Wednesday, July 31, 2024
3:00 PM

City Council
Special Called Meeting Agenda

Council Chambers
200 Forrest Street

Call to Order and declaration of a special called meeting

Policy Item

1. **2024-364** Approve Takeover Agreement between City of Hattiesburg and Fidelity and Deposit Company of Maryland in connection with Performance Bond No. 939864 for the Hall Avenue Roundabout Project at Bay Street, Arledge Street and James Street (FBLD-8769-00(001) LPA/108639-801000) to complete the project after the failure to perform by Colony Construction.

Meeting Recess

Memorandum

To: Mayor Toby Barker and Members of City Council

From:

cc:

Date: Wednesday, July 31, 2024

Re: Approve Takeover Agreement between City of Hattiesburg and Fidelity and Deposit Company of Maryland in connection with Performance Bond No. 939864 for the Hall Avenue Roundabout Project at Bay Street, Arledge Street and James Street (FBLD-8769-00(001) LPA/108639-801000) to complete the project after the failure to perform by Colony Construction.
File Number: 2024-364
Minute Book #

Summary

Recommendation Statement

Please place this on the July 31, 2024 City Council meeting for consideration.

TAKEOVER AGREEMENT

This Takeover Agreement ("Takeover Agreement") is made and entered into this 30th day July, 2024 ("Effective Date") by and between Fidelity and Deposit Company of Maryland ("Surety") and City of Hattiesburg, Mississippi ("Obligee").

WHEREAS, Colony Construction, LLC ("Colony") entered into a contract ("Contract") with Obligee to construct Hall Avenue Roundabout Project at Bay Street/Aldridge Street/James Street ("Project") for the amount of $2,372,393.00;

WHEREAS, in connection with the Contract, Surety executed Performance Bond No. 9398964 ("Bond"), in the penal sum of $2,372,393.00, naming Colony as the principal and the City of Hattiesburg, Mississippi as the obligee; and

WHEREAS, Colony, Surety, and Obligee entered into Supplemental Agreement No. 1 dated August 9, 2023, which provided for polished aggregate sidewalk which increased the total contract to $2,413,772.00; and

WHEREAS, Colony, Surety, and Obligee entered into Supplemental Agreement No. 2 dated August 23, 2023, which provided for forty-five (45) additional days to the contract; and

WHEREAS, disputes relating to the Project arose between Colony and the Obligee regarding failure to perform by Colony and

WHEREAS, on March 8, 2024, Obligee notified Principal, with a copy to Surety, of its Intent to Terminate the Contract if certain corrective actions were not taken within fifteen (15) days; and

WHEREAS, on April 26, 2024, Obligee notified Principal, with a copy to Surety, that it was in default and that the Contract was terminated, and demand was made on the Surety to complete the Project under the terms and conditions of the terminated Contract; and

WHEREAS, Obligee and Surety by this Agreement declare a default and termination of Principal and Obligee calls on Surety to fulfill its Bond obligations to complete the Project in accordance with this Agreement;

WHEREAS, subject to the terms and conditions of the Bond and this Agreement, the Surety intends to complete the Project and Obligee and the Surety agree to reserve all rights, claims, defenses and/or obligations whether in contract or at law by, between and/or against each other relating to the Project, Contract and/or Bond;

WHEREAS, Surety has investigated the Obligee's claim against the Bond and has arranged for performance of the remaining work to complete the Project (the "Completion Work");

WHEREAS, in accordance with the Bond Surety selected J.W. Chain Contractors, LLC ("Completion Contractor") to perform all Completion Work.

NOW THEREFORE, in consideration of the bilateral obligations expressed herein the obligations set forth in the Contract, and the Bond for the cause set forth in the recitals above, the parties do hereby agree and bind themselves as follows:

1. Contract Balance

(a) As of the date of execution of this Takeover Agreement, the Contract price is $2,413,772.00, with total amounts remaining to be paid under the Contract of $1,397,630.12 (the "Contract Balance").

(b) The Obligee confirms that the Contract Balance has been obligated to Surety for the Completion Work and that the Contract Balance will be paid in accordance with the Contract for the Completion of the Work. However, the parties agree to reserve all rights, claims, and/or defenses relating to the Contract Balance and the alleged Liquidated Damages.

2. Performance of the Contract

(a) Surety, as completing surety, will procure the completion of the Completion Work. All of the terms and conditions, provisions, clauses, plans and specifications of the Contract are hereby incorporated into this Takeover Agreement. In the event of a conflict between the Contract and this Takeover Agreement, the provisions of this Takeover Agreement shall prevail.

3. Surety's Representative

(a) Surety has the right—but not the obligation— to authorize an individual as its "Authorized Representative" solely for the purposes set forth in this paragraph. The Authorized Representative may represent Surety in dealing with the Obligee, Obligee's design professional(s) and/or the Completion Contractor on day-to-day construction issues with respect to the Project. The Authorized Representative shall not have the authority to negotiate or sign change orders or agreements for extra work (work that is different from, in excess of, or beyond the scope of the work required by the Contract) requested or required by the Obligee. The Authorized Representative has no authority to negotiate deductive credits, back charges, or net deductions from the Contract without Surety's prior written approval. The Authorized Representative has no authority to modify the terms or conditions of the Contract, the Bond, or this Takeover Agreement. It is understood and agreed that any completing contractor or delegated representative of Surety is not in privity of contract with the Obligee and shall have no rights under this Takeover Agreement or the Contract.

(b) David Bresel shall be authorized to execute change orders to the Contract on behalf of the Surety.

4. Satisfaction of Surety's Obligations under Bond

(a) The liability of Surety under this Takeover Agreement is strictly limited to the penal sum of the Bond. Neither Surety's performance under this Takeover Agreement nor any terms of this Takeover Agreement shall be construed to extend the obligation of Surety beyond the terms of its

Bond, and nothing in this Takeover Agreement constitutes a waiver of the penal sum or an increase in the liability of Surety under the Bond.

