

**Albuquerque Metropolitan  
Arroyo Flood Control Authority  
Special Meeting Minutes  
October 12, 2005**

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**1. Call to Order and Roll Call**

Chairman Brown called the Special Board Meeting to order at 8:32 a.m. Wednesday, October 12, 2005. Roll was noted as follows:

Directors present:                      Chairman Ronald D. Brown  
   Director Daniel Lyon  
   Director Tim Eichenberg  
   Director Janet Saiers (arrived at 8:34 a.m.)  
   Director Danny Hernandez (arrived at 8:37 a.m.)

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

A quorum was present.

**2. Approval of Agenda**

Director Eichenberg made a motion to approve the agenda. Director Lyon seconded the motion, which passed (3-0).

**3. Meetings Scheduled**

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

Chairman Brown stated that the meeting schedule could be addressed later, if anyone had any conflicts with the scheduled dates. The dates had been previously approved.

**4. Personnel Matters**

John Kelly, AMAFCA Executive Engineer, stated that Jerry Lovato had been offered the vacant Drainage Engineer position and had accepted. He will begin his new position effective October 17, 2005.

Mr. Kelly stated that staff had begun advertising the Field Engineer position, with résumés due October 21, 2005.

Director Saiers arrived at 8:34 a.m.



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**5. West I-40 Phase III Diversion Channel Status Report**

**a. Report From Surety**

Mr. Kelly introduced Tom Finley, Claims Counsel, Fidelity and Deposit Company of Maryland, Zurich North America, the surety on the West I-40 Phase III Diversion Channel Project; Brian Labbe, of Perini Corporation, and Micah Conrad, Perini's local representative; and Fred Salls, president of Salls Brothers Construction, the completion contractor selected by the surety.

Mr. Kelly stated that the Board would need to consent to the selection of Salls Brothers as the completion contractor on the project. Salls Brothers had originally been the second-lowest bidder on the project when it went to bid in January 2004.

Brian Labbe indicated that the construction schedule submitted by Salls Brothers shows that they would begin construction on October 17, 2005, and expect to finish work February 14, 2006.

Mr. Kelly added that staff had looked at the proposed construction schedule and felt that the 120 day schedule was very reasonable.

Director Hernandez arrived at 8:37 a.m.

Director Lyon made a motion that the Board consent to Fidelity and Deposit Company of Maryland's selection of Salls Brothers Construction as the completion contractor on the West I-40 Phase III Diversion Channel Project. Director Hernandez seconded the motion.

In reply to questions from the Board, Mr. Labbe stated that many of the same subcontractors will be working on completion of the project, including Desertscares and Valley Fence. Mr. Kelly added that all substandard work had been identified to the surety, and they were aware of the work that needed to be done to complete the project to the standards set forth in the original contract documents.

The motion passed unanimously (5-0).

**b. Consideration of Extension of Suspension of Contract Time**

Mr. Kelly stated that, on September 2, 2005, the Board had granted the surety a suspension of contract time from September 1 through September 20, 2005. On September 20<sup>th</sup>, the surety had requested an extension of the suspension of contract time. A decision on the extension of suspension had been deferred at that Board meeting. In light of the Surety's request that



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AMAFCA execute a Take-Over Agreement, to be discussed in the next agenda item, staff recommended that the Board continue to defer a decision on further extending the suspension of contract time.

Director Hernandez made a motion that the Board continue to defer a decision on further suspension of the contract time, with the timing of consideration of any further suspension to be at the Chairman's discretion, but not later than the next regular Board meeting, scheduled for October 27, 2005. Director Saiers seconded the motion.

Director Eichenberg stated that he was not in favor of continuing to defer the decision, as the surety deserved to know whether or not liquidated damages would continue to accrue. He was in favor of AMAFCA continuing to collect liquidated damages from September 21<sup>st</sup> forward.

Director Lyon concurred with Director Eichenberg's comments, and asked if the Board could consider the next item on the agenda (the proposed Take-Over Agreement), then return to consideration of this motion. He stated that the contract's liquidated damages were very clear, and reasonable and just. He reminded the Board of their fiduciary duty to their constituents.

Director Eichenberg made a motion that the Board defer action on the motion to defer a decision on further suspension of the contract time, until after the Board had discussed the next item on the agenda. Director Lyon seconded the motion, which passed unanimously (5-0).

**c. Discussion of Issues Raised by Surety for Proposed Take-Over Agreement**

Mr. Kelly stated that the surety sent a proposed Take-Over Agreement to AMAFCA on October 10, 2005. The agreement contained fairly standard clauses stating that AMAFCA consented to Salls Brothers Construction as the completion contractor, and setting the new completion date of February 14, 2006. However, it also proposed that the contract time be extended to the new completion date, effectively waiving all liquidated damages, in exchange for the promise that the surety will waive any claims AEI might have against AMAFCA for AMAFCA's administration of the contract to date.

