

# Southwest Light Rail Transit Construction: Metropolitan Council Oversight of Contractors

Program Evaluation  
June 28, 2023

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## Key Findings

- The Metropolitan Council's original civil construction contract did not provide sufficient mechanisms to enforce contract requirements.
- The Metropolitan Council has not adequately enforced several aspects of its key construction contracts.
- The Metropolitan Council does not have adequate documentation to support some project decisions.

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## Research Focus

### Change Order

Authorizes change in the work from what was initially defined in the contract, and often results in changes to the amount paid.

### Nonconformance Report

Documents the process to resolve a work product that does not conform to the design or meet contract requirements.

## Outline

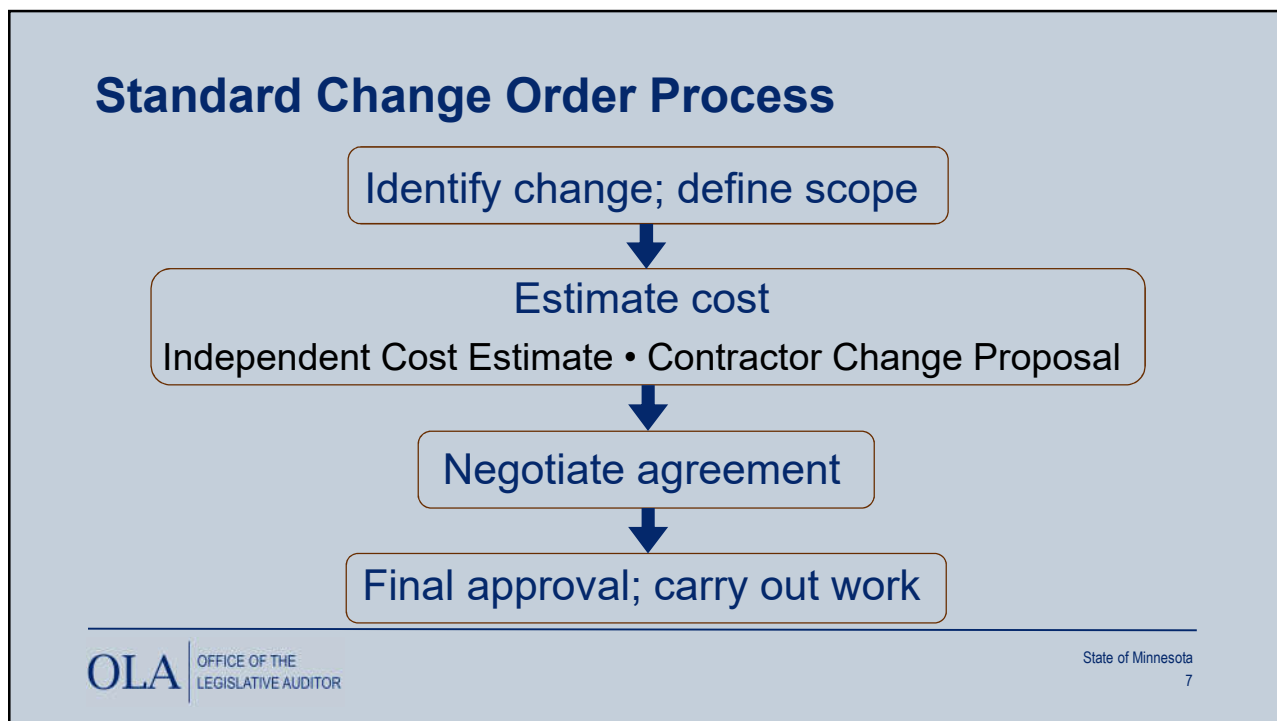
- Change Orders – Process
- Change Orders – Cost Estimates
- Nonconformance Reports
- Conclusion

## Outline

- **Change Orders – Process**
- Change Orders – Cost Estimates
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## Change Orders

- 658 change orders completed Mar. 2019 – Oct. 2022
  - 550 increased cost
  - 44 decreased cost
  - 64 no cost change
- Total cost \$219 million
- OLA examined 16 case studies in depth; reviewed many others



## Metropolitan Council Did Not Enforce Requirements

- Contractor required to submit Change Proposals within 30 days
- No contractor Change Proposals for 30 percent of change orders
- Council did not penalize the contractor

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## Contract Limitations

- Contract enabled Council to withhold or deduct payment to enforce provisions
- However, contract had few other enforcement tools
- Council reluctant to use withholding or deductions, particularly for minor issues
- Council said contract language did not allow withholding for contractor's failure to submit documents

## Metropolitan Council Did Not Follow Federal Recommendations

- Federal regulations recommend that all costs and delays be resolved
- Council "closed" many change orders with potential delays unresolved
- Council may not have told its approval bodies of unresolved delays

## 2022 Settlement Agreement

- Reorganized construction work to mitigate delays
- Council agreed to pay up to \$288 million
- Agreement included resolutions to outstanding change orders
  - Without contractor Change Proposals
  - With potential contractor delay claims
- Agreement also changed dispute resolution process

## Alternative Change Order Processes

- Contractor begins change work before change order negotiated
- At least 21 percent of all change orders
- At least \$50 million total

## Alternative Change Order Processes

- FTA recommends project owner set an upper limit on costs
- Council did not set upper limits
- Council process relies on contractor's reporting
- Council sometimes struggled to verify reported costs

