

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Capital Improvement Department

AGENDA DATE: April 4, 2017

CONTACT PERSON NAME AND PHONE NUMBER: Andrew H. Goh, P.E., City Engineer - 212-0065
Jay Banasiak, Director of Mass Transit (Sun Metro) – 212-3301

DISTRICT(S) AFFECTED: 8

CITY STRATEGIC GOAL #7:

Enhance and Sustain El Paso's Infrastructure Network

SUBJECT:

The City Manager is hereby authorized to execute and deliver the Temporary Right-of-Entry Agreement to AKJV (Abrams-Kiewit Joint Venture) in the Sun Metro Bus Maintenance facility (yard) located at 700 W. San Antonio Avenue.

BACKGROUND / DISCUSSION:

The City through its Sun Metro Mass Transit Board owns and operates the Sun Metro Bus Maintenance Facility located at 700 W. San Antonio Avenue ("Yard"). TXDOT has contracted with AKJV to design and construct a retaining wall along a portion of BNSF Railway Company property, as part of the Border Highway West Project.

AKJV will be required to enter onto, exit from, and pass through the Yard with numerous vehicles bearing equipment, construction workers, and construction materials of various kinds in order to access the Project.

This Temporary Right of Entry will allow AKJV the right of passage through the Yard, with the requirement to continuously coordinate with Sun Metro for access. AKJV will be responsible for any damages to the Yard, as per agreement.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

RESOLUTION

WHEREAS, the City of El Paso, ("City") and Abrams-Kiewit Joint Venture ("AKJV"), as the Design Build Contractor for the Texas Department of Transportation ("TXDOT") desire to enter into a Temporary Right of Entry Agreement pertaining to the Yard described below; and

WHEREAS, the City through its Sun Metro Mass Transit Board owns and operates the Sun Metro Bus Maintenance Facility located at 700 W. San Antonio Avenue (the "Yard"); and

WHEREAS, TXDOT has contracted with AKJV to design and construct improvements to the BNSF Railway Company trackage which passes immediately to the southwest, west, and northwest of the Yard (the "Project"); and,

WHEREAS, AKJV has informed the City that completion of the Project requires AKJV to enter onto, exit from, and pass through the Yard with numerous vehicles bearing equipment, construction workers, and construction materials of various kinds in order to access the Project; and,

WHEREAS, AKJV has informed the City that time is of the essence and that AKJV needs to have the Project open to the public by the fall of 2018 in order to meet a deadline imposed by AKJV's contract with TXDOT ; and,

WHEREAS, it is the desire of AKJV and City to enter into a Temporary Right of Entry to allow AKJV to have a right of passage through the Yard but only at times and in manners which do not interfere with the City's operations at the Yard, with the understanding that City and AKJV staff shall continuously coordinate the passage by AKJV through the Yard as circumstances change from time to time.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO, TEXAS:

That the City Manager is hereby authorized to execute and deliver the Temporary Right-of-Entry Agreement with AKJV.

ADOPTED THIS ____ DAY OF _____, 2017.

CITY OF EL PASO

Oscar Leaser, Mayor

Richarda Duffy Momsen, City Clerk

APPROVED AS TO FORM:



Marvin Foust
Senior Assistant City Attorney

APPROVED AS TO CONTENT:



Jay Banasiak, Director
Mass Transit Department

STATE OF TEXAS	}	
	}	TEMPORARY RIGHT-OF-ENTRY
COUNTY OF EL PASO	}	AGREEMENT

This Temporary Right-of-Entry Agreement is entered into between the City of El Paso, ("City") and Abrams-Kiewit Joint Venture ("AKJV"), as the Design Build Contractor for the Texas Department of Transportation ("TXDOT").

WHEREAS, the City through its Sun Metro Mass Transit Board owns and operates the Sun Metro Bus Maintenance Facility located at 700 W. San Antonio Avenue (the "Yard"); and

WHEREAS, TXDOT has contracted with AKJV to design and construct improvements to the BNSF Railway Company trackage which passes immediately to the southwest, west, and northwest of the Yard (the "Project"); and,

WHEREAS, AKJV has informed the City that completion of the Project requires AKJV to enter onto, exit from, and pass through the Yard with numerous vehicles bearing equipment, construction workers, and construction materials of various kinds in order to access the Project; and,

WHEREAS, AKJV has informed the City that time is of the essence and that AKJV needs to have the Project open to the public by the fall of 2018 in order to meet a deadline imposed by AKJV's contract with TXDOT ; and,

WHEREAS, it is the desire of AKJV and City to enter into a Temporary Right of Entry to allow AKJV to have a right of passage through the Yard but only at times and in manners which do not interfere with the City's operations at the Yard, with the understanding that City and AKJV staff shall continuously coordinate the passage by AKJV through the Yard as circumstances change from time to time.

NOW, THEREFORE, for the sum of \$1.00 and other good and valuable consideration, City agrees to provide a Temporary Right of Entry to AKJV and AKJV agrees to accept the Temporary Right of Entry under the following terms and conditions.

1. **PROPERTY.** The City hereby grants a Temporary Right of Entry to AKJV, its contractors, subcontractors, agents, and employees to enter onto portions of the Sun Metro Bus Maintenance Facility, El Paso, El Paso County, Texas, municipally known as 700 W. San Antonio Avenue, El Paso, Texas, being more particularly described by Exhibit "A" attached hereto and made a part hereof for all purposes, and hereinafter referred to as the "Yard."
2. **PURPOSE.** This Temporary Right of Entry is to allow AKJV to access the BNSF trackage which passes immediately to the southwest, west, and northwest of the Yard so it can perform its obligations under its contract with BNSF and to enter onto, exit from, and pass back and forth through the Yard with numerous vehicles bearing equipment, construction workers, and construction materials of various kinds in order to complete the

Project. AKJV agrees that all its actions in, around, and near the Yard will be in accordance with all applicable federal, state and local laws, rules and regulations and state of the art construction and safety practices and shall minimize damage to the Yard. Should any damage to City property occur, AKJV shall be fully responsible for the repair of such damage. In addition, AKJV agrees that in the event any federal or state regulatory agency assesses a civil penalty against the City for any violation of applicable regulations, and such civil penalty shall be imposed as a result of any act or failure to act on the part of AKJV, its agents, contractors, subcontractors, employees, invitees, or licensees, AKJV will immediately reimburse the City in the amount of the civil penalty assessed.

3. **DIRECTION BY CITY.** AKJV shall coordinate with the Director of Sun Metro (the "Director"), or his designee, in advance, so as to minimize interference with the City's use of the Yard. AKJV shall notify the Director, or his designee, in writing each week, at least forty-eight (48) hours in advance about its activities in the Yard for the following week. The notice shall include a description of the vehicles and materials to be brought through the Yard; a list of agents, contractors, subcontractors, employees, and invitees involved, and acknowledgement of the traffic patterns and security procedures to be followed by AKJV, its agents, contractors, subcontractors, employees, invitees, or licensees for which access to the Yard is required. AKJV's activities in the Yard shall be allowed 24 hours per day, Monday through Sunday. AKJV shall request and receive written approval in advance from the Director, or his designee, for any deviation to these set work periods.

AKJV shall adhere to and obey all directions, requirements, and procedures of City with regard to its presence and actions within the Yard, including without limitation traffic circulation and security requirements, and shall cause its agents, contractors, subcontractors, employees, invitees, and contractors to do the same. Failure to do so may result in the termination of this Temporary Right-of-Entry Agreement.

AKJV shall improve the ramp leading to the BNSF trackage at the southwest portion of the Yard in such a manner as to eliminate erosion and stabilize the Yard from and against loss of adjacent support. AKJV shall provide its plans for the ramp to the Director of Sun Metro and to Director of the Capital Improvements Department and shall coordinate its ramp work with Sun Metro. In addition, AKJV shall obtain all City permits required for its ramp work and shall incorporate into its plans all reasonable requests and comments from the City.

4. **INSURANCE.** AKJV agrees to be responsible and liable for any damages, including mechanic's and materialmen's liens, caused or arising out of or in connection with AKJV's use of the Property. AKJV and its agents, contractors, subcontractors, employees, invitees, or licensees, before entering upon the Property for any purpose shall obtain, and maintain the following insurance during the term of this Temporary Right-of-Entry Agreement:

- A. **Commercial General Liability.** AKJV, at its sole cost and expense shall provide and keep in force for the benefit of AKJV with the City as an additional insured,

comprehensive general liability insurance in an amount not less than One Million and no/100Dollars (\$1,000,000.00) for bodily injury to one person for each occurrence, Two Million and no/100 Dollars (\$2,000,000.00) for bodily injuries to more than one person arising out of each occurrence and Five Hundred Thousand and no/100 Dollars (\$500,000.00) for property damage arising out of each occurrence, or in amounts equal to the maximum liability for damages for municipalities for claims arising under governmental functions, provided for under the Texas Tort Claims Act, whichever is greater.

- B. Automobile Liability. AKJV, at its sole cost and expense, shall provide and keep in force for the benefit of AKJV with the City as an additional insured, automobile liability insurance covering allowed, non-owned, and hired vehicles used by AKJV for all operations with a minimum limit of One Million and no/100 Dollars (\$1,000,000.00) combined single limit per accident for bodily injury and property damage.

The policy or policies shall include a waiver of subrogation with respect to the City. Loading and unloading of any motor vehicle must be covered by endorsement to the automobile liability policy or policies.

All policies of insurance required herein shall be in a form and with a company or companies reasonable satisfactory to the City and shall name the City as an additional insured. Each such policy shall provide that such policy may not be materially changed (e.g., coverage limits reduced below the minimum specified in this Temporary Right-of-Entry Agreement) or otherwise materially altered, or canceled by the insurer during its term without first giving at least thirty (30) days written notice to the City. Policies or certificates of valid policies of insurance with required coverages shall be delivered to the City Manager prior to any entry by AKJV or AKJV's representative on the Property and all required coverages must be in full force and effect throughout the term of this Temporary Right-of-Entry Agreement. The provisions of this Section shall survive the term of this Temporary Right-of-Entry Agreement.

- C. Workers' Compensation Insurance. AKJV shall obtain, and maintain throughout the term of this Temporary Right-of-Entry Agreement, Workers' Compensation and Employers Liability coverage with limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act and minimum policy limits for employers liability of One Million and no/100 Dollars (\$1,000,000.00) bodily injury each accident, One Million and no/100 Dollars (\$1,000,000.00) bodily injury by disease policy limit, and One Million and no/100 Dollars (\$1,000,000.00) bodily injury by disease each employee. The following endorsements shall be added to the policy:

1. A Waiver of Subrogation in favor of the City; and
2. A thirty (30) day Notice of Cancellation/Material Change in favor of the City.

5. **INDEMNIFICATION.** AKJV AGREES TO INDEMNIFY AND HOLD THE CITY HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY, OR INDIRECTLY TO THE OPERATION, CONDUCT, OR MANAGEMENT OF ANY ACTIONS BY AKJV, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, INVITEES, OR LICENSEES ON THE PROPERTY, OR FROM ANY BREACH ON THE PART OF AKJV, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, INVITEES, OR LICENSEES OF ANY TERMS OF THIS TEMPORARY RIGHT-OF-ENTRY AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF AKJV, ITS AGENTS, CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, INVITEES, OR LICENSEES IN OR ABOUT THE PROPERTY INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE, OR IN PART, FROM THE NEGLIGENCE OF THE CITY. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST THE CITY BY REASON OF ANY SUCH CLAIM, AKJV, UPON NOTICE FROM THE CITY, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL ACCEPTABLE TO THE CITY. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE EXPIRATION OR EARLY TERMINATION OF THIS TEMPORARY RIGHT-OF-ENTRY.
6. **TERM.** The Temporary Right-of-Entry period shall terminate upon the completion by AKJV of its contract with BNSF or one hundred and twenty (120) days from the date this Temporary Right-of-Entry Agreement is executed, whichever comes first. This Temporary Right-of-Entry Agreement may be extended by written agreement at the discretion of the Director.
7. **TERMINATION.** City may terminate this Temporary Right-of-Entry Agreement at any time at the sole discretion of the Director by giving written notice thereof to AKJV.
8. **NOTICE.** All notices to be given under this Temporary Right-of-Entry Agreement shall be delivered by hand or given by certified or registered mail, receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

CITY: CITY OF EL PASO
Attn: City Manager
P.O. Box 1890
El Paso, Texas 79950

WITH COPY TO: SUN METRO
Attn: Director
10151 Montana Ave
El Paso, Texas 79925

AKJV: J. D. Abrams, L. P.
Attn: Amadeo Saenz, Jr. P.E,
111 Congress Avenue, Suite 2400
Austin, Texas 78701

Any notice so given shall be deemed properly delivered, given, served, or received on the date shown on the return receipt for delivery, rejection, or undeliverable. Any party may

change the address to which notices shall thereafter be given upon five (5) days prior written notice to the other in the manner set forth in this paragraph.

9. **TRANSFER.** AKJV shall not assign, sublet, sell, convey, or transfer all or any part of this Temporary Right-of-Entry Agreement in any way without the prior written consent of the City. Any attempt to transfer or assign without the prior written consent of the City shall be void and may result in the termination of this Temporary Right-of-Entry Agreement.
10. **TEXAS LAW.** This Temporary Right-of-Entry Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Texas. Any controversy arising out of or connected with this Temporary Right-of-Entry Agreement or the underlying work shall be instituted and maintained in the courts of the State of Texas, County of El Paso.
11. **RELATIONSHIP.** Nothing in this Temporary Right-of-Entry Agreement shall be construed as creating the relationship of employer and employee or agent between any of the parties named herein nor that of a joint adventure.
12. **NO REAL PROPERTY INTEREST.** This Temporary Right-of-Entry Agreement is granted solely for the identified use as referenced herein. The Parties expressly understand and agree that the granting of any related easement or other such rights shall require the execution of additional instruments and/or proper legal actions.
13. **AUTHORITY.** Each of the signatories hereto expressly warrants that he or she has been duly authorized to sign this Temporary Right-of-Entry Agreement for their principal and to bind their principal.

(ACKNOWLEDGEMENTS AND ACCEPTANCE ON FOLLOWING PAGES)

EXECUTED this the _____ day of _____, 2017.

ACCEPTANCE AND ACKNOWLEDGEMENT

City of El Paso

BY: _____

Tomás González
City Manager

APPROVED AS TO FORM:



Marvin Foust
Senior Assistant City Attorney

APPROVED AS TO CONTENT:



Jay Banasiak, Director
Sun Metro

ACKNOWLEDGMENT

STATE OF TEXAS }
COUNTY OF EL PASO }

This instrument was acknowledged before me this _____ of _____, 2017, by
Tomás González, as **City Manager** of the **City of El Paso**.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the _____ day of _____, 2016.

Notary Public in and for
The State of Texas
My Commission Expires:

ACCEPTANCE AND ACKNOWLEDGEMENT

The above Temporary Right of Entry Agreement, with all conditions thereof, is hereby accepted this 23rd day of March, 2017 by Joshua Witz as ROW Manager of Abrams-Kiewit Joint Venture.

[Signature]
Name: Joshua Witz
Title: ROW Manager

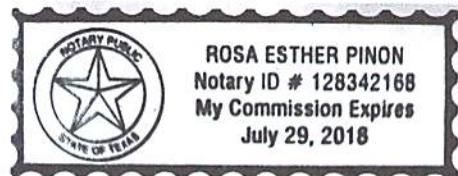
ACKNOWLEDGMENT

STATE OF TEXAS }
COUNTY OF EL PASO }

BEFORE ME, the undersigned, Notary Public, on this day personally appeared Joshua Witz, known to me to be the person whose name is subscribed to the foregoing instrument, as the Row Manager of Abrams-Kiewit Joint Venture and acknowledged to me that he executed said instrument for the purposes and consideration therein expressed on behalf of Abrams-Kiewit Joint Venture.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 23rd day of March, 2017.

Rosa E Pinon
Notary Public in and for
The State of Texas
My Commission Expires:



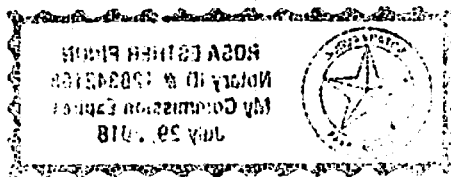


EXHIBIT "A"

RR RW-B Access

Access thru Sun Metro

Mundy Dr

W Franklin

AKJV Flagger (2ea)

Retaining wall to be constructed.

Sun Metro

RR RW-B

GATE:
Improvements needed to existing ramp, A-KJV to provide own lock

Google earth

© 2016 Google
© 2016 NEI

900 ft

