



**Albuquerque Metropolitan
Arroyo Flood Control Authority
Special Meeting Minutes
August 19, 2005**

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1. Call to Order and Roll Call

Chairman Brown called the Special Board Meeting to order at 8:36 a.m. Friday, August 19, 2005. Roll was noted as follows:

Directors present: Chairman Ronald D. Brown
 Director Daniel Lyon
 Director Janet Saiers
 Director Danny Hernandez

Directors absent: Director Tim Eichenberg

Others present: John Kelly, Executive Engineer
 Sam Bregman, Attorney
 Staff

A quorum was present.

2. Approval of Agenda

Mr. Kelly stated there were no changes to the agenda.

Director Hernandez made a motion to approve the agenda. Director Saiers seconded the motion, which passed (4-0).

3. Meetings Scheduled

- a. **September 20, 2005, 10:00 a.m. – Regular Meeting**
- b. **October 27, 2005, 10:00 a.m. – Regular Meeting**
- c. **November 17, 2005, 10:00 a.m. – Regular Meeting**
- d. **December 15, 2005, 10:00 a.m. – Regular Meeting**

4. West I-40 Phase III Diversion Channel Project – Appeal of Executive Engineer's Decision to Not Allow Suspension, Modification or Stay of Liquidated Damages

Chairman Brown stated that this was a continuation of a hearing on an appeal on the West I-40 Phase III Diversion Channel Project, deferred from the August 11, 2005 Regular Board Meeting. The Board had asked for additional information in order to make a decision about Albuquerque Excavators, Inc.'s (AEI) appeal of the Executive Engineer's decision to not allow suspension, modification or stay of liquidated damages on the contract.



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Mr. Kelly introduced Jerry Padilla and Ed Demarey of AEI, and their attorney, Mike Menicucci of Calvert-Menicucci, and Dan Aguirre and Chris Perea of Wilson and Company.

Mr. Kelly stated that on August 18, he had sent Mr. Demarey a letter reminding him of the information the Board had requested at the August 11 meeting, and the items discussed at the August 17 meeting with Mr. Demarey, Mr. Padilla, Mr. Lovato, and himself at AMAFCA. AMAFCA had received a letter from Mr. Demarey on August 18 that addressed some of the items, but not in the detail nor with the verification expected.

Chairman Brown asked Mr. Menicucci if they had obtained these items.

Mr. Menicucci stated that he had tried to get a letter from the bonding company verifying they would meet their obligations, but was unsuccessful. He added that the bonding company had no legal defense preventing them from payment, and they told him they'll pay all claims verified by and approved by the contractor. They indicated they had received additional claims since the August 11, 2005 Board meeting.

Chairman Brown explained that AMAFCA was not asking for a letter giving up the bonding company's defenses, but was simply asking for an indication that they are paying and will pay the subcontractors on this job, so that other subcontractors will have the confidence to return to work.

Mr. Menicucci commented that the bonding company saw no reason why they wouldn't meet those obligations.

Mr. Bregman asked if the bonding company was disputing the liquidated damages.

Mr. Menicucci replied that the bonding company did not dispute liquidated damages, and saw no legal defense against paying them.

Mr. Bregman asked why there would be a 45-60 day delay in the project if AEI were not to continue the job.

Mr. Menicucci explained that there is a process the bonding company goes through on a default. This includes doing an investigation, and either hiring a new contractor or the existing contractor to finish the job, or paying the owner so he could finish the job. From his personal experience, this process always takes at least 45 days.

Chairman Brown summarized that one subcontractor had been paid, and others were pending. Moving on to the next item in Mr. Kelly's letter, he asked about the status of the riprap submittals, and when AEI would be buying the rock they needed.



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Mr. Demarey responded that the sizing test was not included in the Vinyard report on the rock at Salls Brothers, so AMEC had tested the riprap size on Thursday. AMEC's report was due late Friday. He stated that there is rock available, AEI has a supplier lined up, and the rock is available for AEI's purchase.

