



**DEPARTMENT OF VETERANS AFFAIRS**  
PRINCIPAL EXECUTIVE DIRECTOR FOR ACQUISITION, LOGISTICS, AND CONSTRUCTION  
WASHINGTON DC 20420

**MAR 15 2013**

The Honorable Ed Perlmutter  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Perlmutter:

Thank you for your letter co-signed by the Colorado Congressional Delegation regarding the construction of the new Department of Veterans Affairs (VA) replacement medical center in Denver, Colorado. I assure you VA is committed to supporting our contractors and delivering a state-of-the art facility our Veterans deserve at best value and with full transparency.

On March 8, 2013, VA provided your office with the enclosed fact sheets summarizing the project as a whole and the issue of subcontractors' non-payment concerns (enclosures 1 and 2). The concerns outlined in your letter that were not addressed in the fact sheets regarding change orders, subcontractors' claims of non-payment, and the negotiation of a firm fixed price contract between VA and Kiewit-Turner (KT), VA's prime contractor, are addressed below.

Effective February 2013, VA implemented new procedures and added additional staff to resolve the existing backlog in the review of the KT's payment applications and proposed change orders. These improvements will continue through the remainder of the contract and will reduce the amount of time between KT's submissions and VA's reviews, and more importantly, ensure that VA is not a barrier to KT making timely payments to its subcontractors. I share your concerns regarding sub-contractor claims of non-payment and must note that once the payment applications or change orders are finalized, it does not necessarily mean that payment will be for the amount requested by KT. VA may only pay KT for substantiated claims even if the work has been performed. As VA has no direct contractual relationship with KT's subcontractors, KT is responsible to pay its subcontractors in accordance with their contracts.

In addition to the actions discussed in the fact sheets VA senior leadership will continue to monitor the timely processing of payments; VA will continue to educate its contractors about the change order and payment processes.

Regarding VA's contract with KT, VA is currently using an Integrated Design and construct (IDc) contract, which is a type of fixed price contract that allows the parties to agree on a firm target price with ceiling price while design and construction are on-going. The contract permits the parties to either reach a firm-fixed price or negotiate a

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final price at the completion of the project. The contract states "that in no event shall the total final price of these items exceed the ceiling price" unless the parties agree that there are changes causing the price to increase above the ceiling price. VA and KT reached agreement on a firm target price with a ceiling price of approximately \$604 million and \$610 million, respectively.

KT delivered a firm-fixed price proposal to VA on March 14, 2013. VA will evaluate the proposal and enter into negotiations with KT in an effort to arrive at a price mutually agreeable to both parties. These negotiations are a normal part of a Federal IDc construction contract and construction will continue on the project during the negotiations.

I have asked my staff to provide monthly project updates. If you have further questions, please have a staff member contact Robert Madden, Congressional Relations Officer, at (202) 461-6470 or at [Robert.Madden@va.gov](mailto:Robert.Madden@va.gov). A similar letter has been provided to the other co-signers.

Thank you for your interest and commitment to serving our Nation's Veterans and interest in the Denver replacement medical center.

Sincerely,



Glenn D. Haggstrom

Enclosures

# ENCLOSURE 1

## Department of Veterans Affairs Denver VA Medical Center Construction Monthly Project Fact Sheet March 2013

### Project Summary:

The Veterans Affairs, Office of Acquisition, Logistics and Construction, is managing the major construction project to replace the existing Denver VA Medical Center in the Eastern Colorado Health Care System (ECHCS) with a new medical center complex to be constructed at the Fitzsimons campus in Aurora, Colorado.

The new 182-bed medical center will accommodate the ECHCS inpatient tertiary care and ambulatory care functions. It includes the remodeling of the former University Physicians, Inc. building to be the Clinic Building South (CBS), which will house clinical and administrative functions and a DoD clinic at the top floor. The project will allow continued collaboration between the Denver VA Medical Center and the University of Colorado Hospital, which had relocated to the Fitzsimons campus.

