

**SPECIAL MEETING, BOARD OF SANITARY DISTRICT COMMISSIONERS
MONDAY, AUGUST 10, 2007 - 11:00 A.M. - 1100 E. EIGHTH STREET**

The meeting was called to order at 11:00 a.m. in the Board Room of the Administration Building, 1100 E. Eighth Street, by the President of the Board, Boyd W. Phelps.

Commissioners present for the meeting were J. Jeffrey Jones, Ph.D., Boyd W. Phelps, and Linda Simmons and Ronald A. Strauss. Commissioner Judith A. Paul was absent.

Staff Members present for the meeting were:

Alan J. Walus, General Manager

Doretha M. Sanders, Business Office Manager

Tina M. Tabisz, Administrative Secretary

Attorney Christopher Willoughby, Braje, Nelson & Janes, LLP

There were no additional attendees at the meeting.

PURPOSE OF SPECIAL MEETING:

Proposal and consideration of award for Design Services from Brierley Associates for Lafayette/Barker Storm Sewer Interceptor Tunnel

Mr. Walus reminded the Board of the update that was provided under Old Business at the last regular meeting in July concerning the Lafayette/Barker Project. He advised that the last part of the update included a copy of a Request for Proposal (RFP) which was sent to Brierley Associates located in Colorado.

Additionally, at that meeting in July, a Statement of Qualifications was provided by Brierley Associates that documents some of the work they have done with regard to large tunnel projects.

Mr. Walus explained that the RFP was based on information contained in the American Society of Civil Engineers (ASCE) Standard Construction Guidelines for Microtunneling, ASCE 36-01.

Mr. Walus advised that on Monday, August 6th, the District received a proposal from Brierley Associates. He explained that Brierley Associates has also entertained a proposal from an engineering subcontractor, Christopher B. Burke Engineering, Ltd.

Mr. Walus then advised that on Wednesday, August 8th, the District received a revised updated proposal from Brierley Associates, which is the final proposal that was hand delivered to the Board of Commissioners on Thursday, August 9th and is before them today.

Mr. Walus advised that the final proposal of Brierley Associates received on August 8th was then transmitted to the District's legal counsel at Braje, Nelson & Janes, LLP for review of the General Terms and Conditions and that Attorney Willoughby had an opportunity to review those General Terms and Conditions.

Mr. Walus explained that the proposal before the Board at this time contains two basic parts. The first several pages document the work that Brierley Associates proposes to do, which includes a list of the tasks in a spreadsheet outlining the hours that Brierley anticipates a need for in order to complete the work. The first half the spreadsheet contains Brierley's man hours and the second half contains the sub-consultant's hours along with cost estimates on the work activities.

Mr. Walus advised that Brierley Associates was originally asked for a lump sum proposal. However, there is some uncertainty in some of the tasks.

Mr. Walus gave an example of Work Task 1-3, Railroad Permitting. There was a lump sum cost in the proposal with the man hours that they anticipated using for that task totaling \$12,735.00. Then there were Work Task 2-2, Bidding Services and Work Task 2-3, Project Management for Bidding Services.

Mr. Walus explained that the railroad permitting and bidding services are typically something that the District does not include in a lump sum fee proposal with our consultants because we are not quite sure how much time it will take. Typically, these tasks would be done on an hourly basis with reimbursement based on agreed upon contractual hours.

Mr. Walus discussed the possibility of removing those tasks from the lump sum proposal with Brierley Associates and they were agreeable to that.

In reviewing some of the other tasks, such as Rule 5 Permit Application for Stormwater Compliance and some of the utility coordination meetings, again there is some uncertainty with how many hours are needed for these tasks.

Mr. Walus explained then that the District's second question to Brierley Associates was whether they would be agreeable to perform the entire project on an hourly reimbursable basis with the not-to-exceed numbers provided in their proposal. Brierley Associates replied that they would be agreeable to do so and, in fact, would prefer that method. Therefore, if they complete tasks in a quicker time than anticipated, they would not charge the District for those hours which would result in a cost savings.

Mr. Walus advised that the proposal before the Board today is the hourly reimbursable proposal with the not-to-exceed numbers. This protects the District to a maximum amount

possible. District staff would work to keep those hours hopefully below the not-to-exceed numbers in order to gain cost efficiency.

Mr. Walus then pointed out, on Page 6 of 7 of the proposal under Schedule, Brierley Associates has included their fee proposal language and they write specifically *"We propose to provide these services on a time and materials basis at the hourly rate specified on the attached schedule of charges for professional services. Total charges shall not exceed \$370,925.00 without additional authorization from the Owner. Depending on the actual time required to complete our task, there is a potential for our total fee to be less than the above estimated amount. There is also potential for needing to expend more efforts than anticipated at this time, in which case the fee would be higher. However, we will not exceed the current agreed upon total fee without the Owner's express authorization."*

Mr. Walus explained that the last few sentences speak to a possibility where they have done their best effort to determine not-to-exceed numbers but there may be individual line items cases where we run into unexpected matters in the field or different areas that may require an adjustment to the not-to-exceed number in some cases. However, this would only be done with prior negotiation.

Mr. Walus advised that he has reviewed the fee proposal language with City Engineer Bill Phelps and Attorney Willoughby and everyone is comfortable with this language.

Mr. Walus advised that he would recommend approval of the proposal submitted by Brierley Associates on those aspects.

Mr. Walus advised that Attorney Willoughby has a couple of comments with regard to the General Terms and Conditions that he has reviewed.

Attorney Willoughby advised that he has reviewed the General Terms and Conditions with Brierley Associates as well as Christopher B. Burke Engineering and that both contract documents are essentially a mirror image of each other. Attorney Willoughby and Mr. Walus are clearly both in agreement that Paragraph 10 dealing with Indemnification and Paragraph 23 dealing with Limitation of liability, contained in both contract documents should be removed.

Attorney Willoughby explained that the policy of this Board has not been to allow those types of provisions in a contract because, essentially, they are trying to turn the cost back onto the District/Owner if a worse-case scenario event occurs.

Attorney Willoughby advised that he contacted Russ Jernigan of Brierley Associates to let him know that the District does not agree with the inclusion of those provisions, gave him

the reasons why, and explained that generally the Board does not accept those types of provisions. Attorney Willoughby advised that, in fact, Mr. Walus retrieved an old contract with Christopher Burke Engineering that dealt with similar provisions.

Attorney Willoughby advised that Mr. Jernigan was in agreement and actually indicated that they don't like those provisions either. However, the provisions were included in the documents to see if anybody would make a comment.

Mr. Phelps asked if Burke Engineering's previous contract included these two provisions. Attorney Willoughby advised that these provisions were not included in the agreement that was ultimately signed.

Attorney Willoughby commented that he remembered that, when Mr. Walus pulled the contract originally presented from Burke Engineering, this was one of the first contracts that he had worked on when he originally came to work for Braje & Nelson. However, this language was removed before the contract was finally signed.

Attorney Willoughby continued, advising that Mr. Jernigan agreed that these provisions could be removed from the contract but that he would have to get feedback from Burke Engineering first. However, he could not get that prior to this meeting because the contact people from Burke Engineering were not available.

Therefore, Attorney Willoughby suggested that the Board could approve the contracts contingent upon removal of those two provisions previously discussed.

Dr. Jones asked for clarification on which paragraphs were to be removed. Attorney Willoughby advised that it is Paragraph 10, Indemnification and Paragraph 23, Limitation of Liability. Attorney Willoughby advised that both of these paragraphs are included in both the contracts of Brierley Associates as well as Burke Engineering.

Dr. Jones asked if these are related issues. Attorney Willoughby agreed and advised that they are essentially trying to limit any potential liability in the amount of their contract.

Mr. Phelps advised that the history of these types of provisions goes back quite a few years. He explained that, for a long time, a consulting engineer could not buy professional liability insurance because there wasn't a market available.

Mr. Phelps further explained that Victor Shindler started with the architects to come up with insurance policies. Then, Victor Shindler started doing some with engineering.

Mr. Phelps advised that the recognized national association for consultants, American Consulting Engineers Counsel (ACEC) started an insurance plan themselves which was

eventually taken over by an insurance company. Then someone could obtain the insurance.

Mr. Phelps advised that the insurance companies told the engineering consultants that if they limit their liability by using clauses like the ones discussed then the insurance company would reduce the insurance premium. Every year when the policy was renewed, the insurance company would ask the consultant how many contracts were executed that included this type of clause.

Mr. Phelps stated that when he had an engineering firm, he would not include this type of clause because he thought that this was not the way to treat a client and a lot of other people felt that same way.

Mr. Phelps explained that this is how these types of clauses get into contracts and it is really the insurance companies pushing the matter.

Mr. Walus added that the District recognizes that the Brierley Associates proposal mirrors the Burke Engineering proposal very closely. The reason for that is that Brierley is typically a subcontractor to a different prime company. Brierley typically does not act as prime contractor.

Mr. Walus advised that the District specifically requested Brierley to be the prime consultant in this case because we are contracting them for their tunnel expertise. Therefore, once they asked Burke Engineering for their engineering proposal, Brierley simply formulated their own proposal based on the same type of format.

Mr. Phelps understood and explained that there is potential liability on these types of jobs. This is why the District wants Brierley to be the lead contractor.

Mr. Walus summarized that Brierley Associates responded very quickly to the District's Request for Proposal and they were also able to get proposals from a regional subcontracting engineering firm to assist with the drawing preparation. Therefore, District staff recommends acceptance and approval to award this engineering contract to Brierley Associates contingent upon the deletion of General Terms and Conditions Section 10 entitled Indemnification and Section 23 entitled Limit of Liability from both the Brierley Associates and Burke Engineering contracts.

Mr. Phelps asked if there were any questions or comments by the Board.

Ms. Simmons commented that, after Mr. Walus' excellent presentation at the last Board meeting and receiving a copy of the proposal yesterday and having a chance to review it to get a better understanding of it, she is very comfortable and actually happy that the District

has a lead agency because of the criticalness of the project. She feels very good about supporting the recommendation.

Mr. Phelps asked Ms. Simmons if she would like to make a motion on the matter.

Ms. Simmons made a motion to approve the contract of Brierley Associates, and their subcontracting consultant Burke Engineering, as presented contingent upon the exclusion of Sections 10 and 23 in both contracts – seconded by Dr. Jones. No discussion or comment on the matter. Motion carried 4 – 0 in favor.

The next Regular Monthly Meeting of the Board of Sanitary District Commissioners -
August 22, 2007 - 1:00 p.m. - 1100 E. Eighth Street

There being no further business to come before the Board at this time, on motion duly made and seconded, the meeting then adjourned.

Linda G. Simmons, Secretary