Chairman Brown asked if AEI had obtained anything in writing from the surety in support of AEI's proposal to defer liquidated damages to the end of the contract.

Mr. Menicucci stated that there is a letter the surety can send to the owner, to be sure that there will be enough money left at the end of the contract to cover damages, in which they request the owner not pay the contractor any further. This is so that if the surety has to stand in, there is enough money left in the owner's account to pay the surety for the finished job, less liquidated damages.

He added that the surety had indicated to him that they had not sent this letter to AMAFCA, and didn't plan to.

Mr. Kelly clarified that Section 108 of the contract allows AMAFCA to attach liquidated damages to the performance bond if there is no money left at the end of the contract. AMAFCA wanted to be sure that the surety knew of this. AMAFCA also wanted concurrence from the bonding company that they were going to accept attaching the damages to the performance bond in the event that the October pay estimate did not have enough funds in it to cover the expected damages on the project.

Mr. Menicucci replied that he didn't know if the bonding company would answer that question until after their investigation.

Chairman Brown moved on to the next item in the list, asking if AEI was current on their payroll.

Mr. Demarey responded that certified payroll compliance sheets had been faxed to AMAFCA on August 18, which he believed brought AEI current on reporting.

Mr. Kelly stated that staff was still reviewing those certifications. Two of them cover 2-week periods, and hours worked were not clearly given for the second week. The weeks were not labeled with the dates covered, so it appeared that two weeks in July were still missing.

Mr. Demarey replied that he had put in two lines for regular hours, one for each week, but had not labeled them. He stated could revise the detail pages to better label this information.



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Chairman Brown asked if AEI was current on all payroll withholding taxes.

Mr. Demarey responded that he was working on getting a letter to verify withholding taxes have been paid, from the Department of Taxation and Revenue.

Mr. Bregman stated that it was asked if AEI was current in all state and local taxes. Referring to a line in Mr. Demarey's August 18 letter, "AEI has filed the appropriate tax paperwork to date," he pointed out that having filed the paperwork is not the same as actual payment of taxes. He asked if AEI had actually paid all the taxes that are due at this point.

Mr. Demarey then stated that AEI owed about \$8,000 to the state. The state put a tax lien on the piece of property that is being liquidated. The lien will be satisfied when the sale closes in September. In response to a follow-up question from Mr. Bregman, he added that past due federal taxes were also a part of that lien.

Mr. Bregman asked how much AEI owed the federal government. Mr. Demarey replied that it was \$26,000, total, for a four-year period, dating back to 2001 and 2002, before this job, plus a 10% assessment.

Director Saiers asked if AEI was current on payroll.

Mr. Demarey replied that AEI was current on payroll, and the only question was in reporting weekly pay on two-week pay periods. He will revise his payroll report to make that information clearer. He declared that all employees have been paid to date.

Director Lyon asked if AEI was current paying on workman's compensation, not just on filing the paperwork. Mr. Demarey answered affirmatively. Director Lyon asked if it was possible to obtain confirmation of this in writing.

Mr. Menicucci clarified that AEI owed past taxes, state and local, but were paid up on current taxes. The past due taxes were from a period prior to the West I-40 job, and will be satisfied in September when the sale of the real property closes.

Mr. Bregman asked about AEI's financial ability to pay suppliers and cover payroll, including the additional laborers AEI will hire, until the next pay estimate is paid and the property is closed in September. He pointed out that suppliers may have attached liens to the property and AEI may not receive the full proceeds.

Mr. Demarey stated that AEI can borrow against the purchase contract until closing, giving them enough money for payroll.



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Mr. Bregman asked if their ability to get the loan would be contingent on their being able to defer liquidated damages.

Mr. Demarey maintained that AEI can cover payroll with a loan against the purchase contract. The suppliers are being paid by the bonding company. Fred Salls has asked for a joint check to pay for the riprap. If AEI can get through September 10, when they receive a pay estimate, they should be ok financially.

