

MINUTES OF THE SPECIAL MEETING OF THE SARGENT COUNTY WATER RESOURCE BOARD HELD ON WEDNESDAY, NOVEMBER 28, 2012 AT 9:00 A.M., IN THE COMMISSIONERS ROOM, SARGENT COUNTY COURTHOUSE, FORMAN, NORTH DAKOTA

Managers present: Chris McFarland, Jim Bosse, Mark Breker, Richard Engst, and Roger White. Also present: Sherry Hosford, Secretary-Treasurer, Sargent County Water Resource District; Chad Engels and Mike Opat, Moore Engineering, Inc.; Sean Fredricks, Ohnstad, Twichell (by phone); Mike Walstead, David Jacobson, Steve Wyum, and Bill Anderson, Sargent County Commissioners; Paige Cary, Sargent County Teller; Doug and Janel Ruby, Milnor residents; Lyle R. Bopp, Sargent County States Attorney; Dwain Elenberger and Randall Edison, City of Milnor; Steve Johnson, Johnson Excavating.

### **Frenier Dam Permit**

The North Dakota State Engineer's office forwarded a letter to the Board regarding Application No. 2381, a dike/dam permit regarding the proposed repairs to the Frenier Dam. Sean Fredricks explained the Board does not approve or deny these applications; rather, the State Engineer's office reviews dam/dike applications and ultimately approves or denies these permits. The Board can offer comments if they wish. The Board had no comments to offer, since the Board was the entity that applied for the permit application. Sherry Hosford will e-mail Dwight Comfort to confirm the Board received the Application and that the Board had no further comment.

### **Drain 4 Reconstruction**

Chad Engels explained a pay request for PARTIAL PAYMENT NO. 2, including Change Order No. 2 in the amount of \$2,915. The total pay request is \$14,314. Chad reported the project is complete with the exception of acceptance of final seeding. The contractor will complete seeding in the spring, and Moore Engineering will inspect the seeding. There will be an additional pay request following acceptance of final seeding, and the Board will release remaining retainage.

Motion to approve Partial Payment No. 2 in the amount of \$14,314, including Change Order No. 2. (Bosse/Engst. Unanimous.) Warrant No. 66957 – payable to JAV Construction Co.

### **Sargent County Drain No. 7/Milnor Hazard Mitigation Project**

The Board next discussed the water main boring issue regarding Drain 7 in the City of Milnor. In the course of constructing the Drain 7 improvements, the Board's contractor, Johnson Excavating, encountered a water main only 1 to 2 feet below the drain bottom. Brady Woodard from Moore Engineering, the City of Milnor public works director, and Manager Engst were on site to view the main. Plans provided by the City of Milnor showed the water main was supposed to be 7 feet below the drain bottom. The City used Houston Engineering to design a water main improvement project in the early to mid-1990s. Upon discovery of the water main, the City of Milnor's engineer, Interstate Engineering, also visited the site.

The City and their public works director and engineer indicated they wanted to relocate the water main via a boring. Moore Engineering indicated the contractor could have simply gone to a different spot for approximately \$2,000 to \$3,000, but the City indicated their desire for a boring instead. The City and Interstate Engineering wanted Johnson Excavating to use a subcontractor for the boring. Johnson Excavating refused to work with the contractor offered by the City.

Johnson Excavating has always indicated the proposed subcontractor offered by the City did not work for or under Johnson Excavating. The City insisted on the boring and, therefore, proceeded to direct the City's proposed subcontractor to do the boring work. Chad Engels contacted the subcontractor and asked who they were working for or with, and the subcontractor indicated they were working for the City. This contractor's initial boring attempt failed. That contractor pulled off the site and has not invoiced anyone. There were no change orders or work change directives for any of the boring work.

Johnson Excavating has indicated they incurred costs, approximately \$10,000, associated with cooperating with the contractor hired by the City. There is a dispute over whether or not Johnson Excavating's costs associated with the initial boring attempt are project costs that should be paid by the three parties under their Joint Powers Agreement (Agreement between the Sargent County Water Resource District, the Sargent County Commission, and the City of Milnor).

The Hazard Mitigation Grant Program will not cover any cost-share for this boring. Therefore, all costs associated with the boring issues are going to be local costs. The question is whether or not the boring is for an improvement for the benefit of the City, or a project cost that should be split three ways between the parties under the Joint Powers Agreement.

Following the failed initial boring attempt, Johnson Excavating took charge of the situation, hired their own subcontractor, and successfully accomplished a second boring. Johnson Excavating has indicated they incurred approximately \$47,000 associated with the second boring attempt.

