

Rogers Waterworks and Sewer Commission

October 3, 2003

Minutes

The Rogers Waterworks and Sewer Commission held a special called meeting at 2:30 PM, Friday, October 3, 2003, in the Rogers Water Utilities Training Center. Commissioners in attendance were Donnie Moore, Dick McLelland, Jerry Pittman, and Fred Wanger. Rogers Water Utilities staff in attendance were Tom McAlister, Mark Johnson, Joyce Johnson, Earl Rausch, and Don Roberts. Others at the meeting were Kyle Weaver, John Moore, and Byron Freeland. Moore called the meeting to order at 2:35 PM

Tom McAlister, RWU Manