

MINUTES
NORTHEAST OHIO REGIONAL SEWER DISTRICT
BOARD OF TRUSTEES MEETING
AUGUST 6, 2009

Meeting of the Board of Trustees of the Northeast Ohio Regional Sewer District was called to order at 12:31 p.m. by Darnell Brown.

I. Roll Call

PRESENT: D. Brown
G. Starr
D. DePiero
S. Kelly
T. Longo
W. O'Malley
R. Sulik

The Secretary informed the President that a quorum was in attendance.

II. Approval of Minutes

MOTION – Ms. Kelly moved and Mr. Sulik seconded that the minutes of the July 16, 2009 Board meeting be approved. Without objection, the motion carried unanimously.

III. Public Session

Executive Director Ciaccia advised that no members from the public registered to speak at Public Session.

IV. Executive Director's Report

Executive Director Ciaccia moved to the first report item regarding the energy contract for the Southerly Wastewater Treatment Plant (hereinafter "WWTP"). In follow-up to the discussion held the previous week, Executive Director Ciaccia summarized the sequence of events that transpired involving the electrical services contract for the Southerly WWTP.

When Executive Director Ciaccia joined the District, the electrical contracts for the Easterly and Westerly WWTPs expired, and those energy services were provided by

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 2 of 26

Cleveland Public Power (hereinafter "CPP"). The District's former administration determined that exercising a competitive bid process for energy services was in the best interest of the District. Consultants were canvassed, and the District staff initially was going to engage professional services from a consulting firm in the Columbus-area as advisors to the process. Executive Director Ciaccia suggested that the District engage with a local firm, and the District chose Glenn Krassen of Bricker & Eckler, LLP (hereinafter "Bricker"). According to Executive Director Ciaccia, Mr. Krassen is very experienced in the public utilities area and is heavily involved with the Northeast Ohio Public Energy Council (hereinafter "NOPEC"). First Energy Solutions (hereinafter "FES") chose not to compete in the District's bidding process and indicated that tariff was all they could offer. The District executed a 10-year contract with CPP to provide electrical services to the Easterly and Westerly WWTPs, and that contract saved the District several hundreds of thousands of dollars, and is a long-term contract, which is uncommon in electric procurement.

On June 16, 2009, Mr. Krassen advised the District that retail generation rates involving FES were to be determined through a competitive auction through May 31, 2011. Due to the current economic conditions, the auction and accessibility created an opportunity in which the District chose to act quickly in order to maximize the full potential of savings.

On June 18, 2009, the District presented the Board with add-on Resolution No. 141-09, which sought Board consideration to issue Requests for Proposals (hereinafter "RFP") in order to elicit proposals from various utility companies that could provide electrical supply to the Southerly WWTP. Discussion was held at the June 18th Board meeting regarding this issue, and Resolution No. 141-09 was passed by the Board.

Between June 18th and June 28th the RFP was developed by District staff including Dave McNeeley, Director of Operations and Maintenance, Lawrence English, Deputy Director of Law, Ramona Lowery, Administrative Manager of Operation and Maintenance and Mr. Krassen. The RFP indicated that bidders provide the District with a guarantee in the form of a letter of security to be submitted with its proposal. Executive Director Ciaccia explained that the reasoning behind the District's request is that many supply companies are subsidiaries to parent companies, and some of those subsidiary companies have a history of folding which has resulted in the energy supply falling back to the parent company that imposes tariff prices. The District wanted to ensure that the latter would not occur and felt it prudent to obtain a guarantee of security in order to prevent those circumstances from happening. The District was unsure, at that time, as to which utility companies would respond to the District's RFP. Furthermore, many subsidiary companies are not rated by the rating agencies.

On June 29, 2009, the District's RFP was issued to 18 providers certified through the Public Utilities Commission of Ohio (hereinafter "PUCO"), and that includes FES. The

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 3 of 26

Northeast Ohio Sourcing Office (hereinafter "NEO|SO") was not listed as a PUCO certified supplier for the reason that it is an agent of FES and therefore NEO|SO did not receive a RFP. The RFP called for a two-phased submittal approach. The contract terms were to be submitted to the District on July 9th and the pricing proposals were to be submitted on July 13th.

On July 8, 2009, communication transpired between FES and District staff wherein FES objected to the District's RFP stipulation that required a guarantee letter of security. FES indicated that this level of surety is inconsistent with its corporate policy. Upon Executive Director Ciaccia's review of email correspondence between FES representatives and District staff, it was determined that District staff proposed "lesser requirements while still meeting the requirements."

On July 9th Duke Energy (hereinafter "Duke") was the sole proposer to meet the District's RFP submittal deadline for the terms of contract, and FES chose not to participate in the District's bidding process.

On July 10, 2009, District staff disseminated packets to the Board members for the July 16th Board meeting. At that time, Executive Director Ciaccia was unaware of the email correspondence and discussions held between District staff and FES representatives. Negotiations were not yet finalized with Duke for the reason that the fee bid proposals were due on July 13th. Executive Director Ciaccia advised that the District's intent to award the contract for energy supply services at the Southerly WWTP was both included on the Board agenda and publicly noticed, but the contractual price was not included on the agenda since the bid pricing was opened on July 13th. The Board was informed of the contract amount prior to the meeting.

On July 13, 2009, Duke, an A-rated parent corporation, proposed a rate that would save the District \$1.66 million on Southerly's energy usage and also provided guaranteed security, which was in compliance with the District's bid requirements.

On July 16, 2009, the District presented Resolution No. 161-09 to the Board for the consideration of awarding Southerly's energy contract to Duke. The contract was fast tracked for the reason that it will result in a significant cost savings for the District.

On July 20, 2009, Mr. McNeeley received a voicemail message from Bob Aber of NEO|SO indicating that FES would offer the District better pricing than what was proposed by Duke during the competitive bid process. Furthermore, the Board had already awarded the Southerly energy contract to Duke on July 16th.

On June 21, 2009, David Akers of NEO|SO contacted Mayor Starr advising him of the potential costs savings. Mayor Starr requested that Mr. Akers forward him the proposal

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 4 of 26

from NEO|SO and FES. Mayor Starr then contacted Executive Director Ciaccia regarding this issue and forwarded him the proposal for review. Executive Director Ciaccia reviewed the documents which included a spreadsheet from FES indicated that they created this deal for the District on July 21st and that the offer was good through July 28th. Executive Director Ciaccia informed Mr. Aber that he would hold off on executing the Duke contract until he could research this matter further. Executive Director Ciaccia reviewed the email correspondence between District staff and FES representatives. The critical issue was to determine whether the District's competitive bidding process substantiated the contract being awarded to Duke.

Executive Director Ciaccia and Mr. Krassen formally responded to Mayor Starr on July 22nd and the remaining Board members received said correspondence on July 23rd. The District determined that the competitive bidding process was accessible and fair, and that the "after-the-fact" proposal from NEO|SO and FES at this point in the process was invalid. Furthermore, there was an ample amount of utilities capable of providing the District with the required letter of guarantee. Executive Director Ciaccia referred to a chart which showed the compiled responses from the utility companies choosing not to submit a bid. FES was the only company that stated the letter of guarantee was inconsistent with company policy. Executive Director Ciaccia explained that the Board members were informed of their authority to call a special Board meeting if they wanted to reconsider this issue.

Executive Director Ciaccia advised that there was much communication between the Board and himself on this issue, and his priority was keeping the Board informed as well as obtaining their feedback on this matter. The Board was desirous of moving forward with the action that was taken on July 16th Board meeting, which was to award the Southerly energy contract to Duke.

On July 24th, Executive Director Ciaccia spoke to Mr. Aber and indicated that he desired meeting with representatives of NEO|SO in order to reach better understanding of their arrangement with FES. On July 27th the meeting between Executive Director Ciaccia and representatives of NEO|SO and FES took place.

Executive Director Ciaccia advised that there were three significant issues that transpired during the conversations he had with FES representatives between July 22nd and July 24th. First, a high-ranking FES official indicated that, if they had the chance to do this over, FES would have submitted a proposal, and then argued their case regarding the surety guarantee. Second, an individual representing FES advised Executive Director Ciaccia that a high ranking officer of the parent company would provide the District with a letter of surety. Lastly, a FES official stated to Executive Director Ciaccia and Marlene Sundheimer, Director of Law, that they anticipated the District was not going to receive

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 5 of 26

any bidders. Executive Director Ciaccia advised that nothing further transpired from his meeting with NEO|SO.

The Board members did not convene a special meeting to overturn the action taken at the July 16th meeting awarding the Southerly energy contract to Duke. On July 28, 2009, Executive Director Ciaccia and Mr. Brown executed the contract with Duke.

Executive Director Ciaccia commented that the District received a good deal and that this contract will save the District \$1.66 million, or 16% based on what the District is currently paying for energy usage at the Southerly WWTP. According to Executive Director Ciaccia, no other area agencies received comparable savings, and the District is pleased with the savings achieved through the competitive bidding process.

Mayor Starr indicated that this all transpired after he received a telephone call from David Akers. He was unsure why Mr. Akers chose to call him. Mr. Akers informed Mayor Starr that in addition to the \$1.66 million in savings, NEO|SO could save the District an additional \$813,000. Mayor Starr stated that, "at that time, all the timelines were correct," and this is when he provided Executive Director Ciaccia with the information, since he is "the full-time administrator and the Board is only part-time." Mayor Starr indicated that "in the spirit of transparency" he advised Executive Director Ciaccia to share all of this information with the Board members.

Mayor Starr stated that he "wanted to qualify all of that information" and educate himself on the process of setting of electric rates. Mayor Starr commented that it was an interesting process, and that public agencies can choose to exercise the public bidding process or not for obtaining electric services. The District chose to use the public bidding process. Another option was to negotiate directly with Duke, FES and the other 16 bidders in a room.

Mayor Starr stated that at that time, the issues presented to him by NEO|SO and FES was that the performance bond requirement "was kind of the major issue." The District sent out 18 bids and only received one proposal. According to FES, the District only received one bid for the reason that the performance bond "was non-standard language in the public bidding process." Mayor Starr commented that he "still does not know if that is true," and was curious to obtain Bricker's stance on this performance bond issue for a company in the Northeast Ohio region that pays a lot of taxes and completes many jobs, Mayor Starr indicated that FES raised those two him during their discussion.

Executive Director Ciaccia stated that the issues involving the potential for more savings and FES being a local company were taken into consideration, but FES still chose not to participate in the District's public bidding process. FES chose to "roll the dice" and according to their representatives, FES believed that the District was not going to receive

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 6 of 26

any other bidders. Executive Director Ciaccia advised that rewarding FES for not partaking in the District's fair and honest bidding process was not a prudent decision.

Executive Director Ciaccia indicated that there has been a lot of openness and agreed that Mayor Starr suggested that all email correspondence and communication involving this matter be shared with the Board members.

Executive Director Ciaccia referred to the comments made about the performance bond being non-standard terms. He advised that the District documented many entities having those terms including NOPEC. Furthermore, FES representatives subsequently indicated that they were going to offer the District "the exact surety it requested." Executive Director Ciaccia advised that FES needed to "play the game at the time it was being played."

Mayor Starr inquired about the meeting date when the Board adopted the resolution awarding the contract to Duke. Executive Director Ciaccia replied that this transpired at the July 16th Board meeting. Mayor Starr inquired if July 16th is when the Board received the resolution at the meeting. Executive Director Ciaccia affirmed. Mayor Starr inquired if the District was aware, at that time, of the performance bond dispute. Executive Director Ciaccia stated that he was not aware of the dispute, and it was the corporate policy of FES not to provide surety at that time. Mayor Starr questioned that if the Board had been apprised of this issue, all bids could have been rejected and the contract rebid, or at least directly negotiated with Duke and FES. Executive Director Ciaccia stated "possibly."

Mayor Starr stated that he was unaware of this major controversy at the time because "the resolution was presented a few minutes before the meeting." His personal vote may have been different, but "we live and learn." Mayor Starr commented that we should underscore the \$1.66 million cost savings for the District.

Executive Director Ciaccia stated that FES should have notified Executive Director Ciaccia or the Board of any disputes prior to the closing date of the bid proposals, not after. And sending emails to staff does not address the dispute. Executive Director Ciaccia indicated that, at that time, staff had no reason to believe that FES was not going to submit proposal. Executive Director Ciaccia revisited the comments made by high-ranking FES officials wherein they stated that "if they had it to do over, they would have submitted a bid and argued their point" instead of waiting until after the Board took action. Executive Director Ciaccia stated that there was a one week time period between the bid proposal closing date and the Board awarding the contract to Duke. Furthermore, the District publicly noticed on July 10th that the Board was going to take action on this contract at the July 16th Board meeting. FES could have protested this issue before the

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 7 of 26

Board took action, and instead, FES created a proposal after the energy contract was awarded to Duke.

Ms. Kelly commented that the security guarantee was absolutely necessary and within the best interest of the District. Ms. Kelly inquired as to what transpired between the time period when FES indicated that they would not provide the District with a guarantee because it was inconsistent with corporate policy, and then agreeing to supply the guarantee after the Board passed the resolution awarding the contract to Duke. Executive Director Ciaccia speculated that this issue did not immediately get elevated within the corporation, but the District is an important FES customer. FES was under the assumption that the District would have been forced to deal with their corporation since they predicted that the District was not going to receive any bidders altogether. Once the “horse got out of the barn,” it received attention from higher ranking officials within the corporation, and FES then tried salvaging the contract by proclaiming that FES could offer the surety.

Ms. Kelly stated that it is important for the business community to understand and follow the District’s processes, and in order for the District to maintain its credibility, the District must follow its policies. Ms. Kelly questioned whether the District would have handled a construction contract differently. For example, if a construction contract had been awarded to the lowest and best bidder, and then another contractor proposed a lower bid after the contract was awarded and the bid submittal deadline surpassed. Would the latter proposal have even been considered? Ms. Kelly reiterated that the District would lose credibility as an organization by not following its own policies and procedures.

Executive Director Ciaccia agreed with Ms. Kelly. The \$800,000 savings was attached to a “phantom proposal” by FES. Although the potential additional savings were enticing, the District’s integrity was at stake, and the decision was made to remain consistent with the District’s policies and procedures.

Mr. Brown stated the major concern is the “integrity of the process,” which is to be an “open and transparent process.” The bidding process allowed for the District to canvass proposals as well as establish criterion, which is not uncommon within the industry. The bidders were allowed to make a proposal consistent with what was stipulated in the RFP or bring any disputes to the Board within the proper timelines. All bidders are provided the opportunity to exercise their objection to any proposal and request an extension or clarification. Any of those measures could have affected the outcome of the Board’s recommendation. Mr. Brown reiterated that the “integrity of the process is the critical issue.”

Mr. Brown stated that the District received the information regarding this opportunity from its consultant, and the District was then able to canvass providers and immediately

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 8 of 26

receive proposals which resulted in a substantial cost savings for the District. It was wise to take advantage of this opportunity as well as follow the consultant's advice on this process.

Mr. Brown speculated that, given the current economic forecast, more entities will require the guaranteed letter of security as a means of protecting their investment and interest. Mr. Brown stated that it is "an excellent tool for the District to use."

Mr. Brown stated that the District has a process and some may not agree with the outcome. FES learned that they should not hedge their bets based on predictions rather than what can be offered to their customers. We are trying to "protect our bottom line to get the best return on our investment and be accountable to our own ratepayers." Mr. Brown stated that the District received the desired outcome. It is important for people to understand the rules of engagement and respect the integrity of this process. The District follows a fair and equitable process, and "anything outside of that, even though it may look good, is not acceptable or appropriate." Mr. Brown found this to be an educational experience for the Board and staff. Having received this information provided the Board and staff an opportunity for dialogue on these issues.

Mayor Longo stated "people are beginning to understand that we are serious" and much effort was put in place to increase transparency within the District. The ground rules for the bidding process are fair for everyone, and the Board takes "a great deal of pride in doing that."

Mayor Longo indicated that he has been involved with FES on various situations including trying to build an electric system in Garfield Heights and the formation of NOPEC, but "there is a culture of a corporation" that cannot be changed "with a snap of a finger." Mayor Longo stated that it is difficult conforming to processes when "you are used to having the influences" and working "behind the scenes for many decades." Mayor Longo indicated that "now they are feeling the impact," and that "NOPEC was never supposed to go on line" and is now comprised of 115 communities, and "besides electric, there is gas, and they are trying to get back into that."

Mayor Longo stated that he knew "for a fact that FES has negotiated literally thousands of separate deals with corporations throughout their service area for many years," and it is difficult accessing this information. The process cannot be circumvented in order to accommodate contractors because "that is where you get into trouble."

Mayor Longo speculated that this has been "a wake-up call" for FES, and that "everyone should understand that this is an open, transparent, and equitable process." Bidders should put their best deal on the table and this is not business as usual.

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 9 of 26

Executive Director Ciaccia introduced Mr. Krassen to the Board. Mr. Brown indicated that the Board had questions for Mr. Krassen.

Mayor Starr stated that when FES contacted him and put him “on the spot on July 21st,” they indicated that the “performance bond is nonstandard language in the public sector; it is unusual and has onerous specs.” Mr. Krassen advised that based on his 30 years of experience in the energy law area, the statement made by FES was incorrect. Subsequent to Enron and Morant filing for bankruptcy, many public agencies decided it prudent to secure their contractual obligation with their suppliers, or else risk becoming an unsecured creditor receiving nothing and returning to tariff. Mr. Krassen indicated that security guarantee has been a national trend, and he provided the following examples: the City of Chicago, Chicago Housing Authority, Amtrak, the State of Illinois, the City of Lebanon, Ohio for electricity, The County Commissioners Association for natural gas, Ohio Schools Council for natural gas and the Northeast Ohio Public Energy Council for electricity.

