



Legislation Text

File #: 2778-2020, Version: 1

Background:

This Ordinance is submitted to settle the lawsuit captioned *Kokosing Industrial, Inc. v. City of Columbus, Ohio*, Franklin County Court of Common Pleas, Case No. 20-cv-6133, in the amount of \$290,991.60. This amount will be made payable to Kokosing Industrial, Inc. ("Kokosing").

This dispute relates to the Hap Cremean Water Plant, UV Disinfection project (the "Project"). Kokosing and the City of Columbus (the "City") entered into the Hap Cremean Water Plant, UV Disinfection Contract 2025, CIP 690536-100000 (the "Contract"), which required Kokosing to install a system for ultraviolet (UV) disinfection of source water as an enhancement to the water treatment process. The bid documents related to the Contract advised bidders that they would be required to accept assignment of a UV equipment supply contract that the City previously entered into with the supplier of the UV equipment, Xylem Water Solutions USA, Inc. (the "Xylem Contract"). The Xylem Contract was for a total of \$3,198,150.00, and included a deduct change order in the amount of \$290,991.60 (the "Credit"), and a force account (i.e., contingency) in the amount of \$290,000.00 (the "Force Account"). The Xylem Contract, including the deduct change order showing the \$290,991.60 Credit to the City, was provided to bidders.

The bid form included six (6) Pay Items. Pay Item 1 was for General Construction, where bidders entered their lump sum bid for all work except the value of Pay Items 2 through 4. Pay Item 2 was pre-populated with a fixed price for the value of the Xylem Contract (\$3,198,150.00). Pay Item 2 did not include a reduction in price for the Credit. The City of Columbus awarded the Contract to Kokosing and assigned the Xylem Contract to Kokosing.

Subsequently, Kokosing submitted a schedule of values indicating that, prior to submitting its bid, it moved the Credit from Pay Item 2 to Pay Item 1 and applied it as a deduct to Pay Item 1. Kokosing alleges that because pre-populated Pay Item 2 on the bid documents did not reflect a reduction for the Credit, it accounted for the Credit by including it as a deductive cost in bidding Pay Item 1. Kokosing sought payment of the Credit, asserting that it already gave the City the benefit of the Credit by including it as a deductive cost in Pay Item 1. The City disagreed and informed Kokosing that no change to Pay Item 2's fixed value was necessary because the Credit remained property of the City within Pay Item 2 as part of the City's contingency and because payment of the Credit would increase the overall contract amount. The City maintains that Kokosing could not move the Credit from Pay Item 2 because Pay Item 2 was a fixed-value bid item. The claim went to mediation, and the parties were unable to reach a resolution. Later, Kokosing asserted it was entitled to payment for the full value of Pay Item 2 and sought payment of the \$290,000.00 Force Account, which the City denied.

On September 17, 2020, Kokosing filed suit against the City, alleging that it is entitled to payment for the full amount of Pay Item 2 under the terms of the Contract, which includes both the \$290,991.60 Credit and \$290,000.00 Force Account. The City denies Kokosing's allegations, but acknowledges that the outcome of the litigation is uncertain. Accordingly, it is in the City's best interest to settle this lawsuit by paying Kokosing the value of the \$290,991.60 Credit in exchange for Kokosing releasing its remaining claims. Under this settlement agreement, the City will retain the value of the \$290,000.00 Force Account.

Fiscal Impact:

Funds in the amount of \$290,991.90 are available within the Water G.O. Voted Bonds Fund - Fund No. 6006. An amendment to the 2020 Capital Improvement Budget is necessary for the purpose of providing sufficient authority for the aforementioned expenditure.

Emergency:

Emergency legislation is requested in that it is necessary for this ordinance to be effective immediately in order for the parties to effectuate the settlement of these claims, which is in the best interest of the City, and to pay the agreed to sum without delay.

To authorize and direct the City Attorney to settle the lawsuit captioned *Kokosing Industrial, Inc. v. City of Columbus, Ohio*, Franklin County Court of Common Pleas, Case No. 20-cv-6133; to authorize the expenditure of the sum of \$290,991.60 in settlement of the lawsuit; and to declare an emergency.