Mr. Kelly stated that he, Mr. Lovato, and Mr. Bregman felt that such a contract should not be brought before the Board, and asked Mr. Finley for his comments regarding this element of the agreement.

Mr. Finley stated that the agreement sent to AMAFCA on October 10 was a first draft of the agreement, and that changes would likely be made. He acknowledged AMAFCA's contract with AEI called for liquidated damages, which are reasonable and can be calculated through February 14, 2006.



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Mr. Finley continued, stating that even though AEI voluntarily defaulted, so the surety was able to get involved quickly, AEI had identified issues regarding AMAFCA's administration of the contract that the surety will need to investigate. If the issues are substantiated, they will be brought before AMAFCA.

In response to a question from Director Lyon, Mr. Finley replied that a Take-Over Agreement is necessary when the Surety takes over a contract, otherwise the surety risks waiving their bond limit. The agreement basically says they intend to finish the job in accordance with the terms and conditions of AMAFCA's original contract with AEI.

In response to an inquiry from Director Lyon, Mr. Bregman stated that any agreement between AMAFCA and the surety would have to reaffirm the terms of the previous contract. Other than the liquidated damages issue, he didn't see the first draft as trying to expand any of the surety's rights or AMAFCA's obligations.

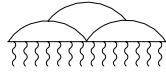
Director Eichenberg asked if the Board's action to consent to Salls Brothers Construction as the completion contractor in item 5a, already resulted in a Take-Over Agreement. By their vote, the Board had consented to Salls Brothers, and also to the proposed completion date of February 14, 2006. He felt that this agreement was being requested in addition to everything the surety needed to begin work, which had already been granted.

Mr. Bregman responded that the Surety was obligated to finish the project according to the terms of the original contract, whether or not there was a Take-Over Agreement. The purpose of the agreement was apparently to clarify some issues surrounding the surety taking over the original contract.

Director Eichenberg was concerned about the language limiting the surety's liability to the \$5.2 million value of the performance bond. He asked what would happen if the project cost more than \$5.2 million to finish. He was also concerned that the agreement asked for liquidated damages to be forgiven, when AMAFCA had already incurred additional costs and had a fiduciary responsibility.

Mr. Bregman stated that he was not aware of any valid claims against AMAFCA, and added that the liquidated damages clause in the original contract was valid under New Mexico law. The surety would investigate AEI's claims to see if they are valid, so it was unsure if any claims would be brought against AMAFCA.

Director Eichenberg pointed out that, valid or not, the claims could still be brought against AMAFCA. He asked Mr. Bregman to prepare a short list of recommended attorneys specializing in construction law litigation.



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Further discussion centered around the question of whether the \$5.2 million bond value would cover the amount of work remaining on the contract, including corrective work and liquidated damages.

Chairman Brown asked Mr. Kelly, Mr. Bregman, and Mr. Finley to work out details of a final proposed Agreement and bring it before the Board.

Directors Hernandez and Eichenberg commented they would support the idea of a Take-Over Agreement, but the terms need to be agreeable to AMAFCA. Director Eichenberg also requested that the Board be advised of the details of the agreement, details of the substandard work involved, and the dollar amount of the work that needs to be finished on the project, to assist them in making a decision. Director Hernandez opined that AMAFCA didn't have a lot of liabilities in the original contract.

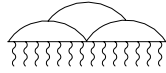
Mr. Bregman asked for direction as he and Mr. Kelly discussed the proposed agreement with the surety. He stated his understanding that the Board appeared to not want to limit the dollar amount of remaining work on the project, and did not want to waive liquidated damages. The Board also wanted to know the specifics of what needed to be done to complete the project.

Chairman Brown confirmed Mr. Bregman's understanding and requested a revised proposed agreement be prepared for review and consideration by the Board.

Director Eichenberg reiterated that he wanted the surety to fulfill the contract according to the original terms, including liquidated damages. If AEI or the surety disagreed with this, they could litigate. However, AMAFCA and Wilson & Company have a number of documented expenses to be paid from liquidated damages, and AMAFCA has a fiduciary responsibility.

Director Eichenberg disclosed that he had worked for a surety around twenty years ago, although he could no longer remember the name of the company.

In response to a series of questions from Director Lyon, Mr. Finley affirmed that the surety needed to have a Take-Over Agreement in place because it was good business practice to do so. Director Lyon replied that an agreement acceptable to AMAFCA would not grant the surety any additional rights. AMAFCA's additional costs from the missed completion dates would need to be paid from liquidated damages. He added that the Board wants to work with the Surety to complete the project, but also has a fiduciary responsibility to their constituency.



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In response to a question from Chairman Brown, Mr. Finley estimated it would take nearly two weeks to work out the details of a proposed agreement. He added that Salls Brothers would be able to start work on Monday, October 17, even if AMAFCA and the surety had not yet signed a Take-Over Agreement.

