

CITY CLERK DEPT.
2018 SEP 27 AM 10:31

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

DEPARTMENT: Capital Improvement

AGENDA DATE: October 4, 2018

CONTACT PERSON/PHONE: Sam Rodriguez, City Engineer, (915) 212-1845

DISTRICT(S) AFFECTED: 1

STRATEGIC GOAL: No. 7: Enhance and Sustain El Paso's Infrastructure Network

SUBJECT:

Discussion and action that the City Manager is authorized to sign the Takeover Agreement between the City and Endurance American Insurance Company("Surety"), for the Surety to complete the Robinson Street and Drainage Improvements 2016-753 project services through the Completion Contractor, Saab Site Contractors, LP., pursuant to the terms of Contract No. 2016-753 and the responsibilities of the Performance Bond.

BACKGROUND / DISCUSSION:

The project includes the reconstruction of Robinson Road from north of Piedmont to Rim Road. The purpose of the project is to provide street and drainage improvements. The project improvements include the construction of continuously reinforced concrete pavement, sidewalks, curb, drainage flumes, rock filled gabion drainage baskets, illumination, hike/bike trail, landscaping and irrigation.

TERMINATION/TAKEOVER AGREEMENT SUMMARY:

Saab Site Contractors, LP was awarded the project on June 14, 2016. The construction timeframe for the project was three hundred (300) consecutive calendar days per the contract. As of August 29, 2018, the contract time elapsed is 745 days with 356 days beyond the substantial completion date (September 20, 2017), resulting in assessment of liquidated damages. A total of 119 days have been credited to the contract per approved change orders. On September 4, 2018 City Council terminated the construction contract with Saab Site Contractors, LP. The proposed action is to sign the takeover agreement with Endurance American Insurance Company for the construction completion of Robinson Avenue.

COUNCIL REPRESENTATIVE BRIEFING:

Was a briefing provided? ☐ Yes or ☒ Not Applicable (Routine)
If yes, select the applicable districts.

- ☐ District 1
- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☐ District 5
- ☐ District 6
- ☐ District 7
- ☐ District 8

☐ All Districts

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PRIOR COUNCIL ACTION:

September 4, 2018 – City Council terminated the contract with Saab Site Contractors, LP.

AMOUNT AND SOURCE OF FUNDING:

190-4740-28900-580270- PCP13ST003Y2C – Certificates of Obligation - \$1,645,814.00

PSB Water Funds - \$ 420,600.00

PSB Sewer Funds - \$ 99,407.00

PSB Storm Water Funds - \$ 118,730.00

BOARD / COMMISSION ACTION:

N/A

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

for
DEPARTMENT HEAD:

Michael J. Vonaset

Michael J. Vonaset

RESOLUTION

WHEREAS, on June 14, 2016 the City of El Paso ("City") contracted Saab Site Contractors, LP ("Contractor") to complete the construction related to the Robinson Street and Drainage Improvements 2016-753 project ("Project"); and

WHEREAS, Contractor provided a Performance Bond through Endurance American Insurance Company ("Surety") in favor of the City to secure the performance obligations of Contractor; and

WHEREAS, on or about September 5, 2018 provided Surety Contractor a Notice of Termination for Default of the Project to Contractor; and

WHEREAS, the City contacted the Surety to secure the performance of Contract for the completion of the Contract pursuant to the obligations of the Performance Bond; and

WHEREAS, the Surety agrees to undertake the completion of Contract No. 2016-753, by subcontracting the performance of the work under the Contract to Saab Site Contractors, LP. ("Completion Contractor"); and

WHEREAS, the Surety is willing to undertake the completion of the Contract in accordance with the terms of the Contract, Performance Bond and the proposed Takeover Agreement; and

WHEREAS, the City reserves the right to its claim for liquidated damages under the contract; and

WHEREAS, the City and Surety desires to enter into a Takeover Agreement for the Surety to undertake the completion of Contract No. 2016-753 by subcontracting the Completion Contractor which will perform for the remaining term of the contract.

