



City of Oskaloosa
City Council Special Meeting
Council Chambers
City Hall, 220 S. Market Street
Oskaloosa, IA 52577
Agenda

Call to Order and Roll Call - Thursday, June 1, 2023 5:00 P.M.

1. Roll Call

___ Mayor David Krutzfeldt, Council Members:

___ Almond, ___ Burnett, ___ Caligiuri, ___ Comfort, ___ Drost, ___ Hermsen, ___ Ossian

2. Approve Thursday, June 1, 2023, City Council Agenda

- 3. Consider holding a closed session under Iowa Code Section 21.5.1.c. to discuss strategy with legal counsel on a matter presently in litigation or in which litigation is imminent, where disclosure would be likely to prejudice or disadvantage the city's position.**

Acting pursuant to the requirements of the Iowa Public Information Board, I, Mayor David Krutzfeldt, would state and indicate that the closed session to follow is to discuss strategy in a pending matter with city attorney and legal counsel for the city of Oskaloosa, Iowa, acting pursuant to the contract existing between the parties.

4. Open Session Action

Consider a motion to take action on any item discussed in Closed Session after the Closed Session.

interim agreement concerning construction at the Oskaloosa Early Childhood YMCA.

Documents:

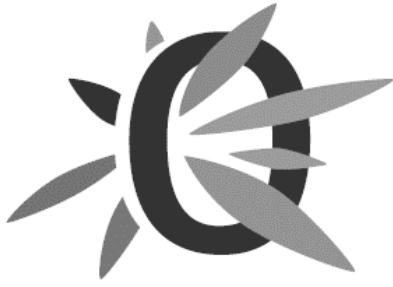
[COMMUNICATION 20230601 INTERIM AGREEMENT.DOCX](#)
[INTERIM AGREEMENT NAS AND CITY AND GRAPHITE FOR SIGNATURE.DOCX](#)

5.
Consider
approval
of

6. Adjourn

-

If you require special accommodations, please contact the city manager's office at least 24 hours prior to the meeting at 641.673.9431.



City Council Communication

Meeting Date: June 1, 2023

Requested By: City Manager

Item Title:

Consider approval of interim agreement concerning construction at the Oskaloosa Early Childhood YMCA.

Explanation:

Staff is proposing an interim agreement with surety to complete the dry side of the recreation center.

Budget Consideration:

Contract will be part of the project budget.

Attachments:

Agreement

Interim Agreement for Completion

THIS AGREEMENT is hereinafter referred to as the “Agreement”, is made and entered into by and between City of Oskaloosa, Iowa (the “Obligee” or “Oskaloosa” or “City”), Graphite Construction Group f/k/a Rochon Corporation of Iowa (“Principal” or “Graphite”), and SwissRe Corporate Solutions America Insurance Corporation f/k/a North American Specialty Insurance Company, (the “Surety” or “NASIC”), the day and year hereinafter set forth.

Recitals

WHEREAS, Oskaloosa is the owner of a public construction project known as the Oskaloosa Early Childhood Education and Recreation Center (the “Project”) located at 1521 Green Street, Oskaloosa, Iowa 52577 (the “Property”).

WHEREAS, in connection with the Project, Oskaloosa and Graphite, entered into AIA Document A101-2017 Standard Form of Agreement Between Owner and Contractor (the “A101 Agreement”), which incorporated and attached AIA Document A201-2017-General Conditions of the Contract for Construction (the “General Conditions;” collectively with the “A101 Agreement,” the “Contract”).

WHEREAS, as required by Iowa Code Chapter 573 and in connection with the Project and the Contract, NASIC issued a Chapter 573 Performance Bond No. 2302334 dated March 17, 2020 in the amount of \$27,355,200.00 (the “Performance Bond”) and a Chapter 573 Payment Bond No. 2302334 dated March 17, 2020 in the amount of \$27,355,200.00 (the “Payment Bond”) with Graphite as the Principal and Oskaloosa as the Obligee.

WHEREAS, certain issues and disputes arose during the construction of the Project between Oskaloosa and Graphite regarding Graphite’s alleged performance of its obligations under the Contract.

WHEREAS, the City issued a letter, through its attorneys, dated December 8, 2022, to Graphite and NASIC entitled “Notice to Surety and Request to Assume Contractor’s Obligation.”

WHEREAS, Graphite issued a letter, through its attorneys, dated December 15, 2022, to the City entitled “Graphite’s Initial Response to December 8, 2022 Notice to Surety and Request to Assume Contractor’s Obligations.”

WHEREAS, the City issued a letter dated December 27, 2022, to Graphite entitled “The City’s Response to Graphite’s December 15, 2022 Letter Regarding the YMCA Recreation Center Wing.”

WHEREAS, the City issued a letter, through its attorneys, dated December 28, 2022, to Graphite responding to the December 15, 2022 Graphite letter.

WHEREAS, the City issued an untitled letter, through its attorneys, dated January 9, 2023, to Graphite.

WHEREAS, Graphite issued a letter, through its attorneys, dated January 11, 2023, to the City titled “Graphite’s Notice of City’s and SVPA’s Material Breaches and Repudiation of the Contract, and Notice of Discharge of Graphite’s Obligations to Perform.”

WHEREAS, the City issued a letter, through its attorneys, dated January 13, 2023, to Graphite and NASIC, titled “Notice of Owner’s Intent to Consider Declaring a Contractor Default.”

WHEREAS, Savage-Ver Ploeg & Associates, Inc. (“SVPA” or the “Project Architect”) issued a letter to the City, dated January 23, 2023, titled “Graphite Construction Group Termination For Cause.”