WHEREAS, the City and Kokosing entered into the Contract, which required Kokosing to install a system for UV disinfection of source water as an enhancement to the water treatment process; and

WHEREAS, as part of the execution of the Contract, the City assigned the Xylem Contract to Kokosing; and

WHEREAS, the Xylem Contract was for a total of \$3,198,150.00, and included a deduct change order (Credit) in the amount of \$290,991.60, and Force Account (i.e., contingency) in the amount of \$290,000.00; and

WHEREAS, the bid form for the project included six (6) Pay Items. Pay Item 1 was for General Construction, where bidders entered their lump sum bid for all work except the value of Pay Items 2 through 4. Pay Item 2 was pre-populated at a fixed price for the total value of the Xylem Contract (\$3,198,150.00), and did not include a reduction for the value of the Credit; and

WHEREAS, Kokosing alleges that because pre-populated Pay Item 2 on the bid documents did not reflect a reduction for the Credit, Kokosing accounted for the Credit by including it as a deductive cost in bidding Pay Item 1; and

WHEREAS, the City informed Kokosing that no reduction to Pay Item 2's fixed value was needed because the Credit remained property of the City within Pay Item 2 as part of the City's contingency. The City further maintained that Kokosing could not move the Credit from Pay Item 2 because Pay Item 2 was a fixed-value bid item; and

WHEREAS, Kokosing sought payment of the \$290,991.60 Credit, alleging that Kokosing already provided the City the benefit of the Credit by including it as a deductive cost in Pay Item 1; and

WHEREAS, the City denied Kokosing's request for payment of the Credit and informed Kokosing that the Credit remained property of the City within Pay Item 2 as part of its contingency and thus no change to Pay Item 2's fixed value was needed; and

WHEREAS, Kokosing further alleged entitlement to payment for the full value of Pay Item 2 and sought payment of the \$290,000.00 Force Account, which the City denied; and

WHEREAS, Kokosing filed a lawsuit captioned *Kokosing Industrial, Inc. v. City of Columbus, Ohio*, Franklin County Court of Common Pleas, Case No. 20-cv-6133, alleging that it is entitled to payment for the full amount of Pay Item 2 under the terms of the Contract, which includes the \$290,991.60 Credit and \$290,000.00 Force Account; and

WHEREAS, the City disputes Kokosing's allegations, but acknowledges that the outcome of the litigation is uncertain; and

WHEREAS, following evaluation of Kokosing's claims, a settlement in the amount of the Credit, \$290,991.60, to be paid by the City, was deemed to be acceptable in exchange for a release from Kokosing of all claims against the City of Columbus and any of its employees, agents, and/or officials relating to the lawsuit, including the \$290,000.00 Force Account claim; and

WHEREAS, it is necessary to authorize a transfer and expenditure of funds within the Water G.O. Voted Bonds Fund, for the Division of Water; and

WHEREAS, it is necessary to authorize an amendment to the 2020 Capital Improvements Budget for the purpose of providing sufficient spending authority for the aforementioned project expenditure; and

WHEREAS, an emergency exists in the usual daily operations of the Department of Public Utilities, in that it is necessary for this ordinance to be effective immediately in order for the parties to effectuate the settlement of these claims, which is in the best interest of the City, and to pay the agreed to sum without delay; **NOW, THEREFORE**,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF COLUMBUS:

Section 1. That the City Attorney is hereby authorized and directed to settle the lawsuit captioned *Kokosing Industrial, Inc. v. City of Columbus, Ohio*, Franklin County Court of Common Pleas, Case No. 20-cv-6133, by payment of the sum of \$290,991.60 as a reasonable and fair amount and in the best interest of the City of Columbus.

Section 2. That, upon receipt of a release approved by the City Attorney, the Department of Public Utilities is authorized to pay Kokosing the amount of \$290,991.60 out of Fund 6006 - Water G.O. Bonds Fund, in Object Class 06 - Capital Outlay, per the accounting codes in the attachment to this ordinance.

Section 3. That the transfer of \$290,991.60, or so much thereof as may be needed, is hereby authorized in Fund 6006 - Water G.O. Bonds Fund, in Object Class 06 - Capital Outlay, per the accounting codes in the attachment to this ordinance.

Section 4. That the 2020 Capital Improvements Budget is hereby amended, in Fund 6006 - Water G.O. Bonds Fund, as follows:

Project ID | Project Name | Current Authority | Revised Authority | Change

P690588-100001 (carryover) | Olentangy RR 24" WM-Ph 2 | \$400,215 | \$109,223 | -\$290,992

P690536-100000 (carryover) | HCWP UV Disinfection | \$393,000 | \$683,992 | +\$290,992

Section 5. Funds are hereby deemed appropriated and expenditures and transfers authorized to carry out the purposes of this ordinance and the City Auditor shall establish such accounting codes as necessary.

Section 6. That the City Auditor is authorized to make any accounting changes to revise the funding source for all contracts or contract modifications associated with this ordinance.

Section 7. That the City Auditor is hereby authorized to transfer the unencumbered balance in a project account to the unallocated balance account within the same fund upon receipt of certification by the Director of the Department

administering said project that the project has been completed and the monies are no longer required for said project.

Section 8. That for the reasons stated in the preamble hereto, which is made a part hereof, this ordinance is hereby declared to be an emergency measure and shall take effect and be in force after passage and approval by the Mayor, or 10 days after passage if the Mayor neither vetoes nor approves the same.