



**Albuquerque Metropolitan
Arroyo Flood Control Authority
Special Meeting Minutes
June 24, 2005**

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1. Call to Order and Roll Call

Chairman Brown called the Special Board Meeting to order at 8:07 a.m. Friday, June 24, 2005. Roll was noted as follows:

Directors present: Chairman Ronald D. Brown
Director Daniel Lyon
Director Tim Eichenberg
Director Janet Saiers
Director Danny Hernandez (arrived at 8:22 a.m.)

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

A quorum was present.

2. Approval of Agenda

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

3. West I-40 Phase III Diversion Channel Project – Appeal of Executive Engineer's Decision to Deny Contract Time Extension Due to Lack of Experience Installing Landscaping

Chairman Brown stated that the meeting would be limited to discussion of the West I-40 Phase III Diversion Channel Project appeal only.

Mr. Kelly explained the administrative remedy section of the contract. He stated that Albuquerque Excavators, Inc. ("AEI"), had requested that 44 days to be added to the contract because they couldn't negotiate a contract with the landscape subcontractor listed on their bid, and had substituted themselves for the landscape subcontractor. AEI stated that because they were inexperienced with doing landscape work, they would need more time to complete the landscape work. They also claimed that failure to negotiate a contract was a labor dispute with the subcontractor.

Mr. Kelly referred to the reasons allowed for a contract extension in the NMHTD Standard Specifications, Section 108.6 (*Determination and Extension of Contract Time*). He stated the question before the Board: is failure to come to terms during contract negotiation with a subcontractor a "labor dispute"?



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AMAFCA Attorney, Sam Bregman, reported that, according to his research, a "labor dispute" is between an employer and employee. He found no case law indicating that failing to negotiate a contract with a subcontractor could be considered a "labor dispute" under the meaning of Section 108.6, paragraph 10, which states, "If the Engineer finds that the work was delayed because of conditions beyond the control and without the fault of the Contractor, including but not limited to labor disputes, the Engineer may extend the time for completion in such amount as the conditions justify."

Mr. Kelly also stated that AEI claimed they were unaware that language stating that the last 5% of the project would be held until all items of work were complete was in the contract until the February 2, 2005, partnering meeting. Mr. Kelly stated this language was in the bid documents and contract, and is in the NMHTD Standard Specifications.

Mr. Kelly explained that this 5% amount on the contract is greater than the amount due to the landscape subcontractor. As the landscaping would be done at the end of the contract, the subcontractor felt this meant payment of their invoices would be delayed.

Mr. Kelly added that AEI chose to substitute themselves for the listed landscape subcontractor. AEI claimed inexperience at doing landscaping, even though they are licensed to do such work. Section 108.6 does not contain language allowing contract time extension for inexperience.

Chairman Brown recognized Ed Demarey, of AEI.

Mr. Demarey asked the Board what AEI had control of. He brought up the steep slope seeding issue, stating that AEI underbid the contract due to not recognizing that a portion of the seeding was on a steep slope and required gravel mulch instead of straw mulch. He added that AEI had been unable to find a landscaper willing to do the job at the bid rate, so they had to substitute themselves to do the landscaping.

Director Hernandez arrived at this point in the meeting, apologizing for his late arrival.

Mr. Demarey added that AEI could not control the actions of others.

Chairman Brown asked if it was customary for the last subcontractor on a job to not get paid until after the retainage is released. Mr. Demarey replied that a large sum withheld at the end of the contract hurts the subcontractors whose work is done at the end of the contract.

Chairman Brown questioned this, stating that a general contractor should have enough working capital on hand to cover overhead and payments to their personnel and



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subcontractors. Mr. Demarey replied that AEI had spent a lot of the profit on machinery to complete the project.

Chairman Brown stated that the 5% retainage is necessarily large on a large job, and that many contractors decline to bid on large jobs because of inadequate working capital to cover employees and subcontractors at the end of the contract. He added that subcontractors should be paid on time, and that it would be difficult to get any subcontractor to bid on a job knowing that they would not get paid until the retainage was released.

Mr. Demarey countered that he thought the City and County did not use a 5% retainage on their contracts, so maybe it was overlooked during the bid process.

Chairman Brown replied that the 5% retainage was in the State's Standard Specifications.

Director Lyon asked Mr. Demarey why he'd stated that AEI did not have control over steep slopes. Mr. Demarey replied that AEI had not noticed the steep slopes on the plans, and that a professional, Lee Landscapes ("Lee"), had brought this to their attention less than a day before bids were due. Lee told them to add \$77,000 to their bid to cover the additional costs of steep slope seeding.

