

CITY OF UNALASKA
UNALASKA, ALASKA

RESOLUTION 2020-18

A RESOLUTION OF THE UNALASKA CITY COUNCIL AUTHORIZING THE CITY MANAGER TO TERMINATE THE CONTRACT WITH F & W CONSTRUCTION REGARDING THE LIBRARY IMPROVEMENTS PROJECT

WHEREAS, the Library Expansion Project was proposed and adopted as a Capital & Major Maintenance Plan component; and

WHEREAS, Council has appropriated funds into a Capital Budget to create the Project; and

WHEREAS, Staff negotiated a scope of work with F & W Construction Company to construct the project that is satisfactory to both parties; and

WHEREAS, the City of Unalaska entered into a contract with F&W Construction to perform the Public Library Improvements Project; and

WHEREAS, the coronavirus COVID-19 pandemic has negatively impacted the health and well-being of the United States, the State of Alaska, and the City of Unalaska; and

WHEREAS, the coronavirus COVID-19 pandemic has negatively impacted the financial resources of the United States, the State of Alaska, and the City of Unalaska; and

WHEREAS, Staff has determined that terminating the Public Library Improvements Project construction contract with F&W construction is in the best interests of the citizens of Unalaska in light of the unexpected health and financial consequences brought on by the coronavirus COVID-19 pandemic.

NOW THEREFORE BE IT RESOLVED that the Unalaska City Council authorizes the City Manager to terminate the contract with F&W Construction regarding the Library Improvements Project.

PASSED AND ADOPTED by a duly constituted quorum of the Unalaska City Council on April 2, 2020.


Vincent M. Tutiakoff, Sr.
Mayor

ATTEST:



Marjie Veeder, CMC
City Clerk



MEMORANDUM TO COUNCIL

To: Mayor and City Council Members
From: Tom Cohenour, Director, Department of Public Works
Through: Erin Reinders, City Manager
Date: April 2, 2020
Re: Resolution 2020-18 Authorizing the City Manager to Terminate the Contract with F&W Construction Regarding the Public Library Improvements Project

SUMMARY: Resolution 2020-18 will authorize the City Manager to terminate the Public Library Improvements Project construction contract with F&W Construction (F&W) for the convenience of the City in accordance with Paragraph 14.4.1 of the General Conditions. Staff has determined that such action is in the best interests of the citizens of Unalaska in light of the unexpected health and financial consequences brought on by the emergence of the coronavirus COVID-19.

BACKGROUND: City Council funded the Public Library Improvements Project for a total of \$8,681,981.00 inclusive of design and construction. Of that amount, \$573,032.47 has been spent on preliminary design work, underground site investigation, final design, advertising and bidding. On January 14, 2020, Council passed Resolution 2020-05 which awarded the construction of the Public Library Improvements Project to F&W for \$6,903,481 but construction work is not scheduled to begin for another few weeks. The unspent balance of \$8,108,948.53 remains in the project budget.

The total budget for the Public Library Improvements Project and expenses to date are:

Project Budget	\$8,681,981.00
<u>Amount Expensed</u>	<u>\$573,032.47</u>
Balance Unspent	\$8,108,948.53

DISCUSSION: Since this project was awarded, the project landscape has drastically changed. The COVID-19 pandemic presents a dynamic and uncharted situation. The measures to mitigate the effects of the pandemic will change over time in unknowable ways. One thing we do know is that the risk to Unalaska has not peaked. These circumstances create extreme uncertainty affecting the conditions under which this project will be completed and potentially having great impacts on project cost and time to completion. Given this situation, the Department of Public Works has been considering different options as to how to proceed with the Public Library Improvements Project. There are three main options available.

ALTERNATIVES: The primary choices before City Council are summarized as follows:

1. One option is to take no action and see how this situation unfolds and how it affects the project implementation. The advantage of this approach is that if the restrictions enacted to reduce the transmission of COVID-19 are lifted completely by early/mid-May the project will most likely be completed as scheduled and no additional costs will be attributed to the pandemic. The disadvantage of this course of action is that if the

mitigating restrictions do affect the project, the contractor has cause to delay the completion of the project.