### Project Scope:

The project includes a 182 patient beds and outpatient clinic, including a 30-bed community living center (CLC) with 4 blind rehab beds; and a 30-bed spinal cord injury/diagnostic unit; research; central energy plant; parking garages; off site utility and infrastructure improvements, and; support facilities located at a new site on the Fitzsimons campus. There are several renewable energy initiatives as part of the project including efforts for silver LEED certification.

### Project Phasing Status:

Phase	Status
1: Initial Demolition and Asbestos Abatement	Construction Completed
2Ai: Clinic Building South DoD Clinic (4 <sup>th</sup> Floor)	Construction Completed – the 4 <sup>th</sup> floor has been turned over to DoD for their clinic operations
2Aii: Clinic Building South VA Clinic (3 <sup>rd</sup> Floor)	Construction Completed – the 3 <sup>rd</sup> floor has been turned over for VA use
2Aiii: Clinic Building South VA Clinic (1 <sup>st</sup> )	Construction approximately 80% complete

Floor)	
2B,C, D: Main Campus construction, off site utilities, Community Living Center	Construction approximately 12% complete

**Funds:**

<u>Total Estimated Cost</u>	<u>Current Total Funds Appropriated</u>
\$800,000,000	\$800,000,000

**Project Highlights:**

Firm Fixed Price Proposal:

The general contractor, Kiewit-Turner (KT), is currently under a firm target price contract of \$604 million with a firm ceiling price of \$610 million. KT has requested an "equitable adjustment" to accommodate several subcontract bid packages that exceeded KT's corresponding budgeted bid packages. The contractor is due to submit a firm fixed price proposal on March 14, 2013. At that time the contractor and the government will enter into negotiations to arrive at a fair and reasonable price.

Small Business Enterprise (SBE) Concerns:

Several SBEs have notified VA that KT has not paid them for portions of work the SBEs have performed on the Denver medical facility. VA has neither privity of contract nor any direct contractual relationship with KT's subcontracted SBEs, and therefore, cannot intervene in any dispute between KT and its subcontractors. However, VA continues to review KT's payment applications and proposed change orders (PCOs) to ensure KT receives timely payment. (A separate fact sheet has been created to provide further details on this activity).

VA will continue to provide updates as information is available.

Office of Acquisition, Logistics and Construction  
March 2013

**Department of Veterans Affairs**

**Fact Sheet**

**Denver New Medical Facility - Small Business Enterprises Concerns**

**Summary:**

VA has contracted with Kiewit-Turner (KT) to construct the new VA Denver medical center for a total firm target price of \$604.1 million (not to exceed \$610 million) within a 40-month construction schedule. As part of the contract, KT must award a percentage of subcontracts to qualified small business enterprises (SBEs). Several SBEs have notified VA that KT has not paid them for portions of work the SBEs have performed on the Denver medical facility. KT has stated that it cannot pay the SBEs because VA has not paid them for approximately \$41 million of work performed to date.

As of December 31, 2012, construction was 15 percent complete and VA had paid KT \$91.2 million, or 15 percent of the firm target price. VA has neither privity of contract nor any direct contractual relationship with KT's subcontracted SBEs, and therefore, cannot intervene in any dispute between KT and its subcontractors. However, VA continues to review KT's payment applications and proposed change orders (PCOs) to ensure KT receives timely payment. The following fact sheet provides a current payment status update and VA's actions to support its contractors and the timely completion of this project.

**Payment Applications, Proposed Change Orders, and Contract Negotiations:**

The SBE non-payment claims are included in KT's unsubstantiated payment applications, PCOs, and high subcontract bid prices.

Payment Applications:

In accordance with VA's contract with KT and the Federal Acquisition Regulations, KT submits a payment application on a monthly basis to VA for work performed the previous month. VA verifies that the payment application represents actual work performed, as verified through surveillance of work and material in place. Over the past 22 months, KT has submitted payment applications total \$109.5 million. The difference of \$18.3 million between the actual payments and the payment requests consists of:

- \$16.6 million for work disallowed<sup>1</sup> by VA as unearned/not performed;

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<sup>1</sup> The following are the reasons VA would disallow a portion of the payment application:

- Payment claimed is for work not performed or not earned.