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

The City Manager is authorized to sign the Takeover Agreement between the City and Endurance American Insurance Company ("Surety"), for the Surety to complete the Robinson Street and Drainage Improvements 2016-753 project services through the Completion Contractor, Saab Site Contractors, LP., pursuant to the terms of Contract No. 2016-753 and the responsibilities of the Performance Bond; and that upon review of the City Attorney, the City Engineer may without further authorization from City Council approve changes which are necessary for proper execution of the work under this Agreement which are necessary for proper execution of the work, which are in accordance with applicable law, including approving any replacement of the Completion Contractor by the Surety if necessary.

(Signatures Begin on the Following Page)

ADOPTED THIS _____ DAY OF _____ 2018.

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THE CITY OF EL PASO:

Dee Margo
Mayor

ATTEST:

Laura D. Prine
City Clerk

APPROVED AS TO FORM:



Sol M. Cortez
Senior Assistant City Attorney

APPROVED AS TO CONTENT:

Samuel Rodriguez, P.E., City Engineer
Capital Improvement Department

TAKEOVER AGREEMENT

This Takeover Agreement (the "Agreement") is made and entered into this ____ day of October, 2016, by and between Endurance American Insurance Company ("Surety") and The City of El Paso, Texas ("Obligee").

RECITALS:

WHEREAS, Obligee and Saab Site Contractors, LP ("Former Contractor") entered into a contract, in the amount of \$2,284,551.00, which included, *inter alia*, all General, Supplementary and Special Conditions, Provisions, Drawings, Specifications, Forms, Addenda and Documents (the "Original Contract") for the Former Contractor to furnish all labor and material and to perform all work in connection with the project known as "Robinson Street and Drainage Improvements, Contract No. 2016-753" (the "Project") in accordance with the terms and provisions of said Original Contract; and,

WHEREAS, on or about June 30, 2016, Surety, as surety, on behalf of Former Contractor, as principal, issued a Performance Bond ("Performance Bond") and Payment Bond ("Payment Bond"), each bearing bond no. EAIC115170001 (collectively, the "Bonds"), and each with a penal sum of \$2,284,551.00, in favor of Obligee, as obligee, in connection with the Original Contract; and,

WHEREAS, thereafter, Obligee issued a Notice of Termination to Former Contractor under the Original Contract (the "Notice of Termination"); and,

WHEREAS, Obligee made demand upon Surety under the Performance Bond to, among other things, complete all work under the Original Contract in accordance with Surety's obligations under the Performance Bond; and,

WHEREAS, Surety timely responded to Obligee's demand; and,

WHEREAS, in satisfaction of its obligations under the Performance Bond, the Surety has agreed to arrange for the completion of the Original Contract in response to the Obligee's demand under the Performance Bond, subject to the terms of this Agreement.

NOW, THEREFORE, in consideration of the agreements and undertakings hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy therefor being hereby acknowledged, the Obligee and the Surety agree as follows:

AGREEMENTS:

1. **Recitals.** The recitals set forth above are incorporated herein.
2. **Takeover and Performance.** The Surety hereby undertakes to cause the performance of each and every one of the terms, covenants and conditions of the Original Contract, including all modifications thereto, and agrees to be bound by the Original Contract, except as modified by this Agreement. In the event of any inconsistency between the Original Contract and this Agreement, this Agreement shall govern. Obligee acknowledges that the Surety, by its execution of this Agreement, is acting in its capacity as the Surety for Former Contractor in making arrangements for the performance and completion of the Original Contract, and not as a completing contractor, and that the Surety is not assuming any obligations or liabilities beyond those set forth in the Bonds and this Agreement. As to the completion of the Original Contract, except as otherwise provided in this Agreement, the Surety shall have all rights, title, and interest and shall be subject to all those duties, responsibilities and obligations of Former Contractor in and to the Original Contract in all respects as if the Surety were the original party to the Original Contract. The term "Contractor" as used in the Original Contract shall be deemed, after the effective date of this Agreement, to refer to the Surety rather than to Former Contractor.