In response to a question from Mr. Bregman, Mr. Demarey stated that AEI expected to do \$400,000/month on the contract until completion, and the riprap would cost them \$100,000.

Mr. Bregman asked where the other \$700,000, or \$350,000/month they would need would come from. He wondered if AEI could borrow that much money.

Mr. Demarey replied that AEI has some materials they've already paid for, including \$100,000 in boulders that still need to be brought to the site. The riprap is \$265,000, including the \$100,000 in riprap they'll get from Salls. Money is currently being held out for the riprap repair sections, where the material is already there. His stated his figures had been reviewed by a CPA.

Mr. Bregman explained that the Board is concerned that AEI will be able to pay the additional employees it hires to finish the job. Mr. Demarey responded that he expected payroll to be about \$125,000/month, and AEI can borrow that amount to cover payroll.

Mr. Menicucci pointed out that there may be \$60,000-70,000/month profit in that \$400,000/month figure, so costs will be less than the amount billed. He also clarified that the money borrowed for payroll will not be a loan at the bank, but money received from the purchaser of the land, in advance of closing. The contract was written up to allow such advances.

Mr. Bregman asked how much the land sold for. Mr. Menicucci replied that the purchaser didn't want to disclose their identity or the purchase price. Mr. Bregman wondered how the Board could make a decision, in part relying on information about an outside activity that couldn't be verified.

Mr. Bregman inquired why some subcontractors hadn't been paid yet. Mr. Menicucci responded that they hadn't submitted claims to the bonding company. Mr. Bregman asked if there was a time limit during which claims must be made. Mr. Menicucci replied that there was no time limit for first tier subcontractors.



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Mr. Demarey clarified that a claim by Bixby Electric has been rejected as "not timely" because it they had done a task twice and that confused the bonding company, because they thought it was a double billing. The bonding company should have paid at least one of the bills. He stated he will follow up with the bonding company about Bixby Electric.

Mr. Bregman continued, saying the subcontractors were concerned that they haven't been paid for work already done, and wasn't the bonding company supposed to be doing this. Mr. Menicucci replied that the bonding company hasn't received their claims yet, and can't pay without a claim being made.

Mr. Kelly said that a Mr. Darryl Green of Bixby Electric told him they'd made a claim and the bonding company denied the claim because they did not file in a timely manner. Mr. Menicucci replied that he could not think of a defense for this and he didn't know why it happened.

Director Saiers referred to the request for "assurance and proof of financial capability" and asked if AEI's proof of financial capability was their declaration that some property would be sold in September, and they could borrow against the purchase price till then.

Mr. Menicucci replied that the money would only have to cover the first month. The pay estimate from the first month would cover expenses of the second month.

In response to several questions from the Board about liquidated damages and the date they started, Mr. Kelly stated that the current date for substantial completion was June 4, and the date for completion of all items of work was June 14. A change order within pay estimate #14, which had not yet been signed by AEI, would add three days to that date for weather delays in July. There was also a current request for 5 days for the storm the weekend of August 12-13 that could cause these dates to change again.

Mr. Kelly continued, explaining that the liquidated damages for missing the "substantial completion" date is \$1700/day, and the liquidated damages for missing the "all items" date is \$600. The contract provides that liquidated damages are additive if both dates are missed, for a total of \$2300/day. AEI's request and the appeal had involved liquidated damages from August 1 forward only.

Chairman Brown reminded AEI that the Board had requested some information at the last meeting. Some of this information had been supplied verbally, but AMAFCA needed it in writing. He requested that AEI prepare a written, weekly, cash flow analysis that showed the money coming in and expenses going out from now to the end of October. He also requested that any money coming in be identified as to the amount and the source, and be verified in writing by the source.



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He added that if the Board is provided with this cash flow analysis, it is open to considering a stay of liquidated damages. Without it, the Board cannot make a decision about staying liquidated damages, and he would recommend the Board defer a decision until this information is available.