Chairman Brown requested that the agreement be brought to the Board at its next regular meeting on October 27, 2005.

Mr. Kelly confirmed for the Board that Wilson & Company would continue providing construction management on the project. The Board had recently added \$60,000 to their contract so that there would not be any gaps in construction management.

**5. b. Consideration of Extension of Suspension of Contract Time**

Chairman Brown returned to consideration of the motion on the table, that the Board continue to defer a decision on further suspension of the contract time, with the timing of consideration of any further suspension to be at the Chairman's discretion, but not later than the next regular Board meeting, scheduled for October 27, 2005. The motion passed unanimously (5-0).

**6. Lyon Boulevard Storm Drain – Briefing on Traffic Control and Detour Issues**

Mr. Kelly introduced Mike Riordan of the City of Albuquerque Department of Municipal Development, Dan Pearson of TVI, Michael Hill of Van H. Gilbert Architects, and Engineer Terry Brown. Mr. Hill and Mr. Brown are working with TVI on traffic issues at this intersection.

Mr. Kelly briefed the Board on traffic control and detour issues at the Lyon Boulevard Storm Drain Project. Difficulties in traffic flow earlier in the project led to a re-evaluation of the area, which led to the conclusion that traffic flow in the Lyon-Irving intersection needs to be as efficient as possible, to draw traffic away from the Lyon-Paradise intersection. Otherwise, traffic control would be severely and adversely affected when the storm drain work crosses the Lyon-Paradise intersection.

He stated that the City is willing to contribute towards interim intersection improvements in line with the ultimate intersection improvements, to arterial paving standards but not including curbs, sidewalks, or landscaping. AMAFCA would contribute only the amount already budgeted for temporary detours during construction, approximately \$17,000. The rest of the construction cost would be covered by the City, approximately \$145,000. He proposed that design costs would be split with the City.



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Michael Hill stated that TVI had just become aware of these proposed intersection improvements by the City and AMAFCA the previous week. Terry Brown added that TVI had already been in discussions with the County concerning intersection improvements at this location. They had determined that the Lyon-Irving intersection needs a 300 foot right-turn-only lane from southbound Unser to westbound Irving. (Unser becomes Lyon at this intersection.) Design had been complicated due to the lack of right of way, and grade problems at the intersection.

Mr. Kelly replied that by shifting the through lanes to the east, those issues had been solved, leaving room for a right-turn-only lane where the current through lane is located. He asked if TVI had some money to contribute to the intersection improvements.

Mr. Pearson replied that TVI might be able to assist with funding if the improvements were permanent in nature, rather than temporary. Mr. Kelly responded that the paving would be arterial pavement in line with the permanent configuration, but that curbs, sidewalks, gutters, and other permanent improvements would be left until later. Mr. Pearson confirmed that TVI had made a commitment to fund a right turn lane.

Director Eichenberg stated that this appeared to be a traffic control issue, not a flood control issue. He added that he would not be able to vote on the proposal because he is a partner in Paradise Reserve, which to the best of his knowledge, owns a corner lot adjacent to the intersection.

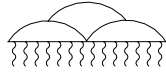
Mr. Kelly responded that traffic control during storm drain projects is a major component of AMAFCA projects. This project would relieve traffic congestion at Paradise and Lyon before that intersection was disrupted for sixty days of work. AMAFCA would only pay for the paving that is incurred in the temporary detour already in the AMAFCA project.

In response to a question from Director Lyon, Mr. Kelly stated that if the Lyon-Irving intersection were functioning well, those going west to Ventana Ranch would be more likely to take Irving rather than Paradise. This would relieve congestion at Paradise when the storm drain crosses that intersection.

Director Eichenberg left the meeting at 9:40 a.m.

Chairman Brown stated that this concept would be further explored at the next regular Board meeting. He added he could see the wisdom of making these intersection improvements now, since the storm drain work would disrupt the intersection anyhow.

Director Hernandez stated he was concerned that AMAFCA was getting involved with traffic engineering.



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Director Saiers disclosed that she serves on the Board of Directors for TVI.

Chairman Brown stated that this was only an introduction to the concept. He directed staff to work with the City, County, and TVI to come up with a more definite proposal for the Board.

**7. Unfinished Business**

Chairman Brown stated that he had verified with AMAFCA's bond counsel that recent events surrounding the State Treasurer's Office would not adversely affect AMAFCA's bond rating or its investments in the State Short-Term Fund.

**8. New Business**

Mr. Kelly showed the Board sample signs that will be used to identify AMFACA flood control facilities, including multi-use facilities. The signs include the AMAFCA phone number and website address.

**9. Items from the Floor/Public Comment**

None.

**10. Adjourn**

With no further business to discuss, Chairman Brown adjourned the meeting at 9:44 a.m.

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Tim Eichenberg, Secretary-Treasurer 10/27/05

Recorded by Pam Woodruff, Secretary to the Executive Engineer