3. Appointment of Completion Contractor. The Obligor acknowledges that Surety will subcontract the performance of the work under the Original Contract to Former Contractor (the "Completion Contractor") and Former Contractor's subcontractors and vendors as selected by Surety. Surety is responsible for procuring all required insurance coverage and intends to satisfy this obligation through its Completion Contractor with Surety and the Obligor being named as additional insureds under the policy and policies of insurance. While insurance coverage may be provided by Former Contractor, it remains Surety's direct obligation to the Obligor to provide the insurances required by this paragraph. Completion Contractor shall also be required to participate in a weekly conference call with Obligor and Surety's consultant, Aacon, Inc. ("Consultant"), regarding the status of the Project.

4. Contract Balance. Obligor certifies and agrees that as of the date of this Agreement, the remaining balance of the Original Contract is as follows:

A	Original Subcontract Amount	\$	2,284,551.00
B	Change Orders	\$	255,187.91
C	<u>Credits</u>	\$	0.00
D	Adjusted Subcontract Amount	\$	2,539,738.91
E	Amount Completed to Date	\$	2,299,235.01
F	Amount Paid to Former Contractor to Date	\$	2,184,273.25
G	Retainage Held	\$	114,961.75
H	Balance to Complete (D-E)	\$	255,890.86
I	Total Remaining Balance of the Original Contract (D-F)	\$	355,465.66

(a) The "Contract Balance" shall be hereinafter defined as the sum of \$355,465.66. The Contract Balance shall be increased or decreased, as appropriate, as a result of any substitutions or changes in estimated quantities, or change orders to the Original Contract hereinafter submitted for extra work (work that is different from, in excess of, or beyond the scope of the work required by the Original Contract) requested or required by the Obligor after the date of the execution of this Agreement.

(b) As of the date of the execution of this Agreement, Obligor represents and warrants that, according to the records available to it, the Contract Balance as defined herein is accurate. The Surety reserves the right to verify the accuracy of the Contract Balance.

5. Payment of the Contract Balance. Obligor agrees that the Contract Balance is dedicated to and will be applied to the completion of the Original Contract pursuant to this Agreement. Obligor shall pay directly to the Surety the Contract Balance, plus or minus any additional amounts of money on account of any modifications requested and authorized by Obligor. The Surety agrees to spend its own funds as may be necessary from time to time to pay for the performance of the Original Contract by the Completion Contractor in the event that the Contract Balance is insufficient, with any such payments being credited against the penal sum of the Performance Bond. The Obligor has indicated that it intends to withhold the Contract Balance until completion of the work under this Agreement and reserves its rights in regard to the assessment of liquidated damages against the Contract Balance. Surety disputes any entitlement of the Obligor to withhold the Contract Balance, and Surety reserves all of its rights in regard to any assessment of Liquidated Damages against the Contract Balance and any withholding by the Obligor. All payments due to the Completion Contractor will be made by Surety. Payments from Obligor to Surety under this Agreement shall be made payable to the Surety and transmitted to the Surety at the following address, unless and until Obligor is notified by Surety in writing of any different addresses:

Beth Gary
Construction Services Group & Southwest Escrow Company / Aacon, Inc.
200 River Pointe Dr., Suite 306
Conroe, TX 77304

6. Time of Performance. Subject to a mutually acceptable resolution of pending design issues and/or change order requests, Surety shall commence work on the date to be specified in a written "Notice to Proceed" issued by Oblige. The work required to complete the work under the Original Contract pursuant to this Agreement shall begin on the date to commence work specified in the Notice to Proceed and shall run thereafter for thirty nine (39) consecutive calendar days as defined by the Original Contract, subject to appropriate time extensions that may hereafter be granted pursuant to the terms of the Original Contract. Should Surety be delayed in the completion of the Original Contract work because of conditions attributable to Oblige or its representatives, Surety shall be entitled to an extension of time as permitted by the Original Contract.