## Recommendations

- ✓ The Metropolitan Council should:
  - Change contract language to improve enforcement tools
  - Enforce its contractors' contractual obligations
  - Inform approval bodies when changes include potential delay claims
  - Limit changes where costs are not approved in advance
  - Improve its cost verification procedures

## Outline

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## Independent Cost Estimates (ICEs)

- ICEs should assist Council to negotiate a fair price
- Council lost trust in its ICE consultant
- Council found the consultant's estimates frequently failed to account for project complexity



## Adjusted ICEs

- Council directed consultant to systematically increase its estimates in 70 percent of ICEs
  - Profit and overhead
  - Disadvantaged business enterprises (DBEs)—even when DBEs not used
  - Unused equipment
  - Unused DBE and equipment costs included when calculating contractor profit and overhead

## Negotiations with the Contractor

- Council often used adjusted ICEs as basis for its negotiation position
- Sometimes negotiation position was even higher than adjusted ICE

## “Fair and Reasonable” Determination

- Under FTA rules, Council must determine it pays only “fair and reasonable” amount
- Council based its “fair and reasonable” findings on adjusted ICEs or negotiation positions
- In the end, Council paid what the contractor initially requested about half the time

## Example: Retaining Wall Drainage

Document	Estimated Costs
Original ICE	\$ 5,294
Adjusted ICE	\$ 6,224
Contractor Proposal	\$14,219
Negotiation position	\$14,792
Final change cost	\$14,219

## Recommendations

- ✓ The Metropolitan Council should hold its cost estimating contractor accountable for delivering acceptable estimates.
- ✓ The Metropolitan Council should reform its processes for determining and justifying final change order costs.

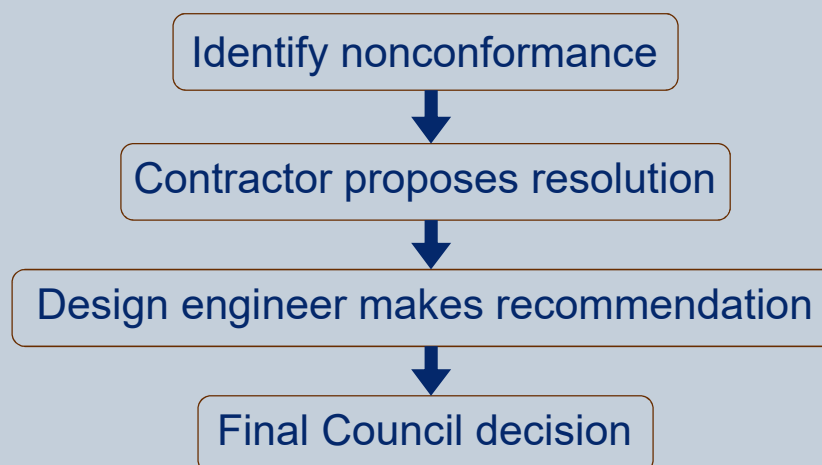
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## Nonconformance Reports

- 700 reports resolved through November 2022
  - Rework/repair 330
  - Keep in place 301
  - Remove/replace 21
  - Other/missing 48
- OLA examined 16 case studies in depth; reviewed many others

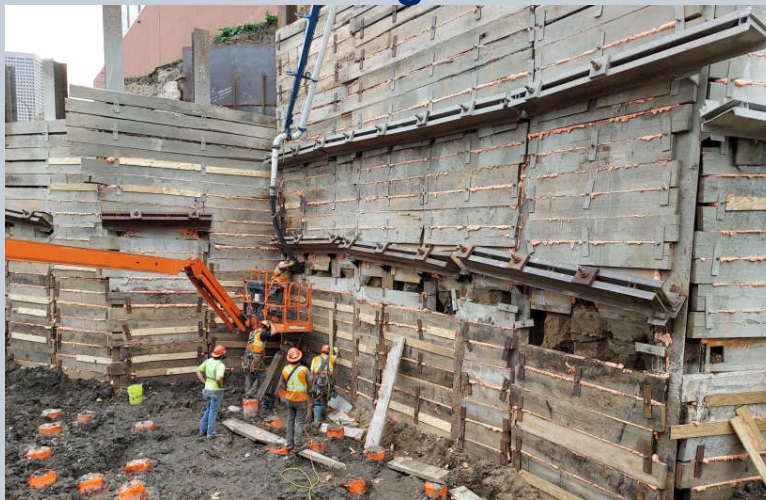
## Nonconformance Process



## Inadequate Documentation

- Difficult to determine from Council's files:
  - How and why decisions were reached
  - What costs were incurred
  - Who was responsible for paying costs
- Council plans to recover some costs at end of project
- Council's documentation may be inadequate

## Example: Currie Building



## Example: Currie Building

- Damage occurred while contractor digging adjacent to building
- Council hired consultants to assess damage and a construction firm to make repairs
- Council and contractor dispute cause of damage

## Example: Currie Building, continued

- Council has said it will pursue a deduction
- However, Council has not:
  - Analyzed the cause of the building settlement
  - Analyzed the contractor's activities
  - Tracked its costs for remediation and preventing further damage

## Recommendation

- ✓ The Metropolitan Council should improve its documentation practices regarding nonconforming work.

## Conclusion

- ✓ The Metropolitan Council should improve:
  - Contract language
  - Enforcement
  - Documentation

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