

MINUTES
NORTHEAST OHIO REGIONAL SEWER DISTRICT
BOARD OF TRUSTEES MEETING
MARCH 15, 2012

Meeting of the Board of Trustees of the Northeast Ohio Regional Sewer District was called to order at 12:30 p.m. by Darnell Brown.

I. Roll Call

PRESENT: D. Brown
S. Kelly
J. Bacci
T. DeGeeter
W. O'Malley
G. Starr

ABSENT: R. Sulik

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

II. Approval of Minutes

MOTION – Mr. O'Malley moved and Mayor Bacci seconded that the minutes of the March 1, 2012, Board Meeting be approved. Without objection, the motion carried unanimously.

III. Public Session

Executive Director Ciaccia informed the Board that no members of the public registered to speak during Public Session.

IV. Executive Director's Report

Executive Director Ciaccia stated that an Executive Session was on the meeting's agenda.

A hearing is scheduled with Judge Pokorny in regards to the Stormwater Management Program (hereinafter "SMP" litigation on March 19 to discuss some of the issues he left open in his opinion. He advised that what staff will present during that hearing will be discussed during the Executive Session.

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The KMM&K litigation will also be discussed during Executive Session. Trial is scheduled for October 15. Executive Director Ciaccia advised that staff has been engaged in mediation and some settlement discussions.

Thirdly, he informed the Board that the Ohio Auditor of State has requested meeting with the Board during Executive Session to begin the process of performing this year's audit.

Executive Director Ciaccia advised that yesterday he and Darnella Robertson traveled to Columbus to meet with certain members of the Ohio House and Senate advocating its legislative agenda. Two items in particular were discussed including raising the competitive bidding limits from \$25,000 to \$50,000, as many municipalities and states agencies have done. The other issue was the ability for the District to obtain conservation easements. Executive Director Ciaccia explained that as the District begins performing stream restoration projects staff wants to have the ability to hold conservation easements to control the work that is done post-construction.

Executive Director Ciaccia advised that he and Ms. Robertson met with the District's advocates, Vorys, Sater, Seymour & Pease, and their main contact, Karen Cincione, who accompanied them for the meetings. A draft bill exists. He explained that legislators apprised them of a new process called the mid-biannual budget review (hereinafter "MBR") put in place by Governor Kasich. A bill is attached to that and will be split in different parts to different committees. The advocates put them in touch with "the right people in the right committees."

Executive Director Ciaccia stated that it was apparent through discussions with legislators that it would be preferable to accomplish these goals through the MBR rather than a stand-alone piece of legislation. He indicated that it had a lot of support and the issues are not controversial. Many governmental organizations have the ability to get conservation easements; however, 6119 districts were left out in an oversight when they were originally established. He continued to explain that raising the competitive bidding limit from \$25,000 to \$50,000 was a similar oversight. The Coalition of Ohio Regional Districts (hereinafter "CORD") was also advocating raising the bidding limit.

Executive Director Ciaccia stated that achieving their goals on those two issues is unlikely to be a significant effort. The MBR hopes to approve it by May or June as the Governor has them on a tight schedule.

During meetings with representatives including Representative Terry Blair, CORD made them aware that they were seeking to amend 6119 to restrict the number of elected officials and township trustees on regional boards. The issue arises out of a dispute in a Lorain County sewer system. Township trustees comprise 13 of their 16 members and groups are threatening to file lawsuits arguing that the trustees have a conflict of interest.

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Executive Director Ciaccia advised that a 1984 attorney general opinion basically states that township trustees cannot be on regional boards. Those issues are being pushed in Lorain County and elsewhere. He stated that the issue is not that relevant to the District because there are no township trustees on the Board. However, CORD has asked staff to support them in advocating for the legislation.

He told Rep. Blair yesterday the District would not take a position on the matter. While CORD has supported the District in the past he did not see a reason to step out on this particular issue. Executive Director Ciaccia urged the Board to advise him if they believe the District should choose another position. There was general indication that this was the right approach.

V. Action Items

Authorization to Enter Into Contract

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| Resolution No. 58-12 | Two-Year Requirement Contract with Environmental Express for Laboratory Filters. Cost: Not to Exceed \$103,874.00. |
| Resolution No. 64-12 | One-Year Contract Renewal with Automatic Data Processing Incorporated (ADP) to Continue Payroll Processing and Technical Services in 2012. Cost: Not to Exceed \$70,000.00. |
| Resolution No. 65-12 | Two-Year Requirement Contract with Great Lakes Petroleum Company for Fuel Management Services to all District Facilities. Cost: \$847,574.61. |
| Resolution No. 66-12 | One-Year Contract with Gartner, Inc. for Information Technology Research and Advisory Services under Ohio State Term Schedule (STS) Contract No. 533904-1. Cost: \$67,009.00. |

MOTION – After discussion, Mr. O’Malley moved and Mayor Bacci seconded to adopt Resolution Nos. 58-12 and 64-12 through 66-12. Without objection, the motion carried unanimously.

Executive Director Ciaccia noted that Resolution No. 58-12 was held from the previous meeting as Ms. Kelly had a number of questions. He wanted to clarify her issues and bring forth the plan going forward.

In regards to the bid itself and award recommendation, staff ruled out EMD Millipore for

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providing a non-conforming bid. Jade Scientific was determined to not be the lowest and best bid because they had the previous contract, which was broader than just laboratory filters. Throughout the course of that contract they failed to provide the filters to the point where that item was deleted from the contract. Filters were procured in another manner.

Executive Director Ciaccia stated that he reviewed e-mails sent to Jade from Mark Citriglia, the District's chief of laboratories, expressing his disappointment in their performance not delivering the filters. The fact that that item had to be deleted from their contract is the main reason they were not the lowest and best bid as it relates to this contract – especially considering that there was only \$1,000 separating their bid from Environmental Express. He stated that it continues to be staff's recommendation to exercise its authority to hire the lowest and best bidder.

The contract under discussion is for filters only. Jade has performed other contracts and they could continue to bid on them again. The District has a proposed debarment policy for companies that do not perform or do other things that might be fraudulent. However, in this case, Jade was not disbarred.

Staff examined the proposed policy that Law and Purchasing departments put together. Debarment means exclusion for consideration for award of any District contract for a specified period of time. The serious nature of debarment requires that a sanction be imposed to protect the interest of the District and its ratepayers. This policy is different than the District's discretionary lowest and best standard which was utilized on this particular bid. A low bidder may not be the best on a particular project based upon past performance or the bidder's skill set.

Mr. Brown indicated the Board had not received that document. Executive Director Ciaccia stated that he wanted it distributed and that would be rectified shortly.

Executive Director Ciaccia stated that under the proposed policy, requirements to disbar a bidder are: written notification from the purchasing manager to the bidder that grounds for disbarment exist; secondly, the right to appeal the District's decision at a hearing; a hearing panel comprised of at least three managers or director-level employees appointed by the Executive Director; and thirdly, written findings issued to the bidder of hearing panel's decision.

The length of debarment is at the purchasing manager's discretion but may be no longer than three years except for extraordinary circumstances. The purchasing manager shall weigh the nature and the severity of events causing disbarment to determine the length; and there are 11 grounds for debarment mainly related to defaulting on District contracts or violating state and federal laws, including being convicted of criminal offenses.

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Executive Director Ciaccia explained that the Board is not being asked to take action until they receive a copy of the policy, but will put in place the debarment policy once input is received.

Mr. Brown appreciated the feedback on that issue. He was concerned about two things.

Mr. Brown stated that in this particular instance Jade Scientific had performed well in providing other items in the past which precluded debarment. He questioned the validity of that action. The issue is if a vendor has a contract with the District and fails to perform, it is not subject to the ability to comply with the terms and conditions of the contract, not which particular items. He thinks that puts the District in a position of diluting the impact when a vendor fails to comply with terms and conditions.

Then the second concern was in regards to a potential sanctioned penalty period of up to three years at the discretion of the purchasing manager. That puts subjectivity into the process.

Ms. Kelly agreed with Mr. Brown's comments and added that no action would be taken. She asked Executive Director Ciaccia what action would be taken with the first bidder. He clarified that her inquiry was in regards to declaring Jade's bid not the lowest and best. Ms. Kelly affirmed.