- \$ 0.4 million retained for uncorrected deficiencies in the finished renovation of two floors in the Clinic Building South;
- \$ 1.3 million for subcontract work, retained by VA at KT's request.

Proposed Change Orders:

VA has verified that KT has 57 PCOs open to date (totaling \$37.7) as follows:

- 45 PCOs totaling \$11.6 million which are in ongoing analysis and negotiations;
- 12 PCOs totaling \$26.1 million that are not allowed by the Federal Acquisition Regulation.

VA has increased its staff to ensure VA's timely review of these PCO's and reduction in backlog<sup>2</sup>.

Contract Negotiations:

KT has also requested an "equitable adjustment" to accommodate several subcontract bid packages that exceeded KT's corresponding budgeted bid packages. VA expects KT to submit a firm fixed price proposal on March 14, 2013, at which point, KT and VA will enter into negotiations to arrive at a fair and reasonable price. (VA will provide additional information as it come available regarding the status of the firm fixed price negotiations.)

**Legal Protections for Subcontractors on Federal Prime Contracts:**

As required by the Miller Act<sup>3</sup>, KT is required to certify it is paying subcontractors the proper portion of the payments received from the government. VA has received this certification for each pay application to date. Since VA does not have a contract with the SBEs, all options for payments require action by the general contractor.

General conditions payments are made over the course of the project based on the contract. As stated in Section 1.6 Network Analysis System of the contract, "it is the responsibility of the prime and the subcontractor to prorate general condition expenses

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- Payment claimed is not per agreed payment schedule for indirect costs, e.g., claiming General Conditions clause in one lump sum instead of distributing these over the life of the contract, per contract provision.

- Payment claimed is unsupported by required documentation.

<sup>2</sup> VA defines backlogged PCO's as those that have not been responded to for over 30 days.

<sup>3</sup> The Miller Act (ch. 642, Sec. 1-3, 49 stat. 793,794, codified as amended at 40 U.S.C. §§ 3131-3134 (formerly 40 U.S.C. §§ 270a-270d)) requires prime contractors on some government construction contracts to post bonds guarantying both the performance of their contractual duties and the payment of their subcontractors and material suppliers.

for the duration of the project into critical path method (CPM) cost loaded data.” General condition expenses include prorated overhead, profit, and general conditions on all work activities or events for the entire contract performance period. VA continues to make proper payments to the general contractor as required by the payment clause of the contract and based on site inspections of actual acceptable construction work in place – the percentage of work in place versus uncompleted work is determined by KT and VA.

On July 11, 2012, OMB issued Memorandum M-12-16, Providing Prompt Payment to Small Business Subcontractors, which directed that agencies should, to the full extent permitted by law, temporarily accelerate payments to federal prime contractors so that they may promptly pay their small business subcontractors. Accordingly, contracting officers shall insert clause 52.232-99 (DEVIATION) (August 2012) in all new solicitations and resultant contracts after the date of this deviation, to the maximum extent practicable; and, to the extent feasible, modify existing solicitations and contracts to include the clause 52.232-99 (DEVIATION). In accordance with OMB’s Memorandum, FAR 52.232-99 was incorporated into KT’s contract on January 30, 2013, via a modification.

**VA Activities in Support of Subcontractor Claims:**

1. During VA’s monthly pay application review meetings with KT, VA has strongly encouraged KT to include the respective subcontractors.
2. VA will work through the Small Business Administration to educate subcontractors of supporting documentation required for payments and changes.
3. VA has put new procedures and staff in place to resolve its backlogged review of PCOs and anticipates being up to date by April 2013.
4. VA will continue to process payment requests in a timely manner and to verify that the general contractor is paying subcontractors in accordance with the applicable clauses in the contract.

VA is committed to working with its contractors to deliver the state of the art facility to Veterans and their families deserve.

Office of Acquisition, Logistics and Construction  
March 2013