According to Mr. Krassen and based on comments made by the industry experts, “it is more usual now for public agencies to have this provision in their RFPs and their requests than not.” It is now the trend to include these provisions because they protect the public agencies and are considered to be prudent business-like provisions to ensure the “benefit for your bargain.”

Mayor Starr inquired whether Duke included performance bonds in their other public sector bids. Mr. Krassen stated that he could not speak on behalf of Duke’s public sector bid proposals. With regards to the District’s request, they “certainly did not blink” at providing a performance bond.

Executive Director Ciaccia moved to the next report item regarding the Combined Sewer Overflow Long Term Control Plan (hereinafter “CSO LTCP”) negotiations with the United States Department of Justice (hereinafter “USDOJ”), Region V and the Ohio Environmental Protection Agency (hereinafter “OEPA”). The District met with the government the week of July 27th, and the government provided the District with its version of the CSO LTCP. Last year, the District provided its version of the CSO LTCP to the government. Negotiations with the government are ongoing and the District’s customers’ ability to pay is a critical issue. Executive Director Ciaccia advised that the District and the government are now entering serious negotiations.

Mr. Brown requested clarification from Executive Director Ciaccia on that point. Executive Director Ciaccia explained that going forward he will cease discussing the positions of the District and government in public forum, and that an executive session must be held in order to further discuss the details and strategies. The government is desirous of an executed Consent Decree by early 2010, and if the government and

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 10 of 26

District cannot reach an agreement, there is high potential of litigation on either side. Executive Director Ciaccia intends to present the Board with the District's initial position, the government's current position, and the reasonable strategy during an executive session, which he recommended be scheduled soon, either before the September 3rd Board meeting or during a special meeting, and he left this to the Board's discretion.

Discussion was held as to when the Board should convene this executive session. Executive Director Ciaccia advised the Board that staff needs additional time to prepare its presentation for the Board and he recommended that the Board consider scheduling its executive session in early September. Mayor DePiero suggested that staff keep the September 3rd Board meeting agenda light and that the Board schedule the executive session on that meeting date. Mr. Brown stressed that the agenda be kept light so the Board can spend ample time and remain focused on the CSO LTCP discussions during executive session. Executive Director Ciaccia advised that only critical issues will be discussed or presented to the Board for consideration at the September 3rd meeting.

Executive Director Ciaccia moved to the last report item and he advised that the negotiations with the American Federation of State, County & Municipal Employees (hereinafter "AFSCME") have ceased as they enter into Fact-Finding. Executive Director Ciaccia advised that the wages and a few other issues are pending with the AFSCME. In the meantime, the District will begin its negotiations with Local 860 (Security Officers) and Local 18-S (Stationary Engineers).

V. Consent Agenda

There were no Consent Agenda items.

VI. Action Items

Authorization to Advertise

Resolution No. 162-09

Southerly Wastewater Treatment Center Renewable Energy Facility (REF) – Contract 28. Engineer's estimate: \$130,000,000.00.

Resolution No. 163-09

Southerly Wastewater Treatment Center Replacement (SSR-1), engineer's estimate: \$23,300,000.00.

Resolution No. 164-09

Two (2) year requirement contract for fencing installation and repair at all District facilities and remote sites, anticipated expenditure: \$790,000.00.

Mr. Brown requested an explanation on Resolution No. 162-09, Southerly Wastewater Treatment Center Renewable Energy Facility (hereinafter "REF"). Discussion was turned over to Kellie Rotunno, Director of Engineering.

Ms. Rotunno stated that in February 2006, there was an original design concept to replace the multiple incinerators with fluidized bed incinerators at the Southerly WWTP, and that project was designed by Malcolm Pirnie, Inc. The original design included rendering of three building components, incineration dewatering and truck loading station.

In August 2008, the District convened the validation workgroup of industry experts to examine the incineration technology prior to committing to this large expenditure. The workgroup examined the District's residuals plan and determined that the technology selection was the best, most economical and sustainable. The workgroup proposed the concept of incorporating renewable energy for the facility by recovering the waste heat and generating electricity from it. This REF concept will result in the District receiving its full investment back after an 11-year period. This led to the REF project which required a building expansion in order to accommodate the turbine generators and waste heat boilers.

The REF will result in significant cost and energy savings. Decreased natural gas usage will save the District approximately \$4 million annually. Decreased electrical consumption through the electricity generated from waste heat will save the District an estimated \$1.2 million annually. The District's hauling of bio-solids to the landfill will not be as frequent and therefore will save the District an estimated \$32,000 annually resulting from reduced fuel usage.

There will also be significant emission reductions, and Ms. Rotunno referred to a slide showing the common air pollutants including carbon monoxide, nitrogen oxide, sulfur dioxide, organic compounds and lead. The 2013 comparison indicated that the aforementioned air pollutants will be reduced by 60% in 2013 from 180 tons to 71.4, which benefits the entire region.

Ms. Rotunno advised that the REF project was phased into six different construction contract packages. Contract 28A, decommissioning of the digesters, is complete and valued at \$853,000. Contract 28B, procurement of the fluidized bed incinerators, is ongoing and was valued at almost \$50 million. Contract 28C-1, removal of the digester domes, was completed and valued just over \$450,000. Contract 28F, preparation of the

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 12 of 26

Southerly site for Contract 28, is ongoing and valued at \$3.9 million. Contract 28G, procurement of the H-piles that will be used for building the foundation, was valued at \$1.9 million, and bids were opened on August 5th for said contract. Contract 28, construction of the REF, is estimated to cost \$130 million, and bids are expected to open in October 2009.

Ms. Rotunno referred to slide depicting the completed projects, and the two contracts expected to continue to 2013 are construction of the REF – Contract 28, and procurement of the incinerators – Contract 28B. Ms. Rotunno indicated that the District anticipates experiencing reductions in emissions and increased energy after construction of the REF is completed in 2013.

