



City of Grand Island

Tuesday, December 15, 2009

Council Session

Item G18

**#2009-322 - Approving Reimbursement Agreement with AT & T
for Lowering Fiber Optics Cable at the Veterans Athletic Field
Complex**

Staff Contact: Steve Paustian

Council Agenda Memo

From: Steve Paustian, Parks and Recreation Director

Meeting: December 15, 2009

Subject: Approving Reimbursement Agreement with AT&T for Lowering Fiber Optics Cable at the Veterans Athletic Field Complex

Item #'s: G-18

Presenter(s): Steve Paustian, Parks and Recreation Director

Background

During the design process of the Veterans Athletic Field Complex it was discovered that an AT&T fiber optics cable was in conflict with the drainage system designed for the Veterans Athletic Field Complex.

Discussion

Because of this conflict it will be necessary for AT&T to lower their cable along the east end of the Complex. AT&T has determined it will cost an estimated \$28,255.00 to lower the cable. Design changes were considered however the best design will require this lowering and it has been determined that we should proceed with the lowering of the cable. Fund number 40044450 90122 Soccer/Bball Fields-Vets Home has funds budgeted for this purpose.

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 Reimbursement Agreement with AT&T for an estimated amount of \$28,255.00.

Sample Motion

Move to enter into a Reimbursement Agreement with AT&T to lower their fiber optics cable at the Veterans Athletic Field Complex.

REIMBURSEMENT AGREEMENT

This AGREEMENT made this ____ day of _____, 2009, by and between AT&T Corp., on behalf of itself and its affiliated companies, which has a place of business at 3001 Cobb Parkway, Atlanta, GA 30339 ("AT&T") and City of Grand Island, which has a place of business at 100 East 1st Street, Grand Island, NE 68802 ("Developer").

WITNESSETH:

WHEREAS, AT&T is a grantee of an easement that is recorded as Document 88-101382, County of Hall, State of Nebraska (the "Easement"); and

WHEREAS, the Easement and any AT&T buried cable and associated facilities that have been placed within the Easement will be adversely impacted by Developer's proposed construction within the easement strip; and

WHEREAS, Developer will reimburse AT&T for AT&T's cost of protecting, relocating and/or lowering a section of the AT&T Grand Island-Prospect Valley Cable between AT&T Marker 5 and 6 (the "Cable");

NOW THEREFORE, the parties agree as follows:

1. AT&T will provide engineering, plant protection, labor, materials, and supervision necessary to protect, relocate and/or lower the Cable, as deemed necessary in AT&T's sole judgment (the "Work"). The Work is more particularly described in attached Exhibit A. The starting date will be set by the parties so that the Work can be completed as expeditiously as practicable.
2. Developer shall pay AT&T the actual cost of the Work, which is estimated to be Twenty-eight Thousand Two Hundred Fifty-five Dollars (\$28,255.00), as shown on attached Exhibit B. The estimated cost shall be paid by Developer upon execution of this Agreement. Developer acknowledges that the estimated cost does not include rock removal costs and that if rock removal is required, the actual cost may greatly exceed the estimated cost. Upon completion of the Work, AT&T will send a final invoice to Developer for the actual cost of the Work. If the actual cost is greater than the estimated amount, Developer will pay to AT&T the difference within thirty (30) days from the invoice date. If the actual cost is less than the estimated amount, AT&T shall reimburse Developer the difference within sixty (60) days from the invoice date. Exhibits A and B are valid for up to sixty (60) days from the date of receipt of this agreement.
3. Developer agrees to exercise all due caution while working near the Cable, in order to prevent damage to the Cable. Developer agrees:

(a) to notify AT&T by telephone at 1-800 252-1133 at least forty-eight (48) hours prior to performing any construction, demolition or repairs at the Cable location;

(b) not to use at the Cable location any tool, equipment, or the machinery capable of being operated within ten (10) feet of the Cable;

(c) to perform construction, demolition, repair, modifications, additions and any other activities in compliance with all applicable laws and regulations and in a manner that does not interfere with the operations of AT&T; and

(d) not to work at the Cable location without AT&T's prior authorization and AT&T's On-Site Work Force personnel being present during the work.

These restrictions shall remain in effect until the "work" contemplated in this agreement has been completed and the Developer has finished installing all drainage, water, sewer, paving, and other infrastructure within the easement. Upon final inspection and payment of all sums due, the Developer shall be entitled to written acknowledgment from AT&T that the project is completed. Thereafter, Developer will contact AT&T prior to any future subsurface work within the easement consistent with Nebraska law.

