



Board of Aldermen Request for Action

MEETING DATE: 10/21/2025

DEPARTMENT: Public Works

AGENDA ITEM: Resolution 1524, Authorizing the Mayor to sign a Takeover Agreement with West Bend Insurance Company

REQUESTED BOARD ACTION

A motion to approve Resolution 1524, authorizing the Mayor to execute a Takeover Agreement with West Bend Insurance Company and authorizing a force account of \$100,000.

SUMMARY

This project includes the construction of concrete sidewalks, curb ramps, concrete curb and gutter removal and replacement, curb inlets, and retaining walls along Commercial Avenue from Smithville School District to Meadow Avenue.

The City received a Federal Grant Award of 80% up to \$960,000 for the 2024 Commercial Avenue Pedestrian Improvements project, the City is responsible for 20% match and construction administration. Legacy Underground provided a bid of \$898,658 (80% is 718,926.4 and the City 20% is \$179,731.6).

Four bids were received on July 30, 2024. The low bid was Legacy Underground Construction at \$898,658.

On August 15, 2025 the contractor was declared in default and could not complete the project.

Staff contacted Legacy's bonding / surety company, West Bend Insurance Company, to inform them they would need to complete the project. West Bend has solicited contractors and has selected Selby Construction to complete the project. Essentially the "Takeover" agreement allows West Bend to hire a contractor to complete the project. The City is only responsible the cost of the original bid and any changes (change orders) at the original unit price bid.

Staff is working closely with MODOT to ensure that the project meets all Federal Highway Administration (FHWA) requirements for the grant.

PREVIOUS ACTION

Bid Award with Legacy, Resolution 1395, August 20, 2024.

POLICY ISSUE

Infrastructure Maintenance

FINANCIAL CONSIDERATIONS

This project is included in the 2025 Transportation Sales tax budget.

ATTACHMENTS

- | | |
|--|-----------------------------------|
| ☐ Ordinance | ☐ Contract |
| ☒ Resolution | ☐ Plans |
| ☐ Staff Report | ☐ Minutes |
| ☒ Other: Draft Agreement | |

RESOLUTION 1524

A RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE A TAKEOVER AGREEMENT WITH WEST BEND INSURANCE COMPANY AND AUTHORIZING A FORCE ACCOUNT OF \$100,000

WHEREAS, The City received a grant from the Mid- America Regional Council (MARC) to complete the Commercial Avenue Pedestrian Improvement Project; and

WHEREAS, the City entered into a construction contract with Legacy Underground Construction on August 20,2024 in the amount of \$898,658; and

WHEREAS, Legacy defaulted on the contract and per the terms of the agreement and performance bond, West Bend Insurance Company is responsible for the completion of the project; and

WHEREAS, West Bend has hired a new contractor to complete the project; and

WHEREAS, West Bend is responsible for any cost that exceeds the original bid price.

NOW THEREFORE BE IT RESOLVED BY THE BOARD OF ALDERMEN OF THE CITY OF SMITHVILLE, MISSOURI, AS FOLLOWS:

THAT the Board authorizes the Mayor to sign a Takeover Agreement with West Bend for the Commercial Avenue Pedestrian Improvement project, RFQ 24-16 and authorizing a force account of \$100,000.

PASSED AND ADOPTED by the Board of Aldermen and **APPROVED** by the Mayor of the City of Smithville, Missouri, the 21st day of October 2025.

Damien Boley, Mayor

ATTEST:

Linda Drummond, City Clerk

TAKEOVER AGREEMENT

THIS TAKEOVER AGREEMENT ("Agreement") is entered into the 21st day of October, 2025 by and between WEST BEND INSURANCE COMPANY ("Surety") and the CITY OF SMITHVILLE, MISSOURI ("Obligee") (collectively, the "Parties").

RECITALS

WHEREAS, Obligee and LEGACY UNDERGROUND CONSTRUCTION, INC. ("Legacy" or "Principal") entered into a contract agreement dated April 20, 2025, for Legacy to furnish labor and materials for the project known as 2024 Commercial Avenue Pedestrian Improvements ("Original Contract");

WHEREAS, as required under the terms of the Original Contract, Surety made, executed, and delivered to Obligee payment and performance bonds bearing the number 2582926, both in the penal sum of \$898,658.00, identifying Legacy as the bond principal and City of Smithville as the bond obligee ("Payment Bond" and "Performance Bond", respectfully);

WHEREAS, on August 5, 2025, Principal provided written confirmation that it was unable to continue performance of the Original Contract;

WHEREAS, via correspondence dated August 15, 2025, Obligee terminated the Original Contract and called upon the Surety to fulfill its obligations as surety under the terms of the Performance Bond.

WHEREAS Surety has decided to take over and complete all required work that remains to be performed;

WHEREAS, the estimated remaining work includes the work identified in **Exhibit A – Scope of Remaining Work** and all items of work as required to complete the Project in accordance with the Contract, plans, specifications, and applicable updated schedules ("Remaining Work"). A copy of **Exhibit A** is attached hereto and incorporated by reference;

WHEREAS, in accordance with the terms and limitations of the Performance Bond and this Agreement, Surety intends to undertake the completion of the Remaining Work by contracting with Selby Excavating, LLC, to act as the Completion Contractor to perform the Remaining Work.

NOW, THEREFORE, based on the exchange of valuable consideration, the receipt and sufficiency of which is acknowledged, and based on the Recitals set forth above, all of which form a part of this Agreement, Surety and the Obligee agree as follows:

COVENANTS

1. The above Recitals and the Covenants herein are contractual and not merely recitals, and the agreements contained herein.
2. 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 Surety and Obligor 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 Legacy 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 Legacy.

3. The Obligor acknowledges that the Surety will perform the work under the Original Contract by using Selby Excavating, LLC ("Completion Contractor"), and Obligor approves the use of Selby Excavating, LLC, to complete the Original Contract. The Completion Contractor shall provide all insurances required under the Contract, which Surety shall timely provide to Obligor before any work is performed under this Agreement. Additionally, Obligor acknowledges that, subject to the terms of the Original Contract, the Completion Contractor is authorized to make routine day-to-day decisions regarding the operation and manner of performing the Remaining Work, but does not have authority under this Agreement to: (i) agree to any changes in the Contract or Remaining Work; (ii) agree to any backcharges or deductions of any nature; (iii) agree to any schedule changes; or (iv) agree to any adjustments in the Contract or Remaining Work, without Surety's prior express written consent which shall be delivered to Obligor as a condition precedent to the Completion Contractor's negotiating items (i) through (iv), above. The Remaining Work shall be subject to inspection and acceptance by Obligor as provided in the Contract. Obligor shall forward concurrently to Surety (by electronic mail as well as U.S. Mail) a copy of all its written communications directed to the Completion Contractor.
4. The Surety shall notify the Obligor of its intent to start work in writing.
5. The Obligor 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 \$898,658.00
 - (b) The amount paid on the Original Contract is the sum of \$55,505.14
 - (c) The contract balance is \$843,152.86, all of which will be made available to the Surety
 - (d) The amount held as retainage is the sum of \$5,240.92 (including retainage for Pay App 3)
 - (e) Obligor and Surety agree no liquidated damages have or will be assessed;As of the date of the execution of this Agreement, the Obligor 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.

The Obligor agrees that upon execution of the Agreement and submission of a revised pay application by Surety to Obligor, payment for pay application 3R in the amount of \$52,322.34 will be paid within ten (10) days of executing the agreement.

6. The Obligor agrees that the amount of the Original Contract, including all approved change orders is dedicated to the payment for performance of this Agreement. 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. Oblige, Completion Contractor, and Surety are actively working to prepare an agreed completion schedule ("Completion Schedule"). The Parties will supplement this Agreement in writing with a copy of the Completion Schedule attached hereto as an exhibit.

Surety and Oblige agree that Completion Contractor will begin performing the remaining work within three (3) days of the execution of the Takeover Agreement.

Oblige agrees to grant to Surety the full benefit of future extensions of time and other associated relief, including for excusable delays, that are appropriate under the Contract and by law during the performance of the Remaining Work.

8. Completion Contractor proposes to performing the Remaining Work within 68 calendar days. There are 30 calendar days remaining on the original contract. The City agrees to issue a NO Cost Change Order granting an additional 38 days for the Remaining Work to be performed.
9. Insofar as the Oblige has any right, title, or interest therein, the Oblige 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.
10. Payment Requisitions. Surety, by and through its Consultant, Bierhalter & Associates, will submit to Oblige whatever information or documentation is required regarding the work performed under the Contract and stored materials, to conform to and support the requisition process and schedule established under the Contract and this Agreement. Oblige recognizes that Surety intends to complete the Remaining Work using the services of the Completion Contractor. Accordingly, Oblige shall accept the Completion Contractor's representations and certifications with respect to all aspects of the work, progress of the work, quality of the work, conformance of the work to the requirements of the Contract, payments to others, warranty and maintenance of the work, and all other matters pertinent to the Contract, wherever such representations are required by the Contract, as if those representations had been made by Surety, since Surety may have no personal knowledge of such matters.
11. The Surety shall be represented by Gary Bierhalter with Bierhalter & Associates. 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 Oblige and receiving prior approval from the Oblige such approval to not be unreasonably withheld. Payments from the Oblige 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.
12. The total aggregate liability of the Surety under this Agreement and the Performance Bond for the performance of the work is limited to and shall not exceed the penal sum of the Performance Bond and any additional amounts attributable to approved change orders. All payments to any completing contractor made by the Surety for the performance of the Original Contract, shall be credited against the penal sum of the Performance 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 Performance Bond.
13. In no event shall the Oblige 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.

14. 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.
15. 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.
16. 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.
17. This Agreement shall not be changed, amended, or altered in any way except in writing and executed by both the Obligee and the Surety.
18. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original.
19. This Agreement shall be governed by and controlled by the laws of the State of Missouri.
20. 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:

Cynthia Wagner, City Administrator
107 W. Main Street
Smithville, MO 64089
cwagner@smithvillemo.org

Chuck Soules, Public Works Director
107 W. Main Street
Smithville, MO 64089
csoules@smithvillemo.org

Scott Scott J. Sullivan
Attorney at Law
Kuhlman, Reddoch & Sullivan, P.C.
1201 W. College
Liberty Mo. 64068
scott@krsr.net

As to the Surety:

Via certified mail, return receipt
requested, postage prepaid to:

David S. Berry

Surety Claims Attorney
West Bend Insurance Company
1900 South 18th Avenue
West Bend, WI 53095
DBerry@wbmi.com

with copy to:

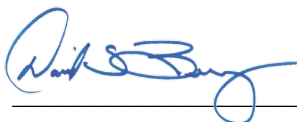
Bierhalter & Associates
Attention: Gary Bierhalter
11827 Thoreau Dr.
Montgomery, Tx. 77356
gbierhalter@bierhalterconsulting.com

21. This Agreement is effective as of the date first written above.
22. This Agreement shall be binding upon the parties and their respective successors and assigns.
23. 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.
24. 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.

WEST BEND INSURANCE COMPANY

CITY OF SMITHVILLE

By: 

By: _____

Name: David S. Berry

Name: Damien Boley

Title: Surety Claims Attorney

Title: Mayor

Date: October 16, 2025

Date: October 21, 2025

City of Smithville - Commercial Avenue Pedestrian Improvements			BID FORM		
ITEM	DESCRIPTION	UNIT	ORIGINAL	QUANTITY	QUANTITY
NO.			QUANTITY	ACHIEVED	REMAINING
BID ITEMS					
1.00	Mobilization	LS	1.00	0.51	0.49
2.00	Contractor Furnished Surveying & Staking	LS	1.00	0.50	0.50
3.00	Removal of Existing Structures	LS	1.00	0.55	0.45
4.00	Seeding and Fertilizing	AC	1.70		1.70
5.00	Erosion Control Blanket	SY	5,250.00		5,250.00
6.00	Unclassified Excavation	CY	973.00	351.00	622.00
7.00	Embankment	CY	382.00	7.00	375.00
8.00	Remove and Reset Curb Inlet Top	EA	2.00		2.00
9.00	Convert Inlet to Junction Box	EA	1.00		1.00
10.00	5'x4' Setback Curb Inlet (Precast)	EA	3.00		3.00
11.00	Storm Sewer (15")(RCP)	LF	46.00		46.00
12.00	Storm Sewer (18")(RCP)	LF	49.00		49.00
13.00	Remove and Reset End Section	EA	2.00		2.00
14.00	Curb Ramp (AE)	SY	90.00		90.00
15.00	Concrete Sidewalk (4")(AE)	SY	1,492.00	677.00	815.00
16.00	Concrete Sidewalk (6")(Steel-Reinf)(AE)	SY	935.00		935.00
17.00	Integral Concrete Wall (12")	LF	62.00		62.00
18.00	Integral Concrete Wall (18")	LF	446.00		446.00
19.00	Integral Concrete Wall (24")	LF	366.00		366.00
20.00	Integral Concrete Toe Wall (0" to 18")	LF	600.00		600.00
21.00	Integral Concrete Toe Wall (18" to 36")	LF	260.00		260.00
22.00	Concrete Entrance Pavement (6")(Reinf)(AE)	SY	675.00		675.00
23.00	Concrete Entrance Pavement (8")(Reinf)(AE)	SY	445.00		445.00

City of Smithville - Commercial Avenue Pedestrian Improvements			BID FORM		
ITEM	DESCRIPTION	UNIT	ORIGINAL	QUANTITY	QUANTITY
NO.			QUANTITY	ACHIEVED	REMAINING
24.00	6" Aggregate Base (Type 1)	SY	531.00		531.00
25.00	Remove and Replace Curb and Gutter (AE)	LF	887.00	23.00	864.00
26.00	Integral Pavement Curb (6")	LF	135.00		135.00
27.00	Modular Block Retaining Wall	SF	903.00		903.00
28.00	Handrail (4'-0")	LF	860.00		860.00
29.00	Chain Link Fence (4'-0")	LF	150.00		150.00
30.00	Remove and Replace Chain Link Fence	LF	25.00		25.00
31.00	Landscape Rock	SY	338.00		338.00
32.00	USPS Mailbox	EA	43.00		43.00
33.00	Relocate Existing Water Meter	EA	2.00	2.00	0.00
34.00	Adjust Existing Manhole	EA	2.00		2.00
35.00	Adjust Existing Water Valve Box	EA	3.00		3.00
36.00	Replace Existing Fire Hydrant	EA	3.00		3.00
37.00	Temporary Traffic Control Sign	EA	40.00		40.00
38.00	Temporary Traffic Control Barricade (Type III)	EA	12.00	4.00	8.00
39.00	Temporary Traffic Control Barricade (Pedestrian)	EA	8.00		8.00
40.00	Allowance	LS	1.00		1.00