange for dismissing the lawsuit. We are working on the details of how the defense will be handled, and whether and when we will dismiss our lawsuit.

A Request for Proposal (RFP) was released in August 2015 to assist Metro in developing the requirements for the new O & M contract. Staff is currently in the process of selecting a consultant for this effort.

The additional year of O & M also necessitates the funding of Contract Modifications and an increase in the CMA to ensure uninterrupted customer service and ExpressLanes operations. To ensure that there is no interruption in services, staff requests authority be granted to the CEO to execute a Contract Modification for the additional O&M support costs for Option Year 3.

DETERMINATION OF SAFETY IMPACT

Approval of these recommendations will improve safety for Metro ExpressLanes patrons.

FINANCIAL IMPACT

The funding of \$5,915,257 for some of the increase in CMA will be added to the FY16 budget in cost center number 2220, Congestion Reduction, and split between project numbers Project 307001 (ExpressLanes I-110) and Project 307002 (ExpressLanes I-10).

Because this is a multi-year program, the cost center manager and Executive Officer, Congestion Reduction will be responsible for budgeting the remaining CMA in future years.

IMPACT TO BUS AND RAIL OPERATING BUDGET

The funding for this action will come from toll revenues generated from the Metro ExpressLanes operation. No other funds were considered for this activity because these funds are specifically approved for the Metro ExpressLanes operations. This activity will not impact ongoing bus and rail operating costs.

ALTERNATIVES CONSIDERED

The Board may decline to approve the recommended actions. This is not recommended as staff cannot immediately re-procure a new contractor to operate and maintain the ExpressLanes and ensure uninterrupted operations.

Another alternative is to award a sole source, emergency contract for the remaining option years to Xerox (the primary sub-contractor to Atkinson that currently operates and maintains the toll system) which will most likely require re-negotiation of all rates under the existing contract and result in higher costs. As a result, staff does not recommend this option.

NEXT STEPS

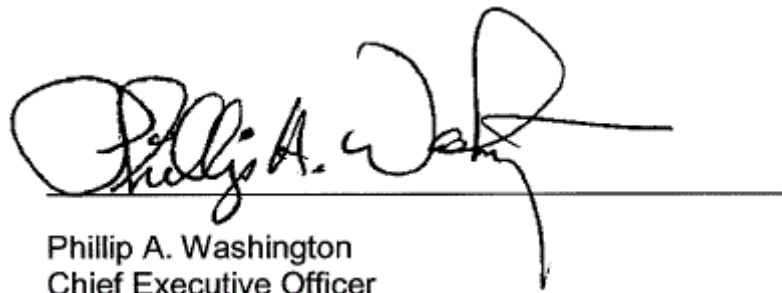
Upon approval of the Contract Modifications, staff will take the necessary steps to amend the budget, notify the contractor of the exercising of Option Year Three for O & M and execute all required Contract Modifications for Option Year Three O & M.

ATTACHMENTS

- A. Procurement Summary
- B. DEOD Summary
- C. Contract Modification Authority Summary

Prepared by: Joe O'Donnell, Director, (213) 922-7231
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Kathleen McCune, Director (213) 922-7241

Reviewed by: Shahrzad Amiri, Executive Officer, (213) 922-3061
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Phillip A. Washington
Chief Executive Officer

PROCUREMENT SUMMARY

METRO EXPRESSLANES OPERATIONS AND MAINTENANCE

1.	Contract Number: PS092210233		
2.	Contractor: Atkinson Contractors, LP		
3.	Mod. Work Description: Exercise Option 4.3 – Option Year 3; Additional O&M Support Costs for Option Year 3;		
4.	Contract Work Description: Design, Build, Operate and Maintain the Metro ExpressLanes		
5.	The following data is current as of: October 21, 2015		
6.	Contract Completion Status:		
	Bids/Proposals Due:	8/31/10	% Completion \$s: 90.7%
	Contract Awarded:	12/16/10	% Completion time: 96%
	NTP:	01/11/11	Original Contract Days: 990
	Original Complete Date:	09/28/13	Change Order Days: 879
	Current Est. Complete Date:	02/23/16	Suspended Days: 0
	Total Revised Days:		1,869
7.	Financial Status:		
	Contract Award:		\$72,363,702
	Total Contract Modifications Approved:		\$47,232,633
	Current Contract Value:		\$119,596,335
	Contract Administrator: Joe O'Donnell	Telephone Number: 213-922-7231	
8.	Project Manager: Shahzad Amiri	Telephone Number: 213-922-3061	

A. Contract Action Summary

This Board Action is to approve Contract Modification No. 63 issued in support of Operations and Maintenance of the ExpressLanes for Option Year 3, Contract Modification No. 64, issued in support of additional O & M Support Costs for Option Year 3, and Contract Modification No. 65, issued for additional transponders and retail packaging.