Executive Director Ciaccia advised that Jade would not be awarded this contract because in spite of the fact they were slightly lower, they were not the lowest and best bidder. Ms. Kelly inquired if there would be correspondence with the bidder. Executive Director Ciaccia stated that there has been correspondence to the bidder expressing displeasure with their failure to comply with the bid and they were not awarded the contract.

Ms. Kelly inquired if the draft policy had been distributed. Executive Director Ciaccia advised that it had not; he wanted input first and is aware that the issue of subjectivity of the term limit may be altered. The document will not be issued until at least after the next Board Meeting so any issues may be worked out.

Ms. Sundheimer distinguished the difference between making an evaluation of competitive bids based on the standard of lowest and best, and rejecting a bid because it is not best, as compared to the proposed debarment policy. The proposed debarment policy is a very draconian measure and deprives a contractor of rights to bid. There has to be due process prior to debarring a contractor from bidding.

Ms. Sundheimer advised that staff modeled the policy after federal contracting standards. In this situation staff was not dealing with the concept of debarment in regards to Jade.

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Staff was simply exercising its right, or the Board's right to evaluate bids under the standard of lowest and best.

Mr. Brown stated that his concern is that one criteria of the evaluative process is past poor performance. Using that criteria as the basis for not awarding a contract without taking an action so the contractor becomes aware leaves the door open for them to take action against the District. The District would essentially say they have performed poorly in the past and even though they have a lower price and the product may be good, because of actions in the past they will not be awarded the contract.

Mr. Brown stated that was a mixed message to a vendor, which is why he raised the issue during the last Board meeting. He stated that there ought to be a consequence or message if a vendor's bid is not deemed best due to past performance so the District can be on the record as to why. He stated that the likely response would be that staff has flexibility in terms of determining the lowest and best bid.

Ms. Sundheimer stated that Mr. Brown's comment in regards to flexibility was correct. She wanted to make sure there was no confusion between the two standards of evaluation. If staff wished to debar Jade it would go through the lengthy due process set out in the proposed policy. In this situation the bids were evaluated and staff selected the lowest and best, which was not Jade. That does not preclude them from bidding again. Mr. Brown stated that may have the same or similar outcome for that product for an unspecified length of time.

Ms. Kelly was concerned with the implications when a contractor is not notified that the District is dissatisfied with its performance. Executive Director Ciaccia agreed and advised that managers and purchasing must understand the need to document it and make contractors aware of any dissatisfaction.

However, in this case there was documentation he reviewed that made clear Jade was aware of staff's dissatisfaction. Jade did not know it would lead to them not being selected as the lowest and best bid on the contract under discussion, because they submitted a bid.

Jade was notified of staff's dissatisfaction and in fact staff took that item out of the contract and procured it in a different manner. There are other items on which staff would be interested in their bid.

Mr. Brown stated that staff has recommended another vendor appropriately. He questioned what the reaction would be in the future if Jade is a recommended vendor on a contract. He asked the staff to take note of the Board's concerns regarding the final policy. Executive Director Ciaccia stated that he understood Mr. Brown's point and staff

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will encompass that into its evaluation of lowest and best.

Mayor Starr inquired what could be done to prevent a contractor that has been debarred from forming a new corporation or joint venture with new partners from bidding on contracts. Ms. Sundheimer advised that there may be no way to prevent it, but in that event it would be incumbent upon the District to do its due diligence. There are ways to find out if a company is new, who the principals are, and staff can raise the issue. There is an appeals process in the debarment policy and a debarred vendor may argue their case, that they have reformed or an individual who was previously involved with them has left.

Mayor Starr stated that the final step is an administrative due process in which the Executive Director forms a panel. He inquired if there is an appeal beyond that process such as the Board of Trustees since contracts involve public money. He inquired if a step such as that would add fairness and be more legally defensible.

Executive Director Ciaccia stated that was a good question. He thinks any vendor may appeal to the Board. He recalled an individual who appealed to the Board previously. The Board is a public body and anyone may sign up to speak before it and state their case and the Board may decide how they wish to proceed.

Mr. Brown stated that there is a question between the actions the Board would take on a company as opposed to principals in terms of the debarment issue. He asked the staff to look at the ability to do so.