7. Authorized Representative. Surety specifically designates and authorizes Consultant to be its representative (the "Authorized Representative") solely for the purposes set forth in this paragraph. The Authorized Representative shall have the authority to negotiate and sign change orders for extra work (work that is different from, in excess of, or beyond the scope of the work required by the Original Contract) requested or required by Oblige (hereinafter "Change Order") without the Surety's prior written approval, provided the Change Order does not exceed \$10,000 and the Completion Contractor is given additional time to perform the Change Order. If the Change Order does exceed \$10,000, or no additional time is given to the Completion Contractor to perform the Change Order, then the Surety's prior written approval is required to negotiate the Change Order and the final Change Order must be signed by the Surety and not the Authorized Representative. If the total of all of the approved Change Orders exceeds the sum of \$50,000, then the Surety, not the Authorized Representative, must approve in writing all additional or subsequent Change Orders regardless of the amount of each such Change Order. The Authorized Representative has no authority to negotiate deductive Change Orders, credits, backcharges or net deductions from the Original Contract or the Contract Balance of any nature whatsoever without the Surety's prior written approval. Any agreements with respect to the warranty work of the Former Contractor or corrective work as a result of latent defect in the work performed by the Former Contractor shall require the written approval of the Surety.

8. Use of Equipment and Materials. Insofar as Oblige has any right, title or interest therein, Oblige agrees that the Surety and its Completion Contractor shall have the right to use, without charge, any of the equipment, materials and appurtenances furnished or supplied by Former Contractor which may be stored on or about the premises of the Project site or materials which may have been fabricated for use in connection with the Original Contract, whether or not presently upon the Project site.

9. Liability of Surety - Performance Bond. The total liability of the Surety under this Agreement and the Performance Bond for the performance of the work, after the expenditure of the Contract Balance, is limited to and shall not exceed the penal sum of the Performance Bond in the amount of \$2,284,551.00. All payments properly made by the Surety for the performance and completion of the Original Contract shall be credited against the penal sum of the Performance Bond. Nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Performance Bond.

10. Liability of Surety - Payment Bond. Oblige agrees that it will not acknowledge or honor any claim or charges against the remaining Contract Balance by any alleged assignees, successors, creditors or transferees of Former Contractor, or any other person or entity making claim to the remaining Contract Balance without the consent of Surety, except by order of a court of competent jurisdiction after due notice to Surety. The Payment Bond shall remain in full force and effect in accordance with its terms and provisions. The total liability of the Surety under the Payment Bond is limited to and shall not exceed the penal sum of the Payment Bond in the cumulative sum of both Bonds amount of \$2,284,551.00. All Payment Bond payments properly made by the Surety shall be credited against the penal sum of the Payment Bond. Nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Payment Bond.

11. Relationship of Parties. This Agreement is solely for the benefit of the Oblige and the Surety. Oblige and the Surety 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 Obligor and the Surety. Specifically, Obligor and the Surety 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 Bonds.

12. Reservation of Rights. This Agreement shall not alter or diminish any rights Surety has under the General Indemnity Agreement executed by Former Contractor and its indemnitors, or any other agreement to which Surety, Former Contractor and/or Former Contractor's indemnitors, are a party. Except as otherwise set forth herein, all rights, remedies, claims, and defenses of Former Contractor and Surety are reserved. Specifically, Surety reserves all of its rights under the Original Contract. Nothing in this Agreement shall constitute a waiver of the Former Contractor's rights against the Obligor. Surety acknowledges that the Obligor specifically reserves all of its defenses in connection with the rights reserved in the foregoing sentence.