Director Eichenberg pointed out that AEI knew of this before bids were due, and inquired why AEI had not changed their bid before submitting it. Mr. Demarey stated they saw the letter, but had no time to verify the information before the bids were due.

Director Eichenberg reiterated that the engineer's estimate was low, AEI's estimate was low, and when they learned from a landscaping expert that there was steep slope seeding to be done and the bid should be changed, AEI had not changed their bid.

Mr. Demarey allowed that the steep areas in question had since been regraded to eliminate nearly all steep slope seeding areas from the project. Director Eichenberg noted that the steep slope issue had thus been mitigated.

Chairman Brown invited Chris Perea, of Wilson & Company, to address the Board. He also acknowledged the presence of Dan Aguirre, also of Wilson & Company.

Mr. Perea defined his job as a civil engineer doing construction management work as enforcing the plans and specifications on the project. He stated that Wilson & Company had worked very hard to minimize the impact of steep slope seeding, and less than 2 acres of steep slope remained on the project. He added that in his opinion, the failure to negotiate a contract with the landscaping subcontractor was not a labor dispute.



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In response to a question, Mr. Perea replied that two steep slope areas remained, with a total area of less than 2 acres. He added that AMAFCA typically lumps all seeding together in the specification rather than breaking out different types, such as steep slope seeding. The Highway Department breaks out the different kinds of seeding in their bid documents.

Director Eichenberg asked about the gravel mulch specifications. Mr. Lovato explained that the angular gravel would stay in place on the slopes, thus minimizing erosion.

Director Lyon and Chairman Brown asked the status of the landscaping work on the project. Mr. Kelly replied that certain parts of it had been started, but that staking the landscape plan and trenching had not yet begun.

Chairman Brown asked for verification of the total value of the landscaping portion of the contract. Mr. Demarey and Mr. Perea replied that it was between \$265,000 and \$300,000.

Chairman Brown asked Mr. Perea how long it would take to do the project's landscaping. He replied that 90-120 days was reasonable, depending on how the job was scheduled; Lee had estimated 88 days.

Chairman Brown asked if an estimate of 80-90 days to complete the rest of the landscaping was reasonable. Mr. Perea affirmed this. Chairman Brown then asked how much time it would take to complete the whole project. Mr. Perea stated as there was approximately \$2 million of the project yet to complete, he estimated it would take about 4 more months, based on AEI's last submitted schedule.

Chairman Brown concluded that since only about 60-65% of the job was complete, the landscaping was not holding up the project. The timeline of the project was such that landscaping could be done concurrently with portions of the remaining work.

Mr. Perea stated that AEI was still working on riprap placement and some channel work on the flood control portion of the project.

Chairman Brown asked why AEI felt they needed a time extension in order to complete the landscaping, since landscaping was not holding up the project. Mr. Demarey replied that Lee had been planning to use 25-30 people on the landscaping, and AEI couldn't fill that void. AEI's workers were busy completing the riprap.

Chairman Brown asked how long AEI had known it would need a different landscape subcontractor, or would have to do the work themselves. Mr. Demarey replied that at the end of April, they knew Lee would not be doing the work. They had a specialist do a take-off and redo the submittal to Wilson & Company for approval at the end of April and beginning of



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May. At that time, AEI realized they couldn't get another subcontractor to do the work at the bid price, so they'd have to do it themselves.

Chairman Brown stated that AMAFCA didn't wish to be unreasonable, but if AEI were to gather the appropriate resources, landscaping shouldn't take any longer than is already scheduled. A contractor normally has to plan ahead and assemble the manpower and equipment to do scheduled jobs, and this is no different.

Mr. Kelly reminded the Board that, after the bid opening and before the construction contract was awarded in early 2004, the second low bidder on this job had protested the bid results. One of the points of their protest was AEI's inability to do the job. At that time, Mr. Demarey had told the Board that he'd have 70 people working on the job throughout the project. Although manpower had fluctuated, there had been an average of only 20 people on the job each day.

Mr. Kelly added that the decision to deny the protest and award the contract to AEI was based, in part, upon Mr. Demarey's assurance that AEI would staff the job adequately.

Mr. Kelly also stated that on October 7, 2004, Mr. Lovato had sent a letter to Jerry Padilla, President of AEI, summarizing the discussion he'd had with Mr. Demary, Mr. Perea, and Robert Garcia (of Wilson & Company) the previous day. At that time, Mr. Lovato told Mr. Padilla that he would need at least 89 people to complete the job on time.

Director Eichenberg stated that he would make a motion for discussion purposes.