These Contract Modifications will be processed in accordance with Metro's Acquisition Policy and the contract type is a firm fixed priced price.

On December 16, 2010, Contract No. PS0922102333 was awarded to Atkinson Contractors, LP in the amount of \$72,363,702, to Design, Build, Operate and Maintain the Metro ExpressLanes Project.

Attachment B shows that 57 Contract Modifications/change orders have been issued to date to add and/or delete work, and 12 Contract Modifications are currently pending or in negotiations.

The proposed Contract Modifications are for \$16,695,408 and will be used to Exercise Option 4.3 – Option Year 3; additional O&M Support Costs for Option Year 3; and additional Transponders and Retail Packaging.

B. Cost/Price Analysis

The recommended price for Contract Modification No. 63 was a bid rate for Option Year 3. A market survey was performed that confirmed the Option price is fair and reasonable.

The recommended price for Contract Modification No. 64 has been determined to be fair and reasonable based upon an independent cost estimate, cost analysis, technical evaluation, fact finding, and negotiations. An audit of Contract Modification No. 64 was requested on October 8, 2015, and the audit is anticipated to be complete by the end of November 2015. Should the audit determine that any proposed costs for Contract Modification No. 64 are unallowable, the negotiated amount shown below will be adjusted.

The recommended price for Contract Modification No. 65 was determined to be fair and reasonable as the price of the additional transponders was based on market rates validated by other toll lane operators.

Mod No.	Changes	Proposal amount	Metro ICE	Negotiated or NTE amount
63	Additional Year of O&M – Option Year 3	\$3,072,000	N/A*	\$3,072,000
64	Additional O&M Support Costs for Option Year 3	\$10,501,854	\$10,380,468	\$10,383,408
65	Additional Transponders and Retail Packaging	\$3,240,000	N/A*	\$3,240,000

* Mod. no. 63 price was a bid rate. Mod. no. 65 pricing is based on the agreed rates for new transponders.

DEOD SUMMARY

METRO EXPRESSLANES OPERATIONS AND MAINTENANCE

A. Small Business Participation

This contract is funded by the Federal Highway Administration funds and falls under the Caltrans Underutilized Disadvantaged Business Enterprise (UDBE) program requirements. At the time of award Atkinson made a 16.20% UDBE and a 1.87% DBE commitment. This contract complies with the Caltrans UDBE Federal Highway program. Atkinson is exceeding their commitment with a current total UDBE participation of 17.77% and a current DBE (race neutral) participation of 2.70%. UDBE and DBE participation covers Design, Civil, and Operation & Maintenance.

SMALL BUSINESS COMMITMENT	16.20% UDBE 1.87% DBE	SMALL BUSINESS PARTICIPATION	17.77% UDBE 2.70% DBE
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UDBE Subcontractors	Commitment	Participation
1. MARRS Corp (Design)	0.18%	0.13%
2. Lin Consulting (Design)	1.20%	0.86%
3. Abratique & Assoc. (Civil)	0.16%	0.08%
4. SafeProbe (Civil)	0.27%	0.48%
5. G&C Equipment Corp (Civil)	4.02%	4.94%
6. Mariman Security (Civil)	0.35%	0.53%
7. Davis Blue Print Co. (Civil)	Added	0.02%
8. Payco Specialties (Civil)	1.19%	1.31%
9. Fine Grade Equipment (Civil)	1.82%	2.16%
10. American Steel Placers (Civil)	0.79%	0.68%
11. DNS Solutions (Civil)	0.07%	0.05%
12. R.J. Lalonde (Civil)	Added	0.01%
13. Ace Fence (Civil)	0.28%	0.26%
14. Sequoia Consultants (Civil)	Added	0.20%
15. Rivera Trucking (Civil)	Added	0.26%
16. JC Supply & Manufacturing (Civil)	Added	0.07%

17. TEC Management Consultants (Civil)	0.19%	0.21%
18. E-Nor Innovations (Civil)	Added	0.06%
19. G&C Equipment (O&M)	5.44%	4.53%
20. G&C Equipment/Xerox (O&M)	Added	0.48%
21. Noble Insight (O&M)	0.24%	0.45%
Total	16.20%	17.77%

DBE Subcontractors	Commitment	Participation
1. Intueor Consulting (Design)	0.65%	0.44%
2. Diaz Yourman Assoc. (Design)	0.19%	0.21%
3. Seville Construction (Civil)	1.03%	2.05%
Total	1.87%	2.70%