Director Hernandez also requested that written verification of the information asked for at the August 11 meeting be provided.

Director Lyon asked if AEI needed to have the Board decide on the liquidated damages issue before they went to the bank, and asked what Board action AEI desired. Mr. Demarey replied that if the Board didn't stay liquidated damages, AEI would have to come up with a different plan. They hoped the Board would stay liquidated damages, so they could be paid at the end of the contract.

Director Lyon stated that AEI should have a cash flow analysis, and should have prepared one already, as it would probably also be needed by the surety and others. He also stated he supported the Chairman's recommendation.

Director Saiers declared that she had been prepared to support the Executive Engineer's denial of AEI's request, but will follow the Chairman's leadership on this matter. She asked if there was now to be another special meeting to discuss this situation further.

Chairman Brown indicated that another special meeting would be necessary.

Director Saiers continued, stating her understanding that if AEI's cash flow analysis is inadequate, the Board could deny their appeal. She indicated her surprise at the incomplete information provided by AEI for the meeting.

In response to a question from Director Saiers, Mr. Kelly stated that \$3.5 million had already been paid on the contract.

Director Lyon asked how much more time Chairman Brown was considering, pointing out that it should not be an open-ended period beyond the next regular Board meeting.

Mr. Bregman suggested the Board schedule consideration of the appeal for the next Board meeting or sooner if AEI provided all requested documentation before that time.

Director Lyon asked AEI how long it would take to gather the requested information. Mr. Demarey replied that he was uncertain, but it would probably take more than a week.



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Chairman Brown informed AEI that AMAFCA has to give three days public notice of a special meeting, so the meeting would probably be scheduled about 3 days after AMAFCA has received all the requested information. Director Hernandez added that a quorum of Directors needed to be available for the meeting, so it could end up being 4 or 5 days after, but probably not longer.

Director Hernandez made a motion that the Board defer action on AEI's appeal to a date no later than the September 20, 2005 Board meeting, or an earlier special meeting if the requested information is provided earlier. Director Lyon seconded the motion.

During discussion, Mr. Demarey assured Director Saiers that work should continue on the project, rather than stop until the Board made a decision. He stated that after the riprap is delivered, they should continue with the placement of the riprap.

Director Saiers asked if Mr. Demarey now understood what information the Board was seeking, in writing. He indicated that he did.

Chairman Brown added that the bank and surety company will probably also want to take a look at the cash-flow analysis.

Mr. Bregman also stated that the Board needed to know what subcontractor claims AEI was aware of, so that everyone would be working from the same information. He reminded AEI that it was not the Board's intent to imply or insinuate that work should halt or slow until a decision is made - AEI needs to start moving faster on the job immediately.

Director Lyon told Mr. Demarey that it was not a case of AEI "should be" doing the work, it needs to be they "will" do it.

Chairman Brown requested that Mr. Kelly revise the reminder letter to include the Board's request for a cash flow analysis and a plan of how the vendors and subcontractors will be paid.

He then called the question, and the motion passed (4-0).

Chairman Brown addressed AEI, suggesting that they prepare the cash flow analysis with the assistance of the surety or a CPA, because they are familiar with preparing a business cash flow analysis.

5. Unfinished Business

None.



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6. New Business

Mr. Kelly pointed out a letter the Board had received from Congresswoman Heather Wilson, thanking them for their participation in the ceremony regarding the funding for the Southwest Valley Flood Reduction projects. She also thanked Mr. Lovato for his assistance in handling the logistics and briefing her staff prior to the event.

7. Items from the Floor/Public Comment

Director Saiers expressed her appreciation to Wilson & Company and Mr. Lovato for the hard work the West I-40 project has required.

8. Adjourn

With no further business to discuss, Chairman Brown adjourned the meeting at 9:42 a.m.

Tim Eichenberg, Secretary-Treasurer 9/20/05

Recorded by Pam Woodruff, Secretary to the Executive Engineer