Ms. Rotunno stated that the District is achieving 14% on combined Minority Business Enterprise (hereinafter “MBE”) and Women Business Enterprise (hereinafter “WBE”) participation on those contracts. She explained that Contract 28 will be procured under the SBE program. Furthermore, Contract 28B was strictly a procurement of the incinerators and did not provide subcontracting opportunities. Given the substantial cost of the incinerators, the MBE/WBE participation goals of 20% were not achieved.

MOTION – Mayor DePiero moved and Mr. O’Malley seconded to adopt Resolution Nos. 162-09 through 164-09. Without objection, the motion carried unanimously.

Authorization to Issue Request for Proposals (RFPs)

No discussion ensued on Resolution Nos. 165-09 and 166-09.

Resolution No. 165-09

Issue RFPs for Economic Impact Analysis of the District’s Planned Improvement Program and Operating Expenses for 2012 through 2016.

Resolution No. 166-09

Issue RFPs for PLC Change Management software to be used at all Wastewater Treatment Plants and remote sites. Expected expenditure: \$40,000.00.

MOTION – Ms. Kelly moved and Mayor Longo seconded to adopt Resolution Nos. 165-09 and 166-09. Without objection, the motion carried unanimously.

Authorization to Pay Dues

No discussion ensued on Resolution No. 167-09.

Resolution No. 167-09

Year 2010 dues renewing the District's membership with the Northeast Ohio Areawide Coordinating Agency, at a cost of \$54,834.00.

MOTION – Mayor Longo moved and Mayor Starr seconded to adopt Resolution No. 167-09. Without objection, the motion carried unanimously.

Authorization to Donate

No discussion ensued on Resolution No. 168-09.

Resolution No. 168-09

Approving donation of obsolete Information Technology equipment and paging equipment to RET3 Job Corp.

MOTION – Mayor DePiero moved and Mr. Sulik seconded to adopt Resolution No. 168-09. Without objection, the motion carried unanimously.

Authorization of Easement

No discussion ensued on Resolution No. 169-09.

Resolution No. 169-09

Grant to East Ohio Gas Company, d.b.a. Dominion East Ohio, one permanent easement for the relocation of gas lines on District property, known as part of parcel 531-12-005. In exchange for this grant of easement, East Ohio Gas Company will vacate the easement to the existing line.

MOTION – Ms. Kelly moved and Mayor Starr seconded to adopt Resolution No. 169-09. Without objection, the motion carried unanimously.

Authorization to Enter Into Agreement

No discussion ensued on Resolution No. 170-09.

Resolution No. 170-09

Project participation agreement with the Department of the Army Corps of Engineers (Army) for participation in the Army's Program for funding of the design of the Flats East Bank Development Project pursuant to Section 594 of the Water Resource Development Act of 1999 and acceptance of financial assistance for design in the amount of \$750,000.00.

MOTION – Mayor Longo moved and Mr. O'Malley seconded to adopt Resolution No. 170-09. Without objection, the motion carried unanimously.

Authorization of Contract Modification

Resolution No. 94-09a

Contract No. 09001137, West 117th Street CSO-071 Outfall Culvert Repair, Marra Constructors, Inc. There will be no cost difference to perform the work from Lake Erie in lieu of the use of residential areas.

Resolution No. 171-09

Contract No. 3274, professional services for the Euclid Creek Storage Tunnel (ECT) project, Hatch Mott MacDonald, Inc. Cost increase not to exceed \$7,224,904.13, bringing the total contract price to \$13,667,701.13.

Mr. Brown requested an explanation on Resolution No. 171-09, a contract modification for the Euclid Creek Storage Tunnel (hereinafter "ECT") project, resulting in nearly a 100% increase. Discussion was turned over to Ms. Rotunno.

Ms. Rotunno referred to slide and stated that the original concept of the ECT included the design of 14,000 feet of the ECT (shown in blue) and 18,500 feet for the Dugway Creek Tunnel (hereinafter "DCT") (shown in green). During the design phase, the mining shaft was relocated from the end of the ECT down to the Nine Mile Creek (hereinafter "NMC") site, which extended the length of the ECT to 18,000 feet while reducing the

DCT to 14,500 feet. An additional 4,000 feet of tunnel needed to be designed which resulted in the design concept being modified in November 2006.

In July 2007, the project design was suspended due to several unresolved issues on the ECT project including CSO LTCP negotiations, levels of controls, the amount of overflows needed to be incorporated into the tunnel design, and whether this project will include high rate treatment. Furthermore, the District had not yet determined the location for the Tunnel Dewatering Pump Station (hereinafter "TDPS").

The ECT project was restarted in November 2008 for the reason that the EPA approved the tunnel size and the District agreed that the NMC site was most the most suitable location for the TDPS.

Ms. Rotunno explained that the first portion of the contract modification is for the additional design efforts due to the ECT project's suspension and increase in tunnel length, and the second portion pertains to the professional services needed during construction.

The original design phase was for \$6.4 million. The District negotiated \$3.2 million for the additional design efforts and \$3.9 million for construction administration and resident engineering (hereinafter "CA/RE") services, increasing the total contract with Hatch Mott MacDonald, Inc. (hereinafter "HMM") to approximately \$13.6 million.

Ms. Rotunno stated that the project is estimated to cost \$188 million, and the total engineering design services are \$13.6 million, 7.3% of construction costs, which she considered to be a fair and reasonable percentage of construction for this type of project.

Ms. Rotunno stated that there is 10% MBE, 5% WBE and 6.6% SBE participation on this contract. ECT project design should be completed by mid-2010 and awarded late-2010. The ECT is estimated to be constructed in 4 years and completed in 2014.

Mr. Brown commented that this is a big project that will impact an area that has encountered significant problems, and he was certain that the residents will appreciate the outcome.

MOTION – Mayor Longo moved and Mr. O'Malley seconded to adopt Resolution Nos. 94-09a and 171-09. Without objection, the motion carried unanimously.

