



West Linn – Wilsonville Schools

To: School Board of Directors
Dr. Kathy Ludwig, Superintendent

From: Pat McGough, Chief Operations Officer

Date: December 6, 2024

Subject: Emerick Construction - Declaration of Notice of Default

On December 4, 2024, the District declared that Emerick Construction was in default of the construction contract for Frog Pond Primary School. By declaring the Contractor Default, the contract with Emerick Construction will be terminated in seven days.

Background:

The District issued a Request for Proposal (RFP 19-1009) to solicit statements of qualified proposals from qualified firms interested in being included on a list of qualified eligible contractors to be on the New Primary School at Frog Pond Project under an exemption allowance to ORS 279C.335(2). A panel comprised of district staff, architects, and project manager professionals evaluated all submitted proposals based on a requisite score system. Contractors that achieved the requisite score were included in a list of firms eligible to participate in the second step of selection, a competitive bid. A total of six (6) contractors submitted their qualifications, with five (5) meeting the criteria to become qualified bidders. A total of four (4) qualified bidders submitted sealed bids for construction. By Oregon law, the district must accept the lowest qualified bid. Emerick Construction was awarded the construction contract as the lowest responsive and responsible bidder to build the new Frog Pond Primary School on April 17, 2023 with the approval of Board Resolution No. 2022-12.

Construction broke ground in June, 2023 and work progressed normally through March, 2024. In April, 2024, the District received unsolicited communications from subcontractors, claiming that Emerick was not paying invoices or pay applications for work performed by those subcontractors. By September, the District had received communications from 33 separate subcontractors and suppliers, all unsolicited, each claiming that Emerick had not paid for their work or materials. The District sent letters dated June 24, July 11, August 23 and August 30, 2024, asking Emerick to address the concerns of non-payment to subcontractors, as required by Oregon law and the contract. The District also sent a letter to Emerick and Zurich (the Payment and Performance Bond Surety) regarding payment concerns and utilization of two party checks on future payment applications, dated August 30, 2024. The District sent additional letters and emails on September 20, September 23, October 2, October 10, November 19, November 22 and November 26, 2024. Emerick failed to provide any statement or proof of payment to subcontractors.

By withholding money from subcontractors, without notice to the District, Emerick was in violation of ORS 279C.580. Non-payment of subcontractors is also a violation of the contract and the Payment Bond. Emerick has been non-responsive to demands to produce proof of payment to subcontractors. The District has paid every compliant payment application submitted by Emerick through November, 2024. On December 2, 2024, the District received a letter from the legal representatives for Zurich, directing the District to withhold funds for all future payments. The letter states:

Recent events have prompted this letter, which serves as a formal request that all funds payable on the above-referenced bonded contract, including the final disbursement, be withheld from Emerick and be directed to Zurich, as assignee and attorney-in-fact for Emerick. Zurich will ensure protection and proper disbursement of the project funds to any subcontractors and/or vendors that are owed money on the Project.

Therefore, the District has declared that Emerick Construction is in default of the contract. That declaration is required for termination, which will occur seven (7) days after this declaration.



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Completion of the School

With the declaration of default, the Payment and Performance Surety, Zurich, now has the responsibility to address claims made by subcontractors for non-payment (Payment Bond) and to complete the construction of the school (Performance Bond). The District is obligated to pay the remaining fund balance under the construction contract to Zurich, but has no responsibility to pay any additional funds associated with the increased costs to complete the school. Under the Performance Bond, Zurich has a number of options available to them to complete the work (paraphrased from the Performance Bond):

1. Arrange for a contractor to complete the construction contract.
2. Undertake the construction contract itself and perform the work.
3. Obtain bids or negotiated proposals from qualified contractors acceptable to the District.
4. Negotiate a settlement with the District.
5. Deny any liability.

In communications with Zurich's representatives and legal counsel, the District has confidence that Zurich will accept liability and complete the work, using one of the first four options listed above. ***The District will not be held responsible for any additional costs to complete the work.***

Impact: Recommendation to delay the opening of Frog Pond until the 2026/2027 School Year

As a result of the declaration of Notice of Default, while the completion of the school is assured, the timing is not.

The completion relies on two separate and distinct courses of action moving forward. The first is the actual completion of all construction activities necessary to open the school. The timeline for those can reasonably be projected once work fully resumes on the project. However, the second course of action involves a legal process with both prescribed timelines for legal actions and unknowable delays. Negotiations with Zurich cannot formally begin until the construction contract is terminated. Reaching agreement between Zurich and the District about the remedy to complete the project will take time. Mobilizing a new construction management team, assessing the status of the construction progress and negotiating with either new or existing subcontractors to complete the work will require more time. Some permits have been secured by the original subcontractors and the work can only be performed under their trade licenses. If a different subcontractor is chosen to perform the remaining work, an entirely new permitting process will be needed.

With all of the known prescribed time delays and the potential unforeseen delays of restarting the project, the Operations Department cannot give assurance to the completion of the school for the beginning of the 2025/2026 school year. Internal District processes necessary for the opening of any new school also require time to create new boundaries, hire and allocate staff, design bus routes, etc. Prudent planning dictates that the District must know with certainty that a school will be ready for students on the first day of school. In the assessment of the unknown and unknowable factors related to the default of the contractor, Operations staff cannot give that assurance today. Therefore, Operations Staff recommends that the opening of Frog Pond Primary School be delayed until the 2026/2027 school year.

Staff will be available to answer any questions posed by the Board.