4. Developer (the "Indemnifying Party") shall indemnify, defend and hold harmless AT&T (the "Indemnified Party") from and against any and all claims, demands, actions, losses, damages, assessments, charges, judgments, liabilities, costs and expenses (including reasonable attorneys' fees and disbursements) that may from time to time be asserted by third parties against the Indemnified Party because of any personal injury, including death, to any person or loss of, physical damage to or loss of use of real or tangible personal property, to the extent caused by the negligence or misconduct of the Indemnifying Party, its agents, employees or contractors. For purposes of indemnifications set forth in this Agreement, "Indemnified Party" means AT&T, its affiliates, subsidiaries, parent, successors and assigns and its and their employees, directors, officers, agents, contractors and subcontractors. The Indemnified Party:

4.1 shall notify the Indemnifying Party in writing promptly upon learning of any claim or suit for which indemnification may be sought, provided that failure to do so shall have no effect except to the extent the Indemnifying Party is prejudiced thereby;

4.2 shall have the right to participate in such defense or settlement with its own counsel and at its own expense, but the Indemnifying Party shall have control of this defense or settlement; and

4.3 shall reasonably cooperate with the defense.

5. AT&T makes no warranties, express or implied, including any implied warranties as to merchantability or fitness for a particular purpose.

6. Notwithstanding any provision of this agreement to the contrary, except as provided in Section 4, in no event shall either party be liable to the other party for any special, incidental, indirect, punitive, reliance or consequential damages, whether foreseeable or not, including, but not limited to, loss of profits or revenue, cost of capital, cost of replacement services, or claims of customers or of other third parties, occasioned by any cause whatsoever, including, without limitation, breach of contract, breach of warranty, negligence or strict liability.

7. Insurance

- a. With respect to Developer's performance under this Agreement, and in addition to Developer's obligation to indemnify, Developer if they are performing any work hereunder or their contractors, at Developer's sole cost and expense shall:
- i. maintain the insurance coverages and limits required by this Section and any additional insurance and/or bonds required by law:
 1. at all times during the term of this Agreement and until completion of all Work associated with this Agreement, whichever is later; and
 2. with respect to any coverage maintained in a "claims-made" policy, for two (2) years following the term of this Agreement or completion of all Work associated with this Agreement, whichever is later. If a "claims-made" policy is maintained, the retroactive date must precede the commencement of Work under this Agreement;
 - ii. require each subcontractor who may perform Work under this Agreement or enter upon the Work site to maintain coverages, requirements, and limits at least as broad as those listed in this Section from the time when the subcontractor begins Work, throughout the term of the subcontractor's Work and, with respect to any coverage maintained on a "claims-made" policy, for two (2) years thereafter;
 - iii. procure the required insurance from an insurance company eligible to do business in the state or states where Work will be performed and having and maintaining a Financial Strength Rating of "A-" or better and a Financial Size Category of "VII" or better, as rated in the A.M. Best Key Rating Guide for Property and Casualty Insurance Companies, except that, in the case of Workers' Compensation insurance, Developer may procure insurance from the state fund of the state where Work is to be performed; and
 - iv. deliver to AT&T certificates of insurance stating the types of insurance and policy limits. Developer shall provide or will endeavor to have the issuing insurance company provide at least 30 days advance written notice of cancellation, non-renewal, or reduction in coverage, terms, or limits to AT&T. Developer shall deliver such certificates:
 1. prior to execution of this Agreement and prior to commencement of any Work;

2. prior to expiration of any insurance policy required in this Section; and
 3. for any coverage maintained on a "claims-made" policy, for two (2) years following the term of this Agreement or completion of all Work associated with this Agreement, whichever is later.
- b. The Parties agree:
- i. the failure of AT&T to demand such certificate of insurance or failure of AT&T to identify a deficiency will not be construed as a waiver of Developer's obligation to maintain the insurance required under this Agreement;
 - ii. that the insurance required under this Agreement does not represent that coverage and limits will necessarily be adequate to protect Developer, nor be deemed as a limitation on Developer's liability to AT&T in this Agreement;
 - iii. Developer may meet the required insurance coverages and limits with any combination of primary and Umbrella/Excess liability insurance; and
 - iv. Developer is responsible for any deductible or self-insured retention.
- c. The insurance coverage required by this Section includes:
- i. Workers' Compensation insurance with benefits afforded under the laws of any state in which the Work is to be performed and Employers Liability insurance with limits of at least:
 \$500,000 for Bodily Injury – each accident
 \$500,000 for Bodily Injury by disease – policy limits
 \$500,000 for Bodily Injury by disease – each employee
 To the fullest extent allowable by Law, the policy must include a waiver of subrogation in favor of AT&T, its Affiliates, and their directors, officers and employees.
 In states where Workers' Compensation insurance is a monopolistic state-run system, Developer shall add Stop Gap Employers Liability with limits not less than \$500,000 each accident or disease.
 - ii. Commercial General Liability insurance written on Insurance Services Office (ISO) Form CG 00 01 12 04 or a substitute form providing equivalent coverage, covering liability arising from premises, operations, personal injury, products/completed operations, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract) with limits of at least:
 \$2,000,000 General Aggregate limit
 \$1,000,000 each occurrence limit for all bodily injury or property damage incurred in any one (1) occurrence
 \$1,000,000 each occurrence limit for Personal Injury and Advertising Injury
 \$2,000,000 Products/Completed Operations Aggregate limit
 \$1,000,000 each occurrence limit for Products/Completed Operations
 The Commercial General Liability insurance policy must:

1. include AT&T, its Affiliates, and their directors, officers, and employees as Additional Insureds. Developer shall provide a copy of the Additional Insured endorsement to AT&T. The Additional Insured endorsement may either be specific to AT&T or may be "blanket" or "automatic" addressing any person or entity as required by contract. A copy of the Additional Insured endorsement must be provided within 60 days of execution of this Agreement and within 60 days of each Commercial General Liability policy renewal;
 2. include a waiver of subrogation in favor of AT&T, its Affiliates, and their directors, officers and employees; and
 3. be primary and non-contributory with respect to any insurance or self-insurance that is maintained by AT&T.
- ii. Business Automobile Liability insurance with limits of at least \$1,000,000 each accident for bodily injury and property damage, extending to all owned, hired, and non-owned vehicles.

8. Developer shall keep the Cable and other property of AT&T free from all mechanic's, artisan's, materialman's, architect's, or similar services' liens which arise in any way from or as a result of its activities and cause any such liens which may arise to be discharged or released.

9. Except for payment of the cost of the Work, neither party shall have any liability for its delays or its failure in performance due to: fire, explosion, pest damage, power failures, strikes or labor disputes, acts of God, the Elements, war, civil disturbances, acts of civil or military authorities or the public enemy, inability to secure raw materials, transportation facilities, fuel or energy shortages, or other causes beyond its control, whether or not similar to the foregoing.

10. A party shall be in default if it fails to perform or observe any material term or condition of this Agreement and the failure continues unremedied for thirty (30) days after receipt of written notice (fourteen (14) days in the case of Developer's failure to pay AT&T the estimated and/or actual cost of the Work); provided, however, that when such default (excluding Developer's non-payment) cannot reasonably be cured within such thirty (30) day period, this period will be extended if that party promptly commences to cure the same and prosecutes such curing with due diligence. Upon the default by a party, the other party may terminate this Agreement and pursue any legal remedies it may have under applicable law or principles of equity.

11. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors or assigns. Developer shall not assign, transfer, or dispose of this Agreement or any of its rights or obligations hereunder without prior written consent of AT&T; provided, however, that Developer may assign or transfer this Agreement to a controlling or controlled affiliate or to a successor in the event of reorganization, including a merger or sale of substantially all of its assets, without the

consent of AT&T. An assignment, transfer or disposition of this Agreement by Developer shall not relieve Developer of any of its obligations under this Agreement. AT&T shall have the right to assign this Agreement and to assign its rights and delegate its obligations and liabilities under this Agreement, either in whole or in part, to any party. An assignment, transfer or disposition of this Agreement by AT&T shall not relieve AT&T of any of its obligations under this Agreement. Neither this Agreement, nor any term or provision hereof, nor any inclusion by reference shall be construed as being for the benefit of any person or entity not a signatory hereto.

12. Any demand, notice or other communication to be given to a party in connection with this Agreement shall be given in writing and shall be given by personal delivery, by registered or certified mail, return receipt requested, or by commercial overnight delivery service addressed to the recipient as set forth below or to such other address or individual, as may be designated by notice given by the party to the other:

AT&T:

AT&T CORP.
3001 Cobb Parkway
Atlanta, GA 30339
Room 162
Attention: Right of Way Dept.

With a copy to:

AT&T Services, Inc.
One AT&T Way
Room 3A118A
Bedminster, NJ 07921
Attention: Legal Department - Network Services

Developer:
City of Grand Island
100 East 1st Street
Grand Island, NE
Attention: Director Parks & Recreation

Any demand, notice or other communication given by personal delivery shall be conclusively deemed to have been given on the day of actual delivery thereof and if given by registered or certified mail, return receipt requested or by commercial overnight delivery service on the date of receipt thereof.