Authorization to enter into Contract

Resolution No. 172-09

Contract with ERC Services, Inc. to assist in developing and implementing a Performance Management System, including a Merit Pay Program for non-union employees, at a cost not to exceed \$65,000.00.

Resolution No. 173-09

One (1) year requirement contract with Ciba Corporation for 75,000 pounds of liquid polymer for the Southerly Wastewater Treatment Plant, at a cost of \$171,150.00.

Resolution No. 174-09

Requirement contract to Cleveland Plastics for the purchase of ferric chloride tanks at the Southerly Wastewater Treatment Center, at a cost not to exceed \$95,296.00.

Resolution No. 175-09

Two (2) year requirement contract to Janitorial Services, Inc. for janitorial services at the George J. McMonagle Building and Environmental Maintenance and Services Center, at a cost of \$371,568.00.

Resolution No. 176-09

One (1) year requirement contract with Motornostix (USA) Ltd. for the lease of predictive maintenance equipment and services at the Southerly Wastewater Treatment Plant, at a cost of \$67,920.00.

Resolution No. 177-09

Contract with Bay Mechanical & Electrical for the Easterly Substation Replacement – Contract ESR-1, at a cost not to exceed \$1,629,910.00.

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 18 of 26

Mayor Starr commented that this type of system “works best in the private sector because most of the information is not public record” and he wished the staff luck on this effort.

Mayor Starr inquired about Resolution No. 177-09, and he questioned if District staff could attest to the performance of Bay Mechanical and Electrical. Ms. Rotunno indicated that the District worked with Bay Mechanical and Electrical before and performed well.

MOTION – Mayor Longo moved and Mr. Sulik seconded to adopt Resolution Nos. 172-09 through 181-09. Without objection, the motion carried unanimously.

Authorization to Purchase

No discussion ensued on Resolution Nos. 182-09 through 184-09.

Resolution No. 182-09

Direct purchase from sole source vendor Schultz Handling Equipment, of Moyno pipeliner parts for all Wastewater Treatment Plants, anticipated expenditure of \$100,000.00.

Resolution No. 183-09

Direct purchase from Andritz Separation, Inc. of vendor services needed to refurbish three (3) sludge dewatering centrifuges manufactured by Humboldt at the Southerly and Westerly Wastewater Treatment Plants, anticipated expenditure not to exceed \$300,000.00.

Resolution No. 184-09

Purchase furniture from State term schedule vendor American Interiors for the George J. McMonagle Building, at a cost not to exceed \$100,000.00.

MOTION – Mr. Sulik moved and Mayor DePiero seconded to adopt Resolution Nos. 182-09 through 184-09. Without objection, the motion carried unanimously.

Authorization of Contract Modification

No discussion ensued on Resolution No. 185-09.

Resolution No. 185-09

Modifying Contract No. 09000828 for continued retention of Hahn Loeser & Parks, LLP as special counsel to the Board of Trustees, at a cost increase of \$25,000.00, bringing the total contract price to \$50,000.00.

MOTION – Mr. O’Malley moved and Ms. Kelly seconded to adopt Resolution No. 185-09. Without objection, the motion carried unanimously.

VII. Information Items

1. 2009 Government Finance Officers Association Annual Budget.

Jennifer Demmerle, Director of Finance stated that incorporated into the Board packets was the District’s 2009 Operating and Capital Budget document for the Board members’ perusal. The District’s 2009 Operating and Capital Budget will be submitted to the Government Finance Officers Association (hereinafter “GFOA”) to be evaluated against budget reporting standards in order to receive GFOA’s Distinguished Budget Presentation Award, which the District was awarded the past two years.

Ms. Demmerle expressed her appreciation to District staff members Kerry McCullough, Dawn Sparks and John Gonzalez for their efforts in assembling the 2009 Operating and Capital Budget document.

Mr. Brown commented that the documents were comprehensible and a well-assembled financial document.

2. Northeast Ohio Regional Sewer District Financial Report and Investment Advisor Performance Report for the Sixe (6) Month Period Ending June 30, 2009.

Ms. Demmerle stated that the 2nd Quarter Investor Advisor Report provides detailed information of the issues that were included in Executive Director Ciaccia’s June Board report. The District continues to operate within budget and revenues as of June 30th are slightly higher than budget by about 4%. The District’s total investments remain steady at \$272 million. The return on those investments is slightly ahead of our benchmark of the Merrill Lynch Treasury bill. The average yield on those investments remains less

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 20 of 26

than 1%, which was closer to 3% in 2008, mainly due to the economy. Earlier investments that were maturing at 4% are now maturing at about 1%.

Mr. Brown commended Ms. Demmerle on those financial reports and he commented that the District continues to hold a strong position and exercise good financial management.

Executive Director Ciaccia commented that the District is anticipating many financial challenges with regards to the CSO LTCP as well as the labor negotiations, and the District will need to make many hard decisions over the next couple of years.

Mr. Brown stated that the entire country is in “a belt tightening mode,” and the District will be required to deliver many projects at significant cost to the ratepayers. Given the proposed rate increases in order to mitigate the CSO impacts, the District must remain accountable and fiscally responsible. Mr. Brown stated that “there is no time like the present to make sure that we are sending the right message organizationally, both internal and external.”

3. Update on the Disparity Study for the Northeast Ohio Regional Sewer District.

Ms. Sundheimer stated that she received comments from Craig White, Esq., special counsel to the Board, regarding the level of information the Board desired for the disparity study update. The Board indicated to Mr. White that they wanted further detail on Colette Holt’s role as counsel for the disparity study, the methodology used by NERA Economic Consulting (hereinafter “NERA”) in order to accomplish the study, specific tasks that NERA is undertaking in order to complete the disparity study, and an update on the schedule. Ms. Sundheimer indicated that those details were taken into consideration during preparation of the presentation and she turned discussion over to Colette Holt, Esq., counsel to the NERA disparity study team.