Director Eichenberg made a motion that the Board uphold the Executive Engineer's denial of a 44 day extension of Albuquerque Excavator's contract time. The motion was seconded by Director Hernandez.

Chairman Brown stated he would close the floor from comments from others, unless specifically asked by the Board.

In response to an inquiry from Director Saiers, Jerry Padilla, President of AEI, stated that AEI was willing to complete the project but he didn't want the business to go under in the process.

Director Lyon asked if the contract extension would be an extension of the "substantial completion" deadline, or the "all items of work complete" deadline.

Mr. Kelly stated that the flood control and public safety items of the project were all included in the "substantial completion" date. The bike trail, landscaping, and other items of the project could all be completed between the "substantial completion" and "all items of work complete"



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dates. The request for 44 additional days would only extend the "all items of work complete" date. He summarized the request as follows:

Substantial completion:	June 3, 2005	+ 0 days	= June 3, 2005
All items of work complete:	June 13, 2005	+44 days	= July 28, 2005

Mr. Kelly also stated, in response to another question from Director Lyon, that if the flood control items were complete and the landscaping was incomplete, it would not affect the flood control portion of the project, but would adversely affect public perception of the project. He added that AMAFCA would incur extra costs not covered by the liquidated damages if the contract time were extended.

Director Saiers asked for confirmation that if the extra 44 days were to be added to the "all items" date, then the \$1700/day liquidated damages for missing the substantial completion date were not at issue. Mr. Kelly affirmed this, and added that as the last pay estimate cut-off date had been June 3, AEI had not had a pay estimate with liquidated damages deducted.

Mr. Bregman asked for clarification of which contract date AEI wished to have extended, as the letter from AEI did not specify this. Director Lyon addressed this question to AEI. Mr. Demarey responded that since the landscaping is not considered a "substantial completion" item, he would ask for the additional 44 days to be added to the end of the contract at the "all items of work complete" date.

Attorney Sam Bregman summarized that AEI was not contesting the \$1700/day liquidated damages for missing the "substantial completion" deadline, but was asking for the extension to avoid the \$600/day liquidated damages for missing the "all items of work complete" deadline. Mr. Demarey affirmed this.

In response to a question from Director Lyon, Mr. Bregman stated that the surety had been kept apprised of the situation and had been included in all correspondence. He added that if the Board granted the appeal, it would cost AMAFCA \$600 a day for the 44 days of the extension, or \$26,400.

Director Hernandez asked if AMAFCA would incur \$600/day in extra costs if the "all items" deadline was missed. This was confirmed by Mr. Kelly.

Chairman Brown pointed out that the liquidated damages would drop once the contractor reached substantial completion.

Mr. Kelly confirmed this, and added that if the "all items" deadline were passed before the contractor had obtained substantial completion, both liquidated damages would apply, for a



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total of \$2300/day. AMAFCA would incur additional inspection and administration costs during this time, so the liquidated damages were reasonable.

Director Hernandez stated the Board needed to decide what's best for the project, and balance that with their fiduciary responsibilities to AMAFCA.

Director Eichenberg reminded the Board that Mr. Perea had stated that AEI was still approximately four months from completion. He was concerned that if the work was not substantially complete by the time the first storm hit that area, some of the work AEI is doing could be washed downstream.

Mr. Bregman reminded the Board that the issue in front of them was whether or not in fact the lack of a contract with a landscape subcontractor is a labor dispute.

Director Saiers asserted that legal counsel had advised, based on his research, that this was not a labor dispute.

Mr. Bregman confirmed this, and stated that AEI had given no other adequate reason for the contract extension.

Chairman Brown called the question to uphold the Executive Engineer's denial of the contract extension.

The motion passed, (4-1). Director Lyon voted against the motion.

Chairman Brown stated that the Board upheld the Executive Engineer's denial of the contract extension.

4. Unfinished Business

None.

5. New Business

Director Eichenberg suggested that the Executive Engineer give Mr. Lovato 40 hours of compensatory time off in recognition of the many hours of extra work this project has required. Chairman Brown stated it was the consensus of the Board to do so.

Chairman Brown addressed AEI, stating that if AEI could get this project to substantial completion, AMAFCA could reconsider items they consider to be hardships. He pointed out



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that if the job were completed to the substantial completion point, AEI, AMAFCA, and the community have substantially less exposure to damage caused by a rain event in the area.

6. Items from the Floor/Public Comment

None.

7. Adjourn

With no further business to discuss, Chairman Brown adjourned the meeting at 9:22 a.m.

Tim Eichenberg, Secretary-Treasurer 8/11/05

Recorded by Pam Woodruff, Secretary to the Executive Engineer