13. The failure of either party hereto to enforce any of the provisions of this Agreement, or the waiver thereof in any instance, shall not be construed as a general waiver or relinquishment on its part of any such provision, and said provision shall nevertheless be and remain in full force and effect.

14. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Nebraska without reference to its choice of law principles.

15. Each party represents and warrants that:

- (a) It has full right and authority to enter into, execute, deliver and perform its obligations under this Agreement;
- (b) It has taken all requisite corporate action to approve the execution, delivery and performance of this Agreement;
- (c) This Agreement constitutes a legal, valid and binding obligation enforceable against such party in accordance with its terms, subject to bankruptcy, insolvency, creditors' rights and general equitable principles; and
- (d) Its execution of and performance under this Agreement shall not violate any applicable existing regulations, rules, statutes, or court orders of any local, state or federal government agency, court or body.

16. This Agreement constitutes the entire and final agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior oral and written communications, understandings and agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are an integral part hereof and are hereby made a part of this Agreement. This Agreement may only be modified or supplemented by an instrument in writing executed by a duly authorized representative of each party.

17. Each action or claim against any party arising under or relating to this Agreement shall be made only against such party as a corporate, and any liability relating thereto shall be enforceable only against the corporate assets of such party. No party shall seek to pierce the corporate veil or otherwise seek to impose any liability relating to, or arising from, this Agreement against any shareholder, employee, officer or director of the other party. Each of such persons is an intended beneficiary of the mutual promises set forth in this Section 17 and shall be entitled to enforce the obligations of this Section 17.

18. The relationship between the parties shall not be that of partners, agents or joint ventures for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to federal income tax purposes. The parties, in performing any of their obligations hereunder, shall be independent contractors or independent parties and shall discharge their contractual obligations at their own risk.

19. This Agreement and each of the parties' respective rights and obligations under this Agreement shall be binding upon and shall inure to benefit of the parties and each of their respective permitted successors and assigns.

20. No provision of this Agreement shall be interpreted to require any unlawful action by either party. If any section or clause of this Agreement is held to be invalid or unenforceable, then the meaning of that section or clause shall be construed so as to render it enforceable to the extent feasible. If no feasible interpretation would save the section or clause, it shall be severed from this Agreement with respect to the matter in question, and the remainder of the Agreement shall remain in full force and effect. However, in the event such a section or clause is an essential element of the Agreement, the parties shall promptly negotiate a replacement that will achieve the intent of such unenforceable section or clause to the extent permitted by law.

21. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their authorized representatives as of the date first above set forth.

CITY OF GRAND ISLAND

AT&T CORP.

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Tax ID: _____



EXHIBIT A

THE WORK

The Work will consist of lowering 6 - 2 inch conduits with fiber cable and a direct buried fiber optic cable located in two separate trenches for approximately 300 ft. on the existing ROW including, potholing and exposing conduits and cables to verify locations, expose conduit and cables and lower to a depth of approximately 6 to 8 ft from the surface of the land in 3 separate locations, place the direct buried fiber in a 2 inch split pipe, add one spare 2 inch duct and restore disturbed area to "as good as" condition per AT&T specifications.

EXHIBIT B
ESTIMATED COST

Construction & Materials	\$18,820.00
Detailed Engineering (Consultant) Inspection/Engineering Drawings	\$ 4,885.00
AT&T Engineering/Plant Protection	<u>\$ 4,550.00</u>
TOTAL DUE	\$28,255.00

RESOLUTION 2009-322

WHEREAS, the City of Grand Island is in the process of developing a new athletic field complex; and

WHEREAS, such project will require the lowering of a fiber optics cable by AT & T for the construction of the athletic field complex; and

WHEREAS, the City of Grand Island has received an Reimbursement Agreement from AT & T to lower the fiber optics cable; and

WHEREAS, AT & T submitted a Reimbursement Agreement for the lowering of the fiber optics cable in the estimated amount of \$28,255.00; and

WHEREAS, an Agreement with AT & T to perform work for such project has been reviewed and approved by the City Attorney.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Reimbursement Agreement with AT & T for lowering a fiber optics cable at the athletic field complex is hereby approved at an estimated cost of \$28,255.00.

BE IT FURTHER RESOLVED, that the Mayor is hereby authorized and directed to execute such agreement on behalf of the City of Grand Island

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Adopted by the City Council of the City of Grand Island, Nebraska, December 15, 2009.

Margaret Hornady, Mayor

Attest:

RaNae Edwards, City Clerk

Approved as to Form ☐ _____
December 10, 2009 ☐ City Attorney