(b) The parties acknowledge that Surety's covenants and obligations of performance under this Takeover Agreement are undertaken pursuant to the Bond, and that all payments made by Surety pursuant to this Takeover Agreement, including payments made to any completing contractor, Authorized Representative, or for performance of the Contract will be credited against and reduce the penal sum of the Bond.

(c) This Takeover Agreement does not extend, amend, revise, or alter rights and liabilities under the Payment Bond furnished by Surety in connection with the Subcontracts.

(d) Obligee agrees that, upon final acceptance of the Completion Work and in consideration of performance of the Completion Work, Obligee and any of its past, present and future, direct and indirect members, partners, subsidiaries, affiliates, joint ventures, employees, officers, directors, shareholders, principals, agents, attorneys, representatives, predecessors, successors, and/or assigns hereby releases, remises, acquits, and discharges, completely, unconditionally, irrevocably, and forever, Surety, Colony and any and all of their past and present subsidiaries, affiliates, employees, officers, directors, shareholders, principals, parents, agents, attorneys, representatives, predecessors, successors, assigns, and/or insurers, each of them jointly and severally, of and from any and all claims, demands, actions, causes of action, appeals, suits, and liabilities of every kind, character, and description, direct and consequential, legal, equitable, and otherwise, known and unknown, which Obligee may now have, may have had, or prospective claims that could be asserted at any time in the future arising out of or relating in any way to the Project, Contract, and/or Bond.

5. Reservation of Rights

(a) Surety expressly reserves all of Colony's prior rights, and subrogation rights under the Contract, at law, or in equity, as well as Surety's own rights including, but not limited to, those rights and remedies that accrued prior to the Obligee's claim against the Bond. Further, any rights and remedies that may accrue during the Completion Work are expressly reserved by Surety. No waiver of such rights is agreed to or implied or intended, regardless of any provisions of this Takeover Agreement to the contrary.

(b) The parties recognize that Surety does not waive any of Colony's rights or defenses related to the Contract or the Project.

(c) Nothing herein shall be construed as a waiver of any of the Obligee's or Surety's rights and defenses, with the exception of those expressly waived herein.

6. General Provisions

(a) Nothing in this Takeover Agreement shall be construed as creating any rights for third parties, and nothing in this Takeover Agreement shall be construed as a waiver of any indemnity rights of Surety against Colony or any rights granted to the Surety under any indemnity agreement executed by Colony.

(b) This Takeover Agreement, including all incorporated documents, terms and conditions, provisions, clauses, plans, and specifications, and the Bond constitute the whole of the understanding, discussions, and agreements by and between the parties hereto and shall bind the parties and their successors, and shall not be modified except by a written document duly executed by the parties or their successors.

(c) Each of the parties shall be responsible for and shall pay all of its own administrative expenses incurred in connection with the negotiation, preparation, and finalization of this Takeover Agreement, including all legal fees and other expenses incident to the negotiation, preparation, and execution of this Takeover Agreement.

(d) The parties shall execute such documents and other papers and take such further actions as may be reasonably required to carry out the provisions of this Takeover Agreement.

(e) The recitals to this Takeover Agreement are incorporated into this Takeover Agreement and form a part of the terms and conditions of this Takeover Agreement. The provisions of this Takeover Agreement are contractual and are not mere recitals. The parties participated equally in the drafting and reparation of this Takeover Agreement, and this Takeover Agreement shall not be construed in favor of or against any party on the basis that such party did or did not draft this Takeover Agreement.

(f) This Takeover Agreement has been duly executed and delivered by the parties and constitutes a legal, valid, and binding obligation of the parties. Each person executing this Takeover Agreement represents and warrants that they have full right on behalf of a party to execute this Takeover Agreement.

(g) This Takeover Agreement and the respective rights and obligations of the parties shall inure to the benefit and be bending upon the successors and assigns of the parties.

(h) This Takeover Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original.

(i) All notices required under any of the provisions of this Takeover Agreement shall be mailed by registered or certified mail, return receipt requested, to:

Owner: City of Hattiesburg, Mississippi
Attn: Ann Jones, CAO
200 Forrest Street
Hattiesburg, MS 39401
annjones@hattiesburgms.com

with a copy to:

Moran M. Pope, III
Pope & Pope, P.A.
Post Office Box 17527
Hattiesburg, MS 39404-7527
randypope@popelaw.com

Surety: David Bresel
AVP – Team Lead
Surety and Financial Claims
Fidelity and Deposit Company of Maryland
Post Office Box 968038
Schaumburg, Illinois 60196
david.bresel@zurichna.com

with a copy to:

Craig N. Mangum
Krebs Farley, PLLC
400 Poydras Street, Suite 2500
New Orleans, Louisiana 70130
cmangum@krebsfarley.com

(j) Obligee and the Surety agree to meet within 30 days of the completion of the Project to negotiate, in good faith, any claims by or between the Parties related to the Contract, Bond and/or Takeover Agreement, including but not limited to entitlement to the Contract Balance and Liquidated Damages. If the Parties are unable to amicably resolve the claims by or between them relating to the Contract, Bond and/or Takeover Agreement, those remaining claims may be instituted in a court of competent jurisdiction.

(k) This Takeover Agreement shall be governed by the laws of the State of Mississippi.

IN WITNESS WHEREOF, the parties hereto have executed this agreement.

City of Hattiesburg, Mississippi

By: ____________________________

Name: __________________________

Title: ___________________________

Fidelity and Deposit Company of Maryland

By: ______________________________

Name: David Bresel

Title: AVP, Team Lead, Surety & Financial Claims