



To: Mayor and City Council
From: City Clerk's Office/Electric
Date: April 5, 2024
Subject: Contract and Bond Approval

There is no Council Action Form for the Ash Pond Closure and RDF Ash Pond Construction. The requested action for the City Council to approve the contract and bond for the project is simply fulfilling a *State Code* requirement.

However, at the March 12, 2024 Council meeting, the Council asked two follow up questions regarding this project: Councilperson Gartin asked about the process to indemnify the City, and what insurance the contractor had (type and amount). The Mayor wanted to know if the Risk Manager had reviewed the coverage and if the contractor will need to pay if there is a fine.

Regarding indemnification and contractor insurance, the contract states the following:

INDEMNIFICATION

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the City of Ames, their agents and employees from and against all claims, damages, losses, and expenses, including, but not limited to attorney's fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss, or expense 1) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and 2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Questions concerning these requirements should be directed to: Bill Walton, Risk Manager E-mail: bill.walton@cityofames.org, Phone: 515-239-5102.

MINIMUM LIMITS OF INSURANCE

Contractor shall maintain limits no less than:

2.1 General Liability: \$1,000,000 combined single limit per occurrence for bodily injury, personal injury, and property damage.

2.2 Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.

2.3 If required by statute, Workers Compensation and Employers Liability: Statutory Workers Compensation limits as required by the Laws of the State of Iowa.

2.4 Builder's Risk insurance shall be in an amount not less than the total value of construction.

Regarding Risk Manager Review:

Bill Walton, in his review, states that the coverages appear to be in line with City's requirements. He has also reviewed the general liability and pollution policies in order to confirm that they fit the requirement of the contract.

Based on this information, the City Attorney responds as follows:

The City Attorney's office doesn't review such contracts for insurance requirements, as those are standard and are part of the City's purchasing process. The City Attorney was asked to look into what we have in terms of protection against perhaps an EPA fine someday if the project wasn't up to EPA standards. According to Purchasing Manager Karen Server, these are our standard provisions in bid documents, and do not include anything special for a potential EPA enforcement action in the future, except that the contractor's maintenance bond would provide the City some protection for one year in terms of fixing any problems.

The engineering firm that did the plans and specifications for this project, SCS Engineering, has a \$1 million professional liability policy per the City's requirements. Under standard procedure, that engineering firm (or perhaps another engineer) would okay the project when the construction was finished. At the end of construction, a professional engineer will sign off after reviewing the construction engineering notes, and use their license to certify to the DNR and EPA that it meets the requirements. This would provide the City with a potential claim against the professional liability insurance of the engineer if an EPA enforcement action would take place and the City was made to pay a civil penalty. We are uncertain if the engineer's professional liability insurance's scope of coverage would include coverage for regulatory fines. If it does not, we would still have a claim against the engineering firm.

This project requires an NPDES permit (National Pollutant Discharge Elimination System) which is issued by the Iowa DNR under authority delegated to the DNR by the EPA. The project requires an NPDES permit during construction because it disturbs more than an acre of land. The contractor will be co-permittee on that, so the contractor, as a co-permittee, would likely be involved in any EPA enforcement action (from staff's experience, the EPA files an enforcement action against all co-permittees).

The bottom line is that in any EPA enforcement action, ultimately the City would be mainly liable, but the engineer who signs off on the project at the end would have professional liability insurance that the City could potentially make a claim against.