Ms. Holt provided an overview of the legal standards that NERA is required to meet for the disparity study. The evidence obtained through the disparity study is required by the courts in order to support a race and gender conscious program. The evidence must comport to case law, and although it has been very difficult winning these cases, Ms. Holt has a 100% success rate. Ms. Holt indicated that the team “employs the same levels of scientific rigor that federal judges expect to see in antitrust cases and product liability cases,” and those components cannot be overlooked just because it is an affirmative action program.

The program must reflect the found evidence. The District can determine its policies, but the adopted program must be supported by the evidence. With over 20 years of litigation experience on these types of cases, Ms. Holt observed that programs having inadequate

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 21 of 26

legal reasoning and unsound science or are politically motivated will be challenged and most likely defeated. Conversely, those cases can be won, if done right. Ms. Holt stated that her team has defended several cases through the Court of Appeals and Supreme Court levels. Ms. Holt was confident that the approach used by her team is successful and defensible.

In order to determine what happens if an agency does not have an affirmative action program, economy-wide evidence must be examined especially for agencies such as the District that have run MBE/WBE programs for many years. Many studies simply examine the agency's data, conclude that there are no disparities because the agency applied a remedy, and then advise the agency to drop its program. Ms. Holt advised that her team examines the contracting data as well as the activity of MBEs and WBEs in the larger Cleveland economy.

Ms. Holt stated that NERA is the world's largest firm of consulting economists and that she is the disparity study counsel. Although not employed by NERA, Ms. Holt has been joint venturing with NERA on many projects over the past 15 years. According to Ms. Holt, the NERA team encompasses the professional qualification and experience to take the District all the way to the Federal Court if necessary.

Ms. Holt referred to a slide that provided an overview of NERA, which has 600 economists. The Federal Court judges understand that NERA is not just a disparity study consultant and has won cases like the Microsoft antitrust trial and Visa and have world-renowned credentials. Jon Wainwright is the project director and a majority of the work on a disparity study is statistical.

Ms. Holt stated that she is a research analyst and counsel to the disparity study team. Ms. Holt stressed that she is not legal counsel to the District. Ms. Holt's role is to ensure that the work comports with the legal standards in order to provide a good solid defense should the District's program be challenged.

Ms. Holt referred to slide outlining NERA's team approach, and she explained that "statistical rigor and anecdotal evidence that is solid is the hallmark of a defensible disparity study." Ms. Holt was satisfied with NERA's success rate and indicated that NERA's objectivity is, in some ways, its most important asset. Judges understand that NERA provides its clients with objective results and does not prejudge them. Ms. Holt indicated that she will be surprised if NERA's findings do not include evidence of discrimination in the Cleveland market given that NERA has identified disparity in regions of the country such as Minnesota. NERA's team exercise objectivity and remains supportive of its results.

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 22 of 26

Ms. Holt provided an overview of the project approach, and she indicated that the key to success is to have multiple sources of high quality statistical data to provide the court with a complete perspective of what is going on in the local economy. A comparison is made between the utilization of MBE and WBE firms on District contracts against the availability of MBE and WBE firms within the marketplace, and this is a difficult endeavor. All contract records must be gathered in order to identify the subcontractors, give them industry code and to determine what they were paid.

Ms. Holt explained that the NERA team examines other impeding factors impacting the ability of MBE and WBE firms to perform as prime contractors and subcontractors. Are there statistically significant disparities between the rates at which similar MBE and WBE firms form their businesses versus non MBE and WBE firms? Are the earnings of MBE and WBE firms comparable to non MBE and WBE firms? What about the gross business receipts? What is the size of the firm and how does it compare to non-disadvantaged firms?

Ms. Holt stated that the NERA team conducted pioneering work on offer credit, and that the ability to finance MBE, WBE and SBE firms is critical. Before the current economic meltdown it was difficult obtaining financing and now it is extremely difficult to access credit, capital financing and surety bonding. The NERA team examines loan denial rates and has found consistently country-wide that African American contractors are twice as likely to be denied a loan as similarly situated Caucasian contractors, and when they receive the loan, they pay up to 100 basis points more. In the construction industry, 1% is the difference between being low and not being low. Those are critical evidentiary issues supportive of why an agency must take affirmative steps to ensure that they provide full and fair opportunities for everyone.

Ms. Holt stated that taken into consideration is the ease or difficulty of conducting business, size of projects, costs to bid, prior experience requirements, union issues, bonding, and whether there are significant disparities between MBE and WBE firms versus non-disadvantaged firms.

Telephone surveys are conducted and this is a very time consuming and expensive process, but those surveys enhance the accuracy of availability estimates. It is critical to ensure that the surveys conducted are clean and accurate, and NERA has utilized the same survey firm for many years. This survey firm will contact business owners at varying times in order to receive a response and obtain verification information. NERA also conducts nonresponsive testing for all mail surveys. It has been discovered through this process that everyone "has an axe to grind" whether you are for or against the program, and this must be proven to a federal judge.

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 23 of 26

NERA also examines anecdotal analysis and clarification of the role of anecdotal testimony is important and taken into consideration by the court. It is necessary to have anecdotal information but it is not sufficient. Ms. Holt explained that much time and money is placed in gathering the statistical data for the reason that the statistical evidence must support the District's program.

Ms. Holt explained that it is important to identify the people's experiences in order to provide the policy makers with suggested program elements and areas needing improvement. NERA uses mail surveys, business interviews and focus groups in order to obtain that information. The experiences are consistent with statistical evidence, and it is NERA's intent to prove this to the District. Group interviews will be used to determine any barriers MBE, WBE or SBE firms encountered when doing business with the District, prime contractors or obtaining access to surety bonds. In addition to conducting MBE and WBE interviews, NERA plans to interview and obtain experiences from non-disadvantaged firms. The interview invitation lists were developed by Kim Stewart from Jon Wainwright's office, as she is the head project research assistant assigned to the District. Ms. Holt explained that invitations are sent to industry groups, trade associations, MBE and WBE firms, and others who might have an interest in the District's program.