13. Whole Agreement. This Agreement constitutes the whole of the understanding, discussions, and agreements by and between Obligor and the Surety. The terms and provisions of this Agreement are contractual and not mere recitals. Obligor and the Surety acknowledge that there have been no oral, written or other agreements of any kind as a condition precedent to or to induce the execution and delivery of this Agreement. Any written or oral discussions conducted prior to the effective date of this Agreement shall not in any way vary or alter the terms of this Agreement.

14. Authority. Obligor and Surety hereby represent, covenant and warrant that they have full right, power and authority to execute and perform this Agreement, and that Obligor and Surety have been duly authorized by all proper and necessary corporate/state action required as a condition to the validity or enforceability of this Agreement.

15. Modification. This Agreement shall not be changed, amended or altered in any way except in writing and executed by both the Obligor and Surety.

16. Governing Law. This Agreement shall be governed by and controlled by the laws of the State of Texas.

17. Notice. Any notices which are required to be given by the terms of this Agreement or the Bonds shall be made as follows:

As to the Obligor:

Michael J. Vonasek
218 N. Campbell, 2nd Floor
El Paso, Texas 79901

As to the Surety:

John P. Wilson
Vice President, Surety Claims
Sompco International Companies
1221 Avenue of the Americas
New York, New York 10020

With a copy to:

Arnold Acker
Aacon, Inc.
200 River Pointe Drive, Suite 306
Conroe, Texas 77304

18. Effective Date. This Agreement is effective as of the date first written above.
19. Successors and Assigns. This Agreement shall be binding upon the parties and their respective successors and assigns.
20. Severability. 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, illegal or unenforceable in any respect, unless such invalidity, illegality or unenforceability shall be tantamount to a failure of consideration, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.
21. Other Documents. The parties agree to undertake such other acts and execute such other documents as may be reasonably necessary to affect the purpose and intent of this Agreement.
22. Construction of Agreement. It is understood and agreed by Oblige and the Surety 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.
23. Facsimile Signatures; Counterparts. Signatures transmitted by facsimile or email shall be accepted and deemed to be original signatures and shall be binding on the parties upon signing. This Agreement shall become effective when executed by all parties and may be executed in counterparts, any one of which shall be deemed to be an original instrument. Any proof of the Agreement shall require production of only one such counterpart duly executed by the party to be charged therewith.
24. No Limitation. This Agreement shall not be construed to waive, limit, alter or amend any of the Surety's obligations, rights, defenses, or liabilities under the Bonds.

(Signatures Begin On Following Page)

IN WITNESS WHEREOF, the parties have executed this Agreement on the date indicated above, and each of the undersigned personally represent and warrant that they have the full right, power and authority to execute this Agreement on behalf of the respective parties.

Endurance American Insurance Company

By: _____
Title: _____

STATE OF _____
COUNTY OF _____

On this _____ day of _____, 2018, before me personally appeared _____, who being by me duly sworn did depose and say that s/he is the _____ for Endurance American Insurance Company that s/he executed the foregoing instrument on behalf of Endurance American Insurance Company with full authority to do so, that he executed the foregoing instrument on behalf of Endurance American Insurance Company for the uses and purposes set forth herein.

Notary Public

City of El Paso, Texas

Tomás González
City Manager

APPROVED AS TO FORM


Sol M. Cortez
Senior Assistant City Attorney

APPROVED AS TO CONTENT

Samuel Rodriguez, P.E., City Engineer
Capital Improvement Department

STATE OF TEXAS
COUNTY OF EL PASO

On this _____ day of _____, 2018, before me personally appeared Tomás González, who being by me duly sworn did depose and say that he is the City Manager for City of El Paso, Texas that s/he executed the foregoing instrument on behalf of City of El Paso, Texas with full authority to do so, that he executed the foregoing instrument on behalf of City of El Paso, Texas for the uses and purposes set forth herein.

Notary Public