2. The second option is to suspend the project using clause 14.1 of the general conditions of the contract. The advantage of this option is that it allows the City to wait and see how the COVID-19 pandemic unfolds and we can determine later to restart the project when the situation is more certain, reducing the amount of time the library would be closed. The disadvantage of this option is that the City would be liable for all costs that the contractor incurs due to this suspension and an already expensive project would become more expensive.
3. The third option is to cancel the project using the convenience termination clause in the contract found in clause 14.4 of the general conditions.
 - a. The advantages of this option are:
 - i. It protects the City from increased project costs that may occur due to delays caused by the pandemic
 - ii. It avoids a possible extended closure of the library due to delays caused by the pandemic
 - iii. It avoids possible transmission of COVID-19 to Unalaska from laborers, tradespersons, project administrators, inspectors, and all other personnel that are required to travel to Unalaska to work on the project.
 - iv. It preserves City financial resources to be used in the future for more essential services/projects that this pandemic may require.
 - v. When this project is eventually completed, the City will have learned lessons from the design, estimating and contracting phases of the project development which can be implemented in the new project providing a superior product in a more cost-efficient manner.
 - vi. Since the project is in its early phases, the financial cost to terminate at this time will be limited.
 - vii. This option allows the possibility that the Unalaska Visitors Bureau could stay in their current location
 - b. The disadvantages of project termination are:
 - i. Considerable financial resources (\$573,032) have already been expended for this project, which are unrecoverable.
 - ii. The improvements to the library will be delayed and the level of service that the residents of Unalaska will receive from their library will remain at the current level.

FINANCIAL IMPLICATIONS: A Convenience Termination carries certain financial obligations on the City's part, which is an amount yet to be determined and subject to negotiation with the contractor. However, it could be in the \$3,000,000 range if all the materials have been ordered and contractually includes the following:

1. City pays cost plus 15% for materials on hand
2. City pays factory cancellation charges assuming we do not take delivery
3. City pays for bonds and insurance that are part of the start-up of the project and cannot be amortized by the amount of work accomplished.

LEGAL: Staff consulted with the City Attorney regarding this situation.

STAFF RECOMMENDATION: Given the above analysis, staff recommends approval of Resolution 2020-18 which authorizes the City Manager to cancel the Library Improvements Project as soon as possible.

Additionally, staff is currently performing similar analysis for all ongoing and proposed capital projects to identify options and determine the best path forward given the new reality the City is operating within. It may be prudent to delay the approval of any but the most essential capital projects for the fiscal year 2021, postponing the usual CMMP process until the situation is more certain, allowing for more informed decisions to be made.

PROPOSED MOTION: I move to approve Resolution 2020-18.

CITY MANAGER COMMENTS: I support the Staff recommendation.

ATTACHMENTS: Contract Language Section 14.4 Convenience Termination

14.3 Rights or Remedies:

Where the CONTRACTOR's services have been so terminated by the CITY, the termination will not affect any rights or remedies of the CITY against the CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys due the CONTRACTOR by the CITY will not release the CONTRACTOR from liability.

14.4 Convenience Termination:

14.4.1 The performance of the Work may be terminated by the CITY in accordance with this section in whole or in part, whenever, for any reason the Contracting Officer shall determine that such termination is in the best interest of the CITY. Any such termination shall be effected by delivery to the CONTRACTOR of a Notice of Termination, specifying termination is for the convenience of the CITY the extent to which performance of Work is terminated, and the date upon which such termination becomes effective. Immediately upon receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer the CONTRACTOR shall:

- a. Stop Work on the date and to the extent specified in the Notice of Termination;
- b. Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the Work as is not terminated;
- c. Terminate all orders and subcontracts to the extent that they relate to the performance of Work terminated by the Notice of Termination;
- d. With the written approval of the Contracting Officer, to the extent he may require, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, the cost of which would be reimbursable, in whole, or in part, in accordance with the provisions of the Contract;
- e. Submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory exclusive of items the disposition of which had been directed or authorized by the Contracting Officer;
- f. Transfer to the Contracting Officer the completed or partially completed record drawings, Shop Drawings, information, and other property which, if the Contract had been completed, would be required to be furnished to the CITY;
- g. Take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to the Contract which is in the possession of the CONTRACTOR and in which the CITY has or may acquire any interest. The CONTRACTOR shall proceed immediately with the performance of the above obligations.

14.4.2 When the CITY orders termination of the Work effective on a certain date, all Work in place as of that date will be paid for in accordance with the Basis of Payment clause of the Contract. Materials required for completion and on hand but not incorporated in the Work will be paid for at cost plus 15% with materials becoming the property of the CITY - or the CONTRACTOR may retain title to the materials and be paid an agreed upon lump sum. Materials on order shall be canceled, and the CITY shall pay reasonable factory cancellation charges with the option of taking delivery of the materials in lieu of payment of cancellation charges. The CONTRACTOR shall be paid 10% of the cost, freight not included, of materials canceled, and direct expenses only for CONTRACTOR chartered freight transport which cannot be canceled without charges, to the extent that the CONTRACTOR can establish them. The extra costs due to cancellation of Bonds and insurance and that part of job start-up and phase-out costs not amortized by the amount of Work accomplished shall be paid by the CITY. Charges for loss of profit or consequential damages shall not be recoverable except as provided above.

14.4.3 The termination claim shall be submitted promptly, but in no event later than 90 days from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer upon request of the CONTRACTOR made in writing within the 90-day period. Upon failure of the CONTRACTOR to submit his termination claim within the time allowed, the Contracting Officer may determine, on the basis of

information available to him, the amount, if any, due to the CONTRACTOR by reason of the termination and shall thereupon pay to the CONTRACTOR so determined.

14.4.4 The CONTRACTOR and the Contracting Officer may agree upon whole or any part of the amount or amounts to be paid to the CONTRACTOR by reason of the total or partial termination of the Work pursuant to this section. The Contract shall be amended accordingly, and the CONTRACTOR shall be paid the agreed amount. In the event of the failure of the CONTRACTOR and the Contracting Officer to agree in whole or in part, as provided heretofore, as to the amounts with respect to costs to be paid to the CONTRACTOR in connection with the termination of the Work the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the CONTRACTOR by reason of the termination and shall pay to the CONTRACTOR the amount determined as follows:

- a. All costs and expenses reimbursable in accordance with the Contract not previously paid to the CONTRACTOR for the performance of the Work prior to the effective date of the Notice of Termination;
- b. So far as not included under "a" above, the cost of settling and paying claims arising out of the termination of the Work under subcontracts or orders which are properly chargeable to the terminated portions of the Contract;
- c. The reasonable costs of settlement with respect to the terminated portion of the Contract heretofore, to the extent that these costs have not been covered under the payment provisions of the Contract.

14.4.5 The CONTRACTOR shall have the right of appeal under the CITY's claim procedures, as defined in Article 15, for any determination made by the Contracting Officer, except if the CONTRACTOR has failed to submit his claim within the time provided and has failed to request extension of such time, CONTRACTOR shall have no such right of appeal. In arriving at the amount due the CONTRACTOR under this section, there shall be deducted:

- a. All previous payments made to the CONTRACTOR for the performance of Work under the Contract prior to termination;
- b. Any claim which the CITY may have against the CONTRACTOR;
- c. The agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the CONTRACTOR or sold pursuant to the provisions of this section and not otherwise recovered by or credited to the CITY; and,
- d. All progress payments made to the CONTRACTOR under the provisions of this section.

14.4.6 Where the Work has been terminated by the CITY said termination shall not affect or terminate any of the rights of the CITY against the CONTRACTOR or his Surety then existing or which may thereafter accrue because of such default. Any retention or payment of monies by the CITY due to the CONTRACTOR under the terms of the Contract shall not release the CONTRACTOR or his Surety from liability. Unless otherwise provided for in the Contract Documents, or by applicable statute, the CONTRACTOR, from the effective date of termination and for a period of three years after final settlement under this Contract, shall preserve and make available to the CITY at all reasonable times at the office of the CONTRACTOR, all its books, records, documents, and other evidence bearing on the cost and expenses of the CONTRACTOR under his Contract and relating to the Work terminated hereunder.

ARTICLE 15 - CLAIMS AND DISPUTES

15.1 Notification:

In addition to the notice requirements set out elsewhere in this Contract, if the CONTRACTOR becomes aware of any act or occurrence which may form the basis of a claim by the CONTRACTOR for additional compensation or an extension of time for performance, or if any dispute arises regarding a question of fact or interpretation of the contract, the CONTRACTOR shall immediately inform the Project Manager. If the matter cannot be resolved by agreement within 7 days, the CONTRACTOR shall, within the next 14 days, submit an Intent to Claim in writing to the Project Manager. The