Authorization of Contract Modification

Resolution No. 67-12

Modification and Final Adjustment Deduct Order for Contract No. 11000339, Southerly Maintenance Building Exterior Wall Restoration (WPR-1) Project. Cost: A Decrease in the Amount of \$250,791.41 Bringing the Total Contract Price to \$2,379,108.59.

MOTION – Mayor Starr moved and Ms. Kelly seconded to adopt Resolution No. 67-12. Without objection, the motion carried unanimously.

Authorization to Advertise

Resolution No. 68-12

One-Year Requirement Contract for Ferric Chloride Solution for Use at all District WWTPs. Anticipated Expenditure: \$205,000.00.

Resolution No. 69-12 One-Year Requirement Contract for Crane Inspection, Maintenance & Repairs, and Emergency Service at District Wastewater Treatment Plants and Pump Stations. Anticipated Expenditure: \$120,000.00.

Resolution No. 70-12 Walworth Run Outfall Repair (WROR) Project. Engineer's Opinion of Probable Cost of Construction: \$2,200,000.00.

MOTION – Mr. O'Malley moved and Mayor DeGeeter seconded to adopt Resolution Nos. 68-12 through 70-12. Without objection, the motion carried unanimously.

Authorization to Issue Request for Proposals (RFPs)

Resolution No. 71-12 Customer Awareness and Customer Satisfaction Survey to Establish a Baseline and Offer Recommendations on Improving Customer Perception of the Sewer District. Anticipated Expenditure: Not to Exceed \$75,000.00.

MOTION – After discussion, Mayor Bacci moved and Ms. Kelly seconded to adopt Resolution No. 71-12. Without objection, the motion carried unanimously.

Mayor Starr asked for an explanation.

Executive Director Ciaccia explained that staff is endeavoring to assess customer awareness and satisfaction. The District has been making outreach efforts over the last few years, including spending money on different media buys. Staff wants to get a sense of how effective those efforts have been and to determine how to improve the outreach program. Services are directly provided to the call center to gauge satisfaction by going back to customers from the service.

Mayor Starr inquired if there would be a poll and through what means. Constance Haqq, Director of Administration & External Affairs, advised that the effort will include focus groups and will be a much more comprehensive survey than those done in the past.

Mr. Brown hoped the outcome would shape future outreach and collaboration with the public. He thinks focusing on the right issues such as awareness and the level of customer satisfaction has to do with accessibility of information and service delivery. He advised that the Board will be very interested as the process moves forward to see what is learned and what can be done as a result of the activity.

VI. Information Items

1. Program Management Status Report and Update – February 2012

Kellie Rotunno, Director of Engineering & Construction, was present to provide an update for the month of February on the Capital Improvement Program.

Ms. Rotunno displayed recent photographs of the Euclid Creek tunnel. She advised that work is progressing, including mining at the main shaft, and the tail tunnel has been completed. All excavation has been completed. Shaft excavation continues and the gate has been installed at the Shaft-2 location at Triangle Park, Nottingham Road and East 185th Street. The project is running smoothly. Components of the tunnel boring machine should arrive any day. Ultimately the tunnel boring machine will be assembled in anticipation of beginning mining activities in late summer.

Moving to the Renewable Energy Facility (hereinafter “REF”), translucent panels, or cowl walls, have been installed and are visible to the west from Interstate 77. The existing odor control building has been demolished and the boiler steam piping was completed. Work on the factor acceptance testing continues as does the continuance emissions monitoring system. The package water treatment for the boiler system and installation is complete.

Ms. Rotunno moved the report to Key Performance Indicators (hereinafter “KPI”). The District has awarded \$7.1 million in contracts through February, which is in-line with expectations. Only one awarded contract was out of line with the engineer's estimate, and that project was 21.7% below the opinion of probable construction cost. She advised that that KPI was out of the preferred range.

Ms. Rotunno explained that the best way to track scheduling and delivery performance is to look at cash flow. To date cash flow is tracking at \$42.8 million, which is 4% higher than projected and very much on target. Three projects closed during January and a fourth closed in February. The Train Avenue relief sewer technically closed within the KPI metric of 91.5% of its contract value. She advised the Board that the District agreed to a legal settlement on that project for the grouting claim, which was a \$160,000 cost that is not accounted for in the account.