Incidentally, Johnson Excavating's documents regarding the first boring indicate Johnson Excavating was working for the City regarding that attempt. The consensus amongst the Sargent County Water Resource District was that Johnson Excavating was not entitled to any compensation regarding the initial boring; Johnson Excavating themselves indicated they were working for the City regarding the initial boring and, further, the first boring was completely unsuccessful anyway. The parties discussed whether or not Johnson Excavating is entitled to any payment for the second boring under their construction contract with the Sargent County Water Resource District, and whether or not the Sargent County Water Resource District and the Sargent County Commission should be responsible for any costs associated with any boring attempts since the boring was basically an improvement for the benefit of the City (since the contractor could have easily simply relocated for a minor cost of \$2,000 to \$3,000).

Mike Opat offered three different scenarios:

**Scenario One:**

The Sargent County Water Resource District pays nothing for any of the boring attempts under their construction contract with Johnson Excavating since those costs were improvements for the benefit of the City, and were not necessary project costs.

**Scenario Two:**

The initial boring attempt did not result in any benefits to any party, and, therefore, no party should pay for any costs associated with the initial attempt. The City did receive a benefit as a result of the second boring attempt and so some entity should pay Johnson Excavating something for their work associated with the second boring.

**Scenario Three:**

The Sargent County Water Resource District pays Johnson Excavating under the construction contract for Johnson's costs associated with both boring attempts.

If none of the parties paid anything regarding any of the boring attempts, each party would be responsible for approximately \$17,000. If the parties all rejected any costs associated with the initial boring but all agreed to pay one-third shares regarding the second boring, each party would be responsible for \$36,000. If all three parties agreed to pay all of Johnson's costs associated with both boring attempts, each party would pay \$45,000 each.

Mike Opat pointed out that under the construction contract, the third-party owner of a utility is responsible for relocating, especially if the plans submitted by that third-party (City of Milnor) shows the utility in one place when the utility is actually in another. So under the Sargent County Water Resource District's construction contract with Johnson Excavating, the Board is not responsible for relocating the utility that is apparently not located in accordance with Houston Engineering's initial plans regarding the water main. The City is interested in pursuing something against Houston Engineer as a result of the 1990s project that resulted in the water line placement only 1 to 2 feet below the drain bottom when the plans showed placement required at 7 feet below the drain bottom.

Mike Opat pointed out that Johnson Excavating will still have paving work to do under the contract regarding the culvert installation. The boring work will also require additional paving.

Sean Fredricks indicated that, under the Joint Powers Agreement between the three parties, each party is responsible for a one-third share of each “project cost” that are local costs (non-cost-share costs). The question though is whether or not these boring attempts were “project costs” under the Joint Powers Agreement since they were not necessary for construction of the project. Rather, the City requested and pushed for the boring work. With regard to the construction contract between the Sargent County Water Resource District and Johnson Excavating, Sean Fredricks indicated that the Board is not responsible for costs associated with either boring attempt since that work was not included under the construction contract; the Board never issued any work change directive to Johnson Excavating; and the boring work was directed by the City and not by the Sargent County Water Resource District. Therefore, the boring work was unauthorized work, at least as far as the Water Resource District is concerned and with regard to the construction contract between the Board and Johnson Excavating. To the extent the City received a benefit from the improvement, Mr. Fredricks suggested that Johnson Excavating could pursue something against the City. Of course, he indicated that if Johnson Excavating pursued something against the Water Resource District, the Water Resource District would have to cross-claim or initiate some other type of claim against the City.

The three entities will likely meet with their respective Boards to determine how they will each proceed.

The Board discussed which scenario they would pursue regarding any payment or nonpayment to Johnson Excavating. Manager Breker moved to adopt Scenario 1, under which the Sargent County Water Resource District would not pay for either of the boring attempts since the City of Milnor was the beneficiary of those boring attempts and the project did not require borings. Manager White seconded the motion. Chairman McFarland opened the floor for discussion. Following further discussion, Chairman McFarland called for a roll call vote. Upon roll call vote, Managers White, Breker, and Bosse voted in favor of the motion. Managers Engst and McFarland voted against the motion. The motion passed.

Chairman McFarland will meet with the Sargent County Commission at their meeting on December 4 to report the Water Resource District’s position to the Sargent County Commission. The three entities will meet again within the coming weeks to discuss further.

The meeting adjourned at 11:50 a.m.

APPROVED:

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CHRIS McFARLAND - CHAIR

ATTEST:

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SHERRY HOSFORD - SECRETARY