WHEREAS, on January 25, 2023, the City passed a resolution entitled “Resolution Declaring Graphite Construction in Default on the Oskaloosa Early Childhood Education and Recreation Center Project.”

WHEREAS, the City issued a letter, through its attorneys, dated January 26, 2023, to Graphite and NASIC, titled Declaration of Contractor Default and Notice to Cure.

WHEREAS, the City issued a letter, through its attorneys, dated February 3, 2023, to Graphite and NASIC, titled “Notice of Termination,” terminating the City’s contract with Graphite effective February 3, 2023 (the “Termination”). In that letter, the City made claim to NASIC under the Performance Bond (the “Performance Bond Claim”).

WHEREAS, under a reservation of rights, claims, and defenses by all parties involved, the parties have agreed to work together to mitigate damages and allow Graphite and two of its subcontractors to complete the Project work identified in Exhibit A, and receive Contract funds from Oskaloosa as set forth in Paragraph 3, while all rights, claims, and defenses are preserved and not affected.

WHEREAS, as part of the parties working together to mitigate damages and allow Project work – limited in scope by Paragraph 2.2 below -- to be completed, Graphite and/or Surety has requested, or may request, information, recommendations, or opinions from the City or its Project Architect SVPA and/or its subconsultants related to the scope of work described in

Paragraph 2.2 below. The City, Surety and Graphite reserve all rights as to any and all work on the project that is beyond the limited scope of Paragraph 2.2 below.

Terms of Agreement

NOW, THEREFORE, for and in consideration of the mutual covenants, promises, releases, assignments and payments recited herein and intending to be fully and legally bound hereby, the parties agree as follows:

1. Recitals. The above recitals are incorporated herein by reference.
2. Remaining Work.
 - 2.1 The City of Oskaloosa will allow Graphite and/or its subcontractors to enter the site and arrange for and complete certain remaining work on the Project;
 - 2.2 The parties agree that **Exhibit A** represents the total scope of work that may be required under this Agreement. Graphite and its subcontractors will have until June 21, 2023 to complete the work identified in Exhibit A. The parties will separately negotiate the terms of a second interim agreement for completion of the building exterior, the site work, and the playground;
 - 2.3 The parties agree that their respective efforts under this Agreement are an attempt to mitigate damages while reserving each party's various rights;
3. Contract Funds
 - 3.1 Subject to the retainage requirements of Iowa Code Chapter 573, upon completion of the work on Exhibit A, Oskaloosa shall tender payment directly to the Surety for the following amounts:
 - 3.1.1 \$108,988.98 for the electrical work identified in Exhibit A performed by Van Maanen. Graphite and the Surety dispute the amount Van Maanen is currently claiming. Graphite may hire another subcontractor to complete Van Maanen's work.
 - 3.1.2 \$64,452.29 for mechanical work identified in Exhibit A. Graphite and the Surety dispute the amount Northwest Mechanical is currently claiming. Graphite has hired AMC Mechanical, Inc., to complete Northwest Mechanical's work.
 - 3.2 Oskaloosa shall receive credit under the Contract for the payments made to the Surety pursuant to this Agreement.

4. Reservation of Rights

4.1 Except for completion of the work set forth on Exhibit A and payments and credits as set forth in this Agreement, Oskaloosa, Graphite, and NASIC agree that all of their respective rights, claims, and defenses are not affected, waived, or released.

5. Miscellaneous

The parties and their signatories hereto warrant that each have the power and authority to execute this Agreement.

5.1 The provisions of the Agreement shall be applied and interpreted in a manner consistent with one another so as to carry out the purpose and intent of the parties, but if for any reason any provision is unenforceable or invalid, such provision shall be deemed severed from this Agreement and the remaining provisions shall be carried out with the same force and effect as if the severed portion had not been a part of this Agreement.

5.2 This Agreement shall be effective from the date that all of the parties identified below have executed an original or counterpart of this Agreement. This Agreement may be executed in multiple counterparts, each of which, when assembled to include an original signature for each party contemplated to sign this Agreement, will constitute a complete and fully executed original. All such fully executed original counterparts will collectively constitute a single agreement. Signature of this Agreement may be accomplished by electronic signature and delivery of this Agreement may be accomplished by email. If email delivery is utilized, the original document shall be promptly executed and delivered, if requested.

5.3 This Agreement is solely for the benefit of the parties. The parties do not intend by any provision of this Agreement to create any rights in or increase the rights of any third-party beneficiaries, nor to confer any benefit upon or enforceable rights under this Agreement or otherwise upon anyone other than the parties. Specifically, the parties acknowledge that nothing in this Agreement shall extend or increase the rights of any third-party claimants or the liabilities or obligations of the Surety under the payment bond or the performance bond.

5.4 This Agreement shall inure to the benefit of and be binding upon the parties hereto and all their successors and assigns.

- 5.5 This agreement shall be governed by, enforced under, and constructed in accordance with the laws of the State of Iowa.
- 5.6 In the event that one or more provisions of this Agreement shall be declared to be invalid, illegal, or unenforceable in any respect, unless such invalidity, illegality, or unenforceability shall be tantamount to a failure of consideration, the validity, legality, and unenforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.
- 5.7 It is understood and agreed by the parties that this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.
- 5.8 The parties and the signatories hereto warrant that each has the power and authority to execute this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed in counter parts, on this
19th day of May 2023.

SwissRe Corporate Solutions America
Insurance Corporation f/k/a North American
Specialty Insurance Company

By: _____

Its: _____

Witness or Notary:

**Graphite Construction Group
(f/k/a Rochon Corporation of Iowa)**

By: _____

Its: _____

Witness or Notary:

City of Oskaloosa, Iowa

By: _____

Its: _____

Witness or Notary: