



City of Grand Island

Tuesday, December 01, 2009

Council Session

Item G4

#2009-307 - Approving Locomotive Lease Agreement

Staff Contact: Gary R. Mader

Council Agenda Memo

From: Gary R. Mader, Utilities Director
Wesley Nespor, Asst. City Attorney/Purchasing

Meeting: December 1, 2009

Subject: Locomotive Lease Agreement

Item #'s: G-4

Presenter(s): Gary R. Mader, Utilities Director

Background

The Platte Generating Station utilizes a locomotive to move the coal cars onsite during the coal unloading process. The locomotive is an EMD SW1200 built in 1959 and purchased by the City in 1982. It is periodically inspected by contractors specializing in locomotive maintenance. A recent inspection indicated that an overhaul of some of the major components is required. These include rebuilding the main generator auxiliary generator drives, engine blowers and drive gears, and replacing the main crank shaft and traction motor blower bearings.

At the November 10, 2009 Council meeting, National Railway Equipment was awarded the contract for the locomotive overhaul in the amount of \$87,424.65. In order for National Railway Equipment to begin their work on the locomotive, Platte Generating Station will need to lease an alternate locomotive during this time to continue unloading coal.

Discussion

Bids were solicited from locomotive rental suppliers as follows.

	<u>Rental Price</u>	<u>Freight</u>
Diesel Locomotive	\$160/day	\$2,198
Union Pacific	\$570.38/day	
LRS Locomotive	\$155/day	
National Railway	\$162/day	\$3,265

LRS Locomotive could not meet our schedule requirements and Union Pacific's rate was substantially higher, therefore, freight charges were not determined for the evaluation.

The estimated amount of the locomotive rental is \$5,000.

The lease agreement was reviewed by our Legal Department and by utility staff and is attached.

Alternatives

It appears that the Council has the following alternatives concerning the issue at hand. The Council may:

1. Move to approve
2. Refer the issue to a Committee
3. Postpone the issue to future date
4. Take no action on the issue

Recommendation

City Administration recommends that the Council approve the award of the Locomotive Lease Agreement to Diesel Locomotive Company, LLC, of New Richmond, Wisconsin in the amount of \$160 per day.

Sample Motion

Move to approve award of the lease agreement in the amount of \$160 per day from Diesel Locomotive Company, LLC for the Locomotive Lease Agreement.

LOCOMOTIVE LEASE AGREEMENT

THIS LEASE AGREEMENT, made this _____ day of _____, 2009, by and between DIESEL LOCOMOTIVE COMPANY, LLC, a Wisconsin Corporation, having its principal office at 1551 100th St. in New Richmond, WI (hereafter called "Lessor") and City of Grand Island, Grand Island, NE (hereafter called "Lessee") WITNESSETH:

1. TERM OF AGREEMENT:

This lease shall be effective for a term of thirty (30) days plus any additional days after, beginning at delivery /start-up and ending when the unit is set –out for RR pick-up and return

2. PURPOSE:

LESSEE hereby leases from LESSOR, and LESSOR hereby leases to LESSEE, one locomotive unit (hereafter called the "Unit") EMD GP10 #DLCX8308. LESSEE agrees to lease the Unit for commercial purposes only and agrees that this lease is not a consumer contract.

3. LOCATION:

The Unit is currently located in Blair, NE. LESSOR will ship, at LESSEE'S cost, FOB shipping point to Unit, and all risk of loss shall pass to LESSEE upon placement of the Unit on the transport for shipment. Additionally, during such move and subsequent operation, LESSEE shall maintain in effect such inland marine insurance as required under item X herein.

4. REASONABLE CARE:

LESSEE shall use the Unit in a careful and proper manner, complying with all applicable laws, ordinances or regulations pertaining to the possession, use, or maintenance of the Unit. LESSEE shall require that the Unit be operated only by competent and qualified employees, and shall ensure the Unit is not subjected to careless and needless rough usage.

5. INDEMNIFICATION:

LESSEE shall indemnify LESSOR against, and hold LESSOR harmless from, any and all claims, losses, actions, suits, proceedings, costs, expenses, damages and liabilities, including reasonable attorneys' fees, arising out of, in connection with, or resulting from the Unit, including, without limitation, injury to or loss of the Unit or the manufacture, selection, delivery, possession, use, operation and return of the Unit. This obligation to indemnify shall also include the obligation to defend LESSOR by LESSEE and LESSEE's insurance company. Each party agrees that it will give the other prompt notice of the assertion of any claim or the institution of any action, suit or proceeding. Except for losses solely the result of LESSOR's negligence.

6. OWNERSHIP:

Ownership and title to the Unit shall at all times remain in LESSOR's name unless transferred to LESSEE. LESSEE shall have only the right to retain possession of the Unit pursuant to the terms and conditions of this Agreement. LESSEE shall keep the Unit free from any and all liens and claims, and LESSEE shall do or permit no act or thing whereby LESSOR's title or rights may be encumbered or impaired. Upon expiration or termination hereof by other than default, the Unit shall be returned unencumbered to LESSOR by LESSEE at Blair, NE. or to such other places LESSOR and LESSEE agree upon at LESSEE's sole cost and expense, and in the same condition as when received by LESSEE, reasonable wear and tear resulting from proper use thereof excepted. LESSEE shall pay rent at the said rate until all of said Unit arrives at LESSOR's premises, or other place designated by LESSOR. LESSEE shall provide LESSOR with immediate notice to any claim, levy, lien, or legal process issued against the Unit.

LESSEE shall assist LESSOR by executing and delivering to LESSOR any such instruments and assurances that LESSOR deems necessary for the confirmation or perfection of LESSOR's ownership interest in the unit.

LESSEE shall provide for registration and licensing of the Unit wherever or whenever required. If at any time LESSOR supplies LESSEE with labels, plates, or other marking indicating LESSOR's ownership of the Unit, LESSEE shall affix and keep same in a prominent place on the Unit. LESSEE shall not cover up any marks or identification or ownership, including the Unit number, displayed on the Unit.

7. ALTERATIONS:

LESSEE shall not make any alteration, additions, and improvements to the Unit, absent the written approval of LESSOR, provided that no alterations shall in any way reduce the value of the Unit. Any such alterations, additions and improvements shall immediately become a part of the Unit and ownership of the alterations, additions and improvements shall rest with LESSOR. However, at LESSOR's option, any permitted alterations, additions and improvements shall be removed by LESSEE upon the expiration or earlier termination of this Lease, if and only if such removals can be accomplished without damage to the Unit or otherwise reducing its value below that which it would have been if no such alterations, additions, or improvements had been made.

8. MAINTENANCE AND REPAIR:

LESSEE shall inspect the Unit within forty-eight (48) hours after its receipt. Unless within said time LESSEE notifies LESSOR in writing, stating the details of any defects in or other proper objection to the Unit, LESSEE shall be conclusively presumed, as between LESSOR and LESSEE, to have fully inspected and acknowledged that the Unit is in good condition and repair, and that the LESSEE is satisfied with and has accepted the Unit in its then condition. The LESSEE shall be responsible to maintain or cause to be maintained the Unit with the following items, including : all lubricating oils, all filters, brushes, lighting, fuses, brake shoes, sand, treated water or anti-freeze, batteries and battery charging system, and testing of the lube oil on a scheduled basis Thereafter, LESSEE shall effect and bear the expense of all necessary repairs, maintenance, operation and replacements required to be made to maintain the Unit in good operable condition, ordinary wear and tear from proper operation excepted. LESSEE's agreement to pay all expenses of maintaining and repairing the Unit includes labor, material, parts, and other similar expenses. LESSEE is responsible for all repairs due to operator error, negligence, or failure to report required repairs. The LESSEE is responsible to maintain and operate the wheel and axle sets and traction motor assemblies in accordance with FRA regulations / specifications; any repairs required from damage such as flat spots on the wheels from excessive wheel slip and or wheel skidding shall be to the account of the LESSEE. In the event that replacement of any part, component, or assembly, or any maintenance or repairs to said #8308 is due to negligent acts or omissions on the part of Platte Generating Station. or its employees, agents, or subcontractors; misuse, abuse, or unauthorized use of said #8308, Acts of god, collisions, derailments, vandalism, or the continued operation of the locomotive when in need of service, Platte Generating Station shall be responsible for charges incurred from such replacement, maintenance, and or repair at Diesel Locomotive Co.'s and or its authorized agents at the usual and current rates at the time such products or services are required. 92 Day FRA test shall be completed as per FRA rules, maintenance shall be done per our maintenance program on not more than an 1800 hour interval, whichever would come first. Maintenance program is attached. LESSEE shall report hour meter reading monthly to LESSOR via fax or e-mail.

9. INSPECTION

LESSEE shall, whenever requested, advise LESSOR of the exact location and condition of the Unit, and shall give LESSOR immediate notice of any attachment or other judicial process affecting the Unit, and indemnify and save LESSOR harmless from any loss or damage caused thereby. LESSOR shall have the right, upon reasonable notice, to free access to inspect the Unit and shall be afforded the necessary time for the purpose of such inspection. LESSOR shall make arrangements for such inspections so as to minimize any adverse impact upon LESSEE's normal operations. LESSOR may remove the Unit forthwith, without notice to LESSEE, if the Unit is, in the opinion of the LESSOR, used beyond its capacity or in any manner improperly cared for or abused.

10. CASUALTY AND INSURANCE:

LESSEE hereby assumes all risk or loss or damage to the Unit from any cause. Destruction of, or damage to the Unit shall not serve to relieve LESSEE of any obligations under this Agreement and such obligations shall remain in full force and effect until otherwise discharged. LESSEE agrees to insure the Unit under an inland marine policy for the sum of \$225,000 U.S. Funds and to name LESSOR as the owner and insured. LESSEE agrees to provide LESSOR proof of such insurance. In the event of the loss or damage to the Unit, LESSOR may elect to either:

- A. remit the proceeds to LESSEE to place the Unit in good repair; and
- B. retain the outstanding balance and any other amounts owing under this Agreement.

Should LESSOR elect to keep the proceeds and remit to the LESSEE, return of the unit at the end of the lease unrepaired will not be a breach of Paragraph 6 and 15. LESSEE's maximum liability for risk of loss or damage to the locomotive will not exceed \$225,000 whether paid by the LESSEE or its insurance or both.

In addition, LESSEE also agrees to purchase and carry public liability and property damage insurance covering the Unit on the amounts of not less than \$2 million in respect to bodily injury and death to any one person, not less than \$2 million in respect to any one accident, and not less than \$1 million in respect to property damage. All such public liability and property damage insurance shall designate both LESSOR and LESSEE as insureds. LESSEE may effect such coverages under its blanket policies. All such policies shall be written by companies reasonably satisfactory to LESSOR, and copies of the policies, certificates showing such coverages to be in effect, and receipts of improvements thereunder shall be furnished to LESSOR within thirty (30) days after the execution of this Lease. Each insurer shall agree, by endorsement upon the certificates issued by it or by independent instrument furnished to LESSOR, that it will give LESSOR thirty (30) days' written notice before the policy in question shall be altered or cancelled, and that any proceeds shall be paid to LESSOR.

In the case of failure of LESSEE to procure and maintain said insurances hereinabove specified, or to pay the fees, assessments, charges, and taxes described hereafter, shall be considered an event of default.

11. TAXES AND FEES:

LESSEE shall pay all taxes, assessments, licenses, and registration fees (including interest and penalties thereon) on the Unit during the term of this Agreement, based upon (a) the interest of LESSEE in the Unit or upon the use or operation thereof or the earnings arising there from; and (b) against LESSOR on account of its ownership of the Unit, or any part thereof or the use or operation thereof, exclusive, however, of any taxes based on net income of LESSOR.

LESSEE agrees to file, on behalf of the LESSOR, all required tax returns or reports concerning the Unit with all the appropriate government agencies and within not more than forty-five (45) days after the due date of such filing. LESSEE shall keep the unit free and clear of all levies, liens, and encumbrances, other than those being contested, which, as a result of such contest, do not adversely threaten the LESSORS title to the Unit.

12. DEFAULT:

A. Events of the Default – An event of the default shall be the occurrence of one or more of the following:

1. LESSEE shall fail to make any payment due under this Agreement on the date it is due.

1i. LESSEE shall fail to perform or observe any covenant, condition, or agreement to be performed or observed by it hereunder, and such failure continues uncured for ten (10) days after written notice thereof to LESSEE by LESSOR.

1ii. LESSEE shall cease too do business as a going concern or file a voluntary petition of bankruptcy, be adjudicated as bankrupt or insolvent, file a petition to seek any reorganization arrangement, composition, readjustment, liquidation, dissolution, or similar arrangements under any present or future statute, law or regulation, or file against it any such proceeding, consent to or acquiesce in the appointment of a trustee, receiver, or liquidator of it or all or a substantial part of its assets or properties, or if it or it's shareholders or members shall take any action looking to its dissolution or liquidation.

1iii. LESSEE shall become insolvent (however defined) or make any arrangements for the benefit of creditors.

1v. LESSEE commits, or fails to commit, any act that jeopardizes the rights of the LESSOR.

V. LESSEE attempts to remove, sell, transfer, assign, encumber, part with possession, or sublet the Unit or any part thereof.

Vi. LESSEE shall fail to pay insurance payments as required by this lease under paragraph 10 of this Lease.

B. Remedies for Default – Upon an event of default, LESSOR may elect any of the following remedies, as well as any other remedies available under the law.

1. All sums due under this Agreement shall become immediately payable in full.

1i. LESSOR may terminate the Agreement, except that such termination shall not serve to limit the obligations of LESSEE as incurred under this Agreement.

1ii. LESSOR may demand that the Unit be returned to LESSOR, at LESSEE's expense, at such place as the LESSOR may designate. LESSOR, without notice or legal process and without incurring any liability, may enter any premises under control of LESSEE where the Unit may or is believed to be located for the purpose of repossessing the Unit or any part thereof. Lessee expressly waives all further right to possession of the Unit and all claims for injuries suffered through the cause of repossession and not as a penalty, any unpaid rent that accrued on or before the occurrence of the event of default, plus an amount equal to the difference between the aggregate rental value of the Unit for such unexpired term; provided, however, that if any statute governing the proceeding in which such damages are to be clearly specified in the amount of such claim, LESSOR shall be entitled to prove as and for damages for the breach in an amount equal to that allowed under such statute.

1iii. LESSOR may enforce by legal proceedings, specific performance of all terms and conditions of the Agreement, as well as any other remedy available at law or in equity. Should LESSOR institute such legal proceedings to recover the Unit of any amounts owing under this Agreement, LESSEE shall pay all expenses incurred by LESSOR or on behalf of LESSOR relating to such legal proceedings.

liv. No remedy shall be exclusive of any other remedy provided herein or by law. A waiver by LESSOR of any event of default shall not constitute any other or subsequent waiver.

13. Term

The term of this Agreement shall commence upon the date first written and shall continue for a period of thirty (30) days plus any additional days required, unless earlier terminated as provided herein.

14. Daily Rental Rate:

The daily rental for the Unit shall be One Hundred sixty dollars (160.00) U.S. per day for one month and the same rate for any additional required days. This daily rental shall continue for one month during the term of this Agreement. Payment of the first months' lease shall be made by LESSEE on or about December 15, 2009 and will represent the first months' rental. All rental payments shall be made in advance and apply toward principal. In the event the unit is unavailable for operation due to failure caused by normal wear and tear, the LESSEE shall not be responsible for payment for those days after the first 72 hours out of service.

15. Return of Unit:

Upon expiration or termination of this Agreement, LESSEE shall, at LESSEE's expense, return the unit to LESSOR in good running condition, except for normal wear and tear, at such location, within reason, on any premises controlled by the LESSEE, or his affiliated rail transportation operator, as LESSOR may reasonably direct. In addition, Lessee agrees to make available, at no expense to LESSOR and at no liability to LESSEE, if required, a suitable location to store the Unit on LESSEE's premises for a period of up to ninety (90) days.

16. Acceptance Warranty:

Lessee acknowledges that LESSOR is not the manufacturer of the Unit, nor manufacturer's agent, and that LESSOR makes no warranty or representation, either expressed or implied, as to any matter whatsoever, including, without limitation, the design or condition of the Unit, its marketability, or its fitness for any particular purpose, the quality or capacity of the materials in the Unit, the condition of the Unit, or the workmanship of the Unit, and that the Unit will satisfy the requirements of any law, rule, specification or contract that provides for specific machinery or operators or special methods, it being agreed that the Unit is leased "as is" and that all risks, as between LESSOR and LESSEE, are to be borne by the LESSEE, at its sole risk and expense. LESSEE, accordingly, agrees not to assert any claim whatsoever against LESSOR for loss of anticipatory profits or consequential damages. No oral agreement, guarantee, promise, condition, representations, related hereto and/or to said Unit are integrated herein. No modification hereof shall be binding unless in writing, signed by LESSOR. No defect or unfitness of the Unit shall relieve LESSEE of the obligations to payment, or any other obligations under this Lease to LESSOR.

City of Grand Island

Diesel Locomotive Co. LLC

By: _____

By: _____

Its: _____

Its: _____

Date _____

Date _____

RESOLUTION 2009-307

WHEREAS, the Platte Generating Station utilizes a locomotive to move coal cars on-site during the coal unloading process; and

WHEREAS, at the November 10, 2009 Council meeting, National Railway Equipment was awarded the contract for overhaul of the Platte Generating Station locomotive; and

WHEREAS, in order for National Railway Equipment to begin their work on the locomotive, Platte Generating Station will need to lease an alternate locomotive during this time to continue unloading coal; and

WHEREAS, bids were solicited from locomotive rental suppliers and Diesel Locomotive, LLC, of New Richmond, Wisconsin submitted a bid for locomotive lease; and

WHEREAS, a Lease Agreement was prepared to provide for the locomotive lease for \$160 per day, with an estimated total rental cost of \$5,000.00; and

WHEREAS, the Legal Department has reviewed and approved the Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Locomotive Lease Agreement between the City of Grand Island and Diesel Locomotive Company, LLC, of New Richmond, Wisconsin is hereby approved; and the Mayor is hereby authorized and directed to execute such agreement on behalf on the City of Grand Island.

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Adopted by the City Council of the City of Grand Island, Nebraska, December 1, 2009.

Margaret Hornady, Mayor

Attest:

RaNae Edwards, City Clerk

Approved as to Form ☐ _____
November 25, 2009 ☐ City Attorney