Moving to the forecast of the next 90 days, the Southerly maintenance building exterior wall restoration will close within the KPI.

Ms. Rotunno explained that the business opportunity goals for the Train Avenue relief sewer have been far exceeded. She indicated that during the first 90 days of 2012 three of the four projects are expected to close within the KPI, and a total of six out of eight projects are closing within the goal.

Executive Director Ciaccia asked Ms. Rotunno to elaborate on the challenges with the REF. He noted that extensive internal discussions have been held regarding that project.

Ms. Rotunno advised that there are multiple challenges regarding the REF. She indicated she was over optimistic establishing the general allowance at less than the 10% contingency under the bylaws. The project was in the amount of \$93 million with only a \$6 million allowance. She explained that there were coordination issues that arose from pre-procurement associated with the incinerators being procured under a separate contract. There was a lack of a single point of accountability due to having two contracts.

Ms. Rotunno explained that the project is currently well within the \$6 million general allowance but a number of items are being negotiated with the contractor against the remaining balance. She indicated she was likely to return to the Board in the future to provide a more comprehensive update on the incinerator projects, because she views them as an aggregate. The two projects are interrelated and financially interdependent. The projects are all well within the 10% allowable contingency; it is a question of which contract will meet the goal and which will be modified.

Mr. Brown stated that the Board may have questions when Ms. Rotunno returns with the information. Ms. Rotunno indicated she would be happy to present that information and advised that the errors and omissions are within the industry standard or better. She stated that she should have asked for a 10% general allowance and would not make that mistake again.

Executive Director Ciaccia explained that placing a 10% allowance on a \$90 million project makes for very large contingencies. Staff thought that since this was a vertical building and not underground, it would be unlikely to be in need of a monetary modification. However, the coordination between the two contracts with pre-procurement posed more challenges than anticipated.

Mr. Brown stated that at a minimum this result has caused the staff to keep a very close eye on the process. While the increased scrutiny is positive it is unfortunate it has come as a result of managing it to the best outcome.

Executive Director Ciaccia explained that this was his second pre-procurement experience in his career and both seemed to have the same outcome. He stated that it is preferable to bid projects as one contract.

VII. Public Session (any subject matter)

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

VIII. Open Session

There were no items for discussion.

IX. Executive Session

Mr. Sulik stated that there was a matter for discussion in Executive Session.

MOTION – Mayor Bacci moved to enter into Executive Session to consult with legal counsel and District administration regarding three legal matters. Number one, discussion of the annual audit with the auditors for the state; number two, the District’s proposal in compliance with the court’s February 15, 2012 opinion of the stormwater litigation; and number three, proposed settlement offer in KMM&K litigation. Mayor Bacci stated that discussion of these matters in Executive Session are permitted as specific exceptions to the Public Meetings Act pursuant to Ohio Revised Code §121.22(D)(2) and (G)(3) and he specifically designated all matters discussed in Executive Session to be protected from public disclosure in accordance with Ohio Revised Code §121.22(G), and attorney-client privilege. A roll call vote was taken and the motion carried unanimously to adjourn into Executive Session.

The Board met in Executive Session from 1:15 p.m. to 2:27 p.m.

X. Approval of Items from Executive Session

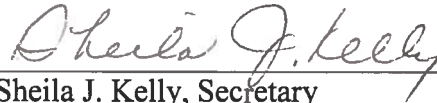
Resolution No. 72-12

Authorizing Settlement of *KMM&K, Joint Venture v. Northeast Ohio Regional Sewer District*, Case No. 07-CV-641132.

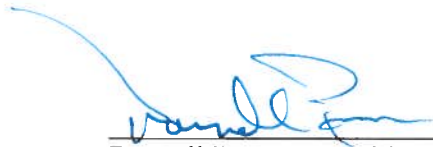
MOTION – Mr. O’Malley moved and Mayor Bacci seconded to adopt Resolution No. 72-12. Without objection, the motion carried unanimously.

XI. Adjournment

Business having been concluded, Mr. Brown adjourned the meeting at 2:29 p.m.



Sheila J. Kelly, Secretary
Board of Trustees
Northeast Ohio Regional Sewer District



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