Ms. Holt stated that NERA has a dedicated hotline, toll-free number and email address. NERA will follow-up with businesses to ensure that it receives good participation in the interviews, and according to Ms. Holt, she has not yet encountered any problems in that area. NERA works closely with District staff, and relies on their knowledge and input as well.

NERA conducts policy analysis, which is primarily handled by Ms. Holt. District staff is consulted regarding their experience with the former MBE/WBE program as well as to provide any suggested changes in order to design an effective future MBE/WBE program. Ms. Holt advised that she has been working with District staff on the development of the SBE program which she explained to be a great race neutral measure that courts are going to take into consideration. Furthermore, NERA intends to make recommendation to the District and suggest responses based on the collected evidence.

Ms. Holt referred to a slide pertaining to the project milestones, and she thanked Denise Andres, Manager of District Records, "for the extraordinary work she did with us in putting together this database" during a very difficult personal time. NERA got a little behind, but they set the bar very high. Ms. Holt stated that NERA never encountered a client that provided data this fast. Ms. Holt commended the District on doing a great job.

NERA is in the process of collecting prime contractor and purchase data. The non-construction data has been challenging, but this is typical, because people do not usually

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 24 of 26

collect subcontractor data outside of construction contracts. However, NERA does need to obtain this information for its disparity study. Ms. Holt commented that we would prefer doing it right and from NERA's perspective, it has been lightning fast.

Mail surveys will be issued in September in order to allow for ample time and avoidance of the holidays, which has been observed to impact responses. NERA conducts extensive follow-up and will mail a second set to ensure that they receive as much coverage as possible. Private sector disparity analysis is an ongoing issue, and the availability estimates are expected to be completed by January. Ms. Holt will be conducting the business owners' interviews in January to avoid the holidays. Misclassification surveys and non-response surveys will be issued, and NERA is projecting that a final draft of the disparity study will be available to the District by April.

Mr. Brown commented that the methodology seems very good and staying within the timeline is a vital component, but the most critical issue is delivering the desired outcome of implementing a good solid program. Mr. Brown understood the need to ensure that the District's program is legally defensible in court, but the District desires providing a program and opportunities for all goods and services providers within the community. Mr. Brown would like to see more local prime contractors, MBE, WBE and SBE firms involved on District projects. Mr. Brown stated that he was interested in obtaining Ms. Holt's suggested accomplishable tasks that can be implemented by the District during and after the disparity study in order to reach its desired outcome.

According to Ms. Holt, the District is already exercising their options. The new SBE program was designed to be broad based program and is race and gender neutral, which is a great start. District staff has suggested unbundling contracts in order to increase subcontracting opportunities. The District is a very unique industry, and Ms. Holt was fascinated by the size of some of the contracts. It can be very difficult obtaining participation from small local firms that are capable of conducting deep tunneling projects.

Ms. Holt advised that data collection systems are being implemented and it is critical to evaluate what has been done as well as keeping good records. Ms. Holt stated that the District is developing a good solid program which is expected to be legally defensible, should the District decide to re-establish a MBE/WBE program.

Mr. Brown stated that "there are a lot of historical disciplines" and was unsure whether those were workforce development issues. Mr. Brown suggested that we examine how to build capacity or introduce individuals to those types of disciplines. Mr. Brown inquired whether there are ways to identify those circumstances in order to target some of those non-traditional areas.

BOARD OF TRUSTEES

Regular Meeting

August 6, 2009

Page 25 of 26

Ms. Holt commented that Mr. Brown raised a good point. Ms. Holt advised that she does not conduct employment studies and is strictly a public contracts lawyer. Individuals often become business owners by first having been employees within the industry. You are either “born into or work into it.” Some of her clients have established non-traditional models when issuing RFPs including conducting qualitative evaluation or assigning points to firms that implement mentoring programs involving young college students. Ms. Holt indicated that when the study is complete, she would be willing to discuss with the District building capacity and growth opportunities in non-traditional areas.

VIII. Open Session

Mayor Longo stated that there were some significant issues that arose from the August 6th Governance Committee meeting with respect to the Board’s flow seat and County Commissioners’ appointed Board seat. The reorganization of Cuyahoga County may affect the County Commissioners’ Board appointment.

The Suburban Council of Governments (hereinafter “SCOG”) adopted its Bylaws revisions which established SCOG-appointed trustees. One representative will be nominated from communities situated to the east of the Cuyahoga River and one representative will be nominated from communities situated to the west of the Cuyahoga River. This modification superseded the Board seats which were represented by communities having populations greater than 25,000, currently held by Mayor Longo, and communities having populations less than 25,000, currently held by Mayor Starr.

The Governance Committee also discussed the SCOG’s recommendation to impose a 2-year term limit on SCOG-appointed trustee seats. The SCOG made recommendation that the Governance Committee consider reopening the Court in order to implement term limits on all Board seats. Committee members Mr. Brown, Mayor DePiero and Mayor Longo consensually agreed that if the SCOG is not satisfied with its representatives, then the members should simply exercise their voting rights rather than impose a 2-year term limit on all Board members. Mayor Longo intends to bring these issues back to the SCOG.

Mayor Longo suggested that the Board review the information being compiled by the District pertaining to the Stormwater Management Program (hereinafter “SMP”). He commented that the District is doing an outstanding job during its meetings with the member communities by explaining and providing details of the District’s SMP initiatives.

IX. Public Session (any subject matter)

No members from the public registered to speak at Public Session.

X. Executive Session

Mr. Brown stated that there were no matters for discussion in Executive Session.

XI. Adjournment

MOTION – Mr. Brown stated business having been concluded, he would entertain a motion to adjourn. Mayor DePiero moved and Mr. O'Malley seconded the motion to adjourn at 2:12 p.m. Without objection, the motion carried unanimously.



Dean E. DePiero, Secretary
Board of Trustees
Northeast Ohio Regional Sewer District



Darnell Brown, President
Board of Trustees
Northeast Ohio Regional Sewer District