

CITY OF MARSHALLTOWN
COUNCIL AGENDA
CITY HALL COUNCIL CHAMBERS
10 W STATE STREET
APRIL 10, 2019, at 8:30 A.M.

A. **NOTICE TO PUBLIC**

The Mayor and City Council welcome comment from the public during discussion of any of the agenda items. You are required to step to the microphone, state your name and address for the record and to limit the time used to present your remarks 3 minutes or less in order that others may be given the opportunity to speak. All speakers shall speak clearly and direct their comments to the Mayor and City Council and not to any Councilor specifically. It is at the discretion of the Mayor and Council to respond to specific questions and comments or to have staff respond during the meeting.

B. **CALL TO ORDER**

Mayor Joel T.S. Greer

C. **PLEDGE OF ALLEGIANCE**

D. **ROLL CALL**

Cahill, Gowdy, Hoop, Isom, Lamer, Martin, Wirin.

E. **RESOLUTIONS**

1. **RESOLUTION 2019-057 APPROVING TAKEOVER AGREEMENT WITH INTERNATIONAL FIDELITY INSURANCE COMPANY**

Documents:

[04-10-2019_2019-057_Res Appv Takover Agreement and Agreement.pdf](#)

F. **ADJOURN**

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RESOLUTION APPROVING TAKEOVER AGREEMENT WITH INTERNATIONAL
FIDELITY INSURANCE COMPANY

WHEREAS the Council previously approved a contract with Corrado Construction by Resolution on or about September 27, 2017; and

WHEREAS such contract has been terminated and the Surety was notified regarding a possible default; and

WHEREAS a TAKEOVER AGREEMENT has been negotiated with FIDELITY INSURANCE COMPANY; and

WHEREAS the Council has fully examined and found the agreement is in the best interest of the city of Marshalltown, Iowa, and that the agreement should be approved and accepted.

THEREFORE, IT IS HEREBY RESOLVED BY THE COUNCIL OF THE CITY OF MARSHALLTOWN, IOWA AS FOLLOWS:

Section 1. The attached TAKEOVER AGREEMENT with FIDELITY INSURANCE COMPANY is hereby fully approved in all respects and particulars and the Mayor and City Clerk are hereby authorized and directed to execute same.

Section 2. The Mayor and City Clerk are hereby authorized and directed to execute said TAKEOVER AGREEMENT on behalf of the City of Marshalltown.

Passed on this ___ day of April, 2019, and signed on this ___ day of April, 2019.

CITY OF MARSHALLTOWN, IOWA

Joel T.S. Greer, Mayor
ATTEST:

Shari L. Coughenour, CMC, City Clerk

TAKEOVER AGREEMENT

This Takeover Agreement (the "Agreement") is made and entered into this ____ day of April, 2019, by and between International Fidelity Insurance Company (the "Surety") and The City of Marshalltown (the "Obligee.")

RECITALS:

WHEREAS, on or about September 27, 2017, Corrado Homes dba Corrado Construction the ("Former Contractor") and the Obligee entered into a contract (the "Original Contract") for the Former Contractor to furnish labor and material and perform brick and block work on the Marshalltown Police & Fire Station Headquarters on the (the "Project") in accordance with the terms and provisions of the Original Contract, including all contract documents forming a part of the Original Contract; and

WHEREAS, on or about September 27, 2017, as required by law and under the terms of the Original Contract, the Former Contractor and the Surety made, executed, and delivered to the Obligee a performance bond and a payment bond, Bond No. DSACSU0553155 (collectively, the "Bonds"), both in the penal sum of \$1,251,000.00; and

WHEREAS, on or about August 17, 2018, the Obligee notified the Surety regarding a possible default by the former contractor;

WHEREAS, the Obligee has declared Corrado in default, and has terminated the construction contract with Corrado Homes dba Corrado Construction, and notified the Surety;

WHEREAS, the Obligee has called upon the Surety to fulfill its obligations as surety under the terms of the Bonds; and the Surety agrees to take over the contract under a full reservation of rights

WHEREAS, patent and latent defects may exist in prior work completed by the Former Contractor; and

WHEREAS, some subsidiary work may remain on items for which full or partial payment has been made; and

WHEREAS, the Surety is willing to undertake the continued performance of the Original Contract in accordance with the terms and limitations of the Bonds and this Agreement under a full reservation of all rights.

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

AGREEMENT:

1. The Surety hereby undertakes to cause the continued performance of the terms, covenants, and conditions of the Original Contract, including all modifications thereto and all approved change orders and agrees to be bound by the Original Contract, all modifications thereto and all approved change orders (collectively the "Original Contract"). If there are any

conflicts or inconsistencies between the terms of this Agreement and the Original Contract, the terms of the Original Contract will control. The Surety is not assuming any additional obligations or liabilities beyond those set forth in the Original Contract or the Bonds, unless both both Surety and Obligee agree in writing. In no event can the Surety's obligation or loss exceed the penal sum of either Bond and any additional amounts attributable to approved change orders. As to the completion of the Original Contract, except as otherwise provided in this Agreement, the Surety is entitled to all rights, title, and interest of the 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 the Former Contractor.

2. The Obligee acknowledges that the Surety will perform the work under the Original Contract by using Carmona Construction ("Completion Contractor"). Obligee approves the use of Carmona Construction to complete the Original Contract. The Surety agrees to repair any defects to be found and determined to exist in already completed work that would have been the responsibility of the Former Contractor. The Surety shall continue performance of all the work on items containing subsidiary work for which full or partial payment has been made. The Surety's obligation to complete the work at the original bid price shall remain in full force and effect.
3. Completion Contractor shall satisfy the required insurance obligations under the Original Contract by providing evidence of the required insurance coverage carried by the Completion Contractor, with the Surety being named as an additional insured under the policy or policies. Work will not be allowed to commence until the Obligee receives evidence that contractually required insurance is in place.
4. The Surety shall notify the Obligee of its intent to start work in writing.
5. The Obligee and the Surety agree that as of the date of this Agreement:
 - (a) The amount of the Original Contract including all approved change order amounts is the sum of \$1,251,000.00
 - (b) The amount paid on the Original Contract is the sum of \$626,599.10
 - (c) The amount held as retainage is the sum of \$32,978.90
 - (d) Any amounts deducted for liquidated damages will be determined prior to the completion of the Work;
 - (e) Any amounts deducted for special deductions will be determined prior to the completion of the Work;
 - (f) As of the date of the execution of this Agreement, the Obligee represents and warrants that, according to the records available to it, the above stated amounts are accurate. The Surety reserves the right to verify the accuracy of the above amounts.
 - (g) The Obligee agrees that upon execution of the Agreement and submission of a revised pay application #6 by Surety to Obligee, payment for pay application #6 in the amount of \$99,500.00 will be paid within ten (10) days of executing the agreement.
6. The Obligee agrees that the amount of the Original Contract, including all approved change orders is dedicated to the payment for performance of this Agreement. Nothing in this agreement shall be construed as a waiver of the Obligee's rights to liquidated damages as provided for in the Original Contract. Upon resumption of the work after the default, monthly

progress payments will be made to the Surety in accordance with the terms of the Original Contract as to the time, amount, and method of payment.

7. All costs incurred by the Obligee as of the date of execution of this Agreement are set forth in Section 5 above. Any such payments will be credited against the penal sum of the Bond and any sums attributable to approved change orders executed pursuant to the provisions of Paragraph 10.03 in the Standard General Conditions of the Construction Contract of the Original Contract.
8. Insofar as the Obligee has any right, title, or interest therein, the Obligee agrees that the Surety shall have the right to use, without charge, any of the equipment, materials, and appurtenances furnished or supplied by the Former Contractor that may be stored on or about the premises of the Project site or materials that may have been fabricated for use in connection with the Original Contract, whether or not presently upon the Project site.
9. The Surety shall be represented at the Project by Anthony Carmona. The Surety may change the authorization as necessary during the course of the work, to reflect the name of the individual, if more than one shall be employed by the Surety, then authorized subject to providing prior notice to the Obligee and receiving prior approval from the Obligee such approval to not be unreasonably withheld. The Authorized Individual will represent the Surety in dealing with the Obligee on day to day construction issues with respect to the Project. The Surety hereby designates Gary Bierhalter with Bierhalter & Associates to prepare and process pay requisitions on the Original Contract. Payments from the Obligee shall be made payable to the Surety and transmitted via wire transfer to the account designated by the Surety or such other account as Surety may hereafter designate in writing.
10. The total aggregate liability of the Surety under this Agreement and the Bonds for the performance of the work is limited to and shall not exceed the penal sum of the Bonds and any additional amounts attributable to approved change orders. All payments made by the Surety for the performance of the Original Contract, shall be credited against the penal sum of the Bonds. Absent a provision to the contrary in this Agreement, nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Bonds.
11. In no event shall the Obligee withhold any payments from the Surety because of or on account of any claims, liens, suits, or demands by and persons or entities furnishing or alleging to have furnished labor and/or materials to the Project. 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 and any additional amounts attributable to approved change orders. Payment Bond payments made by the Surety shall be credited against the penal sum of the Payment Bond. Absent a provision to the contrary in this Agreement, nothing in this Agreement constitutes a waiver of such penal sum or an increase in the liability of the Surety under the Payment Bond.
12. This Agreement is solely for the benefit of the Obligee and the Surety. The Obligee 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 the Obligee and the Surety. Specifically, the Obligee 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.

13. The Surety shall ensure that any of its representatives on site, including anyone from Bierhalter & Associates, and any subcontractors performing work on behalf of Surety have been reviewed and approved by Obligee and are in compliance with the provisions of the Original Contract and applicable state statutes.
14. This Agreement constitutes the whole of the understanding, discussions, and agreements by and between the Obligee and the Surety. The terms and provisions of this Agreement are contractual and not mere recitals. The Obligee 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.
15. This Agreement shall not be changed, amended, or altered in any way except in writing and executed by both the Obligee and the Surety.
16. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original.
17. This Agreement shall be governed by and controlled by the laws of the State of Iowa.
18. 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 Obligee:
Via certified mail, return receipt requested,
postage prepaid to:

City of Marshalltown
24 N. Center Street
Marshalltown, IA 50158
Attn: Justin Nickel

As to the Surety:
Via certified mail, return receipt requested,
postage prepaid to:

International Fidelity Insurance Company
4965 Preston Park Blvd., Ste., 200
Plano, Texas 75093
Attn: Jimmy Sparks Surety Claims Counsel

19. This Agreement is effective as of the date first written above.
20. This Agreement shall be binding upon the parties and their respective successors and assigns.

21. 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 enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.

22. It is understood and agreed by the Obligee 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.

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.

OBLIGEE

City of Marshalltown

By: _____

SURETY

International Fidelity Insurance Company

By: _____