CONTRACT MODIFICATION AUTHORITY (CMA) SUMMARY

METRO EXPRESSLANES OPERATIONS AND MAINTENANCE

Mod. No.	Description	Status	Contract Value	Mods	Board Approved CMA (C)
		(Approved or Pending)	(A)		
N/A	Initial Award	Approved	\$72,363,702		\$7,236,370
1	Exercise Options 1 and 2	Approved		\$4,250,000	
2	Admin Modification of Audit Requirements	Approved		\$0	
3	Install Fiber Cables & Splice Vaults on I-110	Approved		\$470,487	
4	Toll System Digital Visual Aids	Approved		\$65,100	
5	Modification to Field Office	Approved		\$3,228	
6	Drainage Improvements on I-110 (Const.)	Approved		\$1,867,000	
7	Exercise Option 3	Approved		\$2,475,000	
N/A	Board Approved CMA Increase (1/12)	Approved			\$11,592,445
8	Construction of Divider Wall	Approved		\$821	
9	Drainage Improvement on I-110 (Design)	Approved		\$234,440	
10	Harbor Gateway Transit Center	Approved		\$0	
11	Retail Transponder Sales	Approved		\$347,854	
12	Differing Site Condition – CIDH Pile Install.	Approved		\$384,768	
13	Modified Striping for Toll Lanes	Approved		\$607,964	
14	Audible and Visible Warning System	Approved		\$316,334	
15	Adams Blvd/Flower St. OCS (Construction)	Approved		\$80,061	
16	DSC – CIDH Piles Along I-10 Fwy	Approved		\$78,448	
17	Retail Packaging for Add'l Transponders	Approved		\$337,500	
18	Additional Design Support	Approved		\$137,879	
19	Rehabilitation of I-10 Shoulder	Approved		\$633,414	
20	Perforated Steel Pipe	Approved		\$160,276	
21	Temporary Customer Service Center	Approved		\$193,383	
22	Closure of Patsaouras Plaza Ramps	Approved		\$69,524	
23	Modify Conflicting Expo Signs	Approved		\$25,508	
24	Metro's TAP Interface Program	Approved		\$25,734	
25	I-10 Traffic Loops	Approved		\$126,598	
26	Additional Traffic Monitoring Support	Approved		\$957,186	
27	Additional Video Cameras	Approved		\$726,288	
28	Adams Blvd/Flower St. OCS (Design)	Approved		\$59,331	
29	Mobile Van Retail Unit/Extended Hours	Approved		\$50,000	
30	Additional Barrier Markers	Approved		\$39,128	
31	Toll System Software Modifications for Grace Period	Approved		\$9,724	
32	Release of Additional Transponders	Approved		\$450,000	
33	Mailing Costs	Approved		\$450,000	
34	Additional Account Support	Approved		\$1,000,000	
35	Contract Milestone Revision	Approved		\$2,749,778	
N/A	Board Approved CMA Increase (9/13)	Approved			\$2,335,035
36	Reduction of Provisional Sum Line Items	Approved		(\$2,147,709)	
38	Add'l Transponders Option 3 and Retail Packaging	Approved		\$459,375	
39	Additional Contaminated Material	Approved		\$150,000	
40	Additional Mailing Costs	Approved		\$1,000,000	

41	Additional Static and Digital Messaging Signs	Approved		\$432,463	
42	Permanent. Redundant Fiber Comm Network	Approved		\$341,738	
43	Digital Messaging Sign at Santa Anita	Approved		\$481,827	
CO12	Additional Computer Programming	Approved		\$250,000	
CO13	Credit Card Transaction Costs	Approved		\$270,000	
44	Exercise Option 4.1, Add'l Year of O&M – Year 1	Approved		\$3,024,000	\$3,024,000
45	Additional Account Support for Option Year 1	Approved		\$2,900,000	\$2,900,000
46	Add'l Transponders Option 3 and Retail Packaging	Approved		\$1,350,000	\$1,350,000
47	Additional Mailing Costs - Option Year 1	Approved		\$1,700,000	\$1,700,000
N/A	Board Approved CMA Increase (2/14)	Approved			\$1,254,862
48	Interface Configuration Document	Approved		\$35,924	
49	Additional TMO Labor - Option Year 1	Approved		\$445,000	
50	Additional Marketing Support – Option Year 1	Approved		\$304,399	
52	Additional Credit Card Transaction Fees – Option Year 1	Approved		\$300,000	
53	Additional Violations Processing Beyond Base Contract	Approved		\$750,000	\$750,000
54	Additional Transponders – Option Year 1	Approved		\$432,000	
55	Exercise Option 4.2, Add'l Year of O&M – Year 2	Approved		\$3,048,000	\$3,048,000
56	Additional O&M Support Costs for Option Year 2	Approved		\$6,717,874	\$6,717,874
57	Additional Transponders and Retail Packaging	Approved		\$4,999,986	\$4,999,986
62	Add Funds for Additional Violation Processing and Violation Credit Card Fees	Approved		\$605,000	
Subtotal (Approved)				\$47,232,633	\$46,908,572
58	Replacement and Additional Static Message and Dynamic Message Signs for I-10/I-110 and I-105	In-Process		\$2,650,000	\$2,650,000
59	New Toll Gantries	In-Process		\$2,500,000	\$2,500,000
60	Replacement of Pavement Stencils and Striping and New Delineators on I-10/I-110	In-Process		\$1,800,000	\$1,800,000
TBD	Upgrade all CHP Gantry Enforcement Lights	In-Process		\$300,000	
TBD	Construct Permanent Locations for Mobile EarthCams (I-10 and I-110)	In-Process		\$100,000	
Subtotal (In-Process)				\$7,350,000	\$6,950,000
63	Exercise Option 4.3, Add'l Year of O&M – Year 3	Recommended		\$3,072,000	
64	Additional O&M Support Costs for Option Year 3	Recommended		\$10,383,408	
65	Additional Transponders and Retail Packaging	Recommended		\$3,240,000	
Subtotal (Recommended)				\$16,695,408	
61	Pavement Markings, Signage and Tolling Equipment at I-710/I-10 Interchange	Pending		\$2,250,000	\$2,250,000
TBD	Maintenance of Additional Tolling Equipment and DMS	Pending		\$260,000	
TBD	Additional Bond and Insurance Costs	Pending		\$250,000	
TBD	Unforeseen Potential Changes	Pending		\$3,900,000	

TBD	Modification of Toll System Software for New & Replacement Sensys Equipment and Informational Dashboard	Pending		\$200,000	
Subtotal (Pending)				\$6,860,000	\$2,250,000

Subtotal - Approved Modifications			\$47,232,633	
Subtotal - In-Process Modifications			\$7,350,000	
Subtotal - Recommended Modifications			\$16,695,408	
Subtotal - Pending Changes/Modifications			\$6,860,000	
Total Modifications and Pending Changes			\$78,138,041	
Total Contract Value (including Approved, In-Process, Recommended and Pending Modifications)		\$150,501,743		
Board Approved CMA (C)				\$60,934,978
Requested CMA – Total Modifications and Pending Changes (\$76,183,041, minus Board Approved CMA, \$60,934,978)				\$17,203,063

**Metro ExpressLanes
Operations and Maintenance Contract
Modifications - Option Year 3**

Ad Hoc Congestion Reduction

November 18, 2015



Metro

Recommendation

- **Authorize Option Year 3 of 5 one-year options for \$3,072,000**
- **Authorize additional modifications:**
 - **O & M Support Costs of \$10,383,408**
 - **Additional Transponders in the amount of \$3,240,000**
 - **Contract Modification Authority for recommended pending and future expenditures totaling \$17,203,063**
- **Total contract value increases from \$118,991,335 to \$135,686,743**

O & M Contract and Work Performed

- **Atkinson is the prime contractor and was responsible for design and construction of the ExpressLanes**
- **Xerox is a subcontractor and is responsible for operations and maintenance of the tolling equipment on freeways and all customer service-related activities**
 - **Account Support (base contract and additional accounts)**
 - **Phone calls, correspondence, customer inquiries, mailing, postage and processing transactions**
 - **Transponder Distribution**
 - **Violation Processing**
 - **License plate image review, postage, mailing, phone calls and online inquiries**

Patent Infringement Lawsuit

- **August 2015 lawsuit filed by Transport Technologies LLC against Metro for patent infringement**
 - **Alleges system used to monitor occupancy on ExpressLanes (includes transponders, toll equipment and back office system) infringes its patent**
- **Atkinson refuses to indemnify Metro and defend us in the lawsuit stating that indemnification does not apply “to any Goods manufactured to the detailed design of Metro”**
- **Atkinson did agree to submit a pre-trial motion on Metro’s behalf seeking dismissal of the lawsuit**
- **Metro recently filed a third party complaint against Atkinson for breach of contract and requested that Atkinson indemnify Metro and pay all costs and expenses incurred in its defense of the patent infringement lawsuit**



Alternatives for Continued O & M

- Re-procurement of a new O & M contract is at least 18 -24 months away
- To ensure there is no interruption in ExpressLanes operation these are the following alternatives:
 - Continue with the Atkinson/Xerox contract until such time as a new contract can be issued
 - Award a sole source emergency contract for the remaining option years to Xerox
 - It is likely Xerox would want to re-negotiate rates and pricing if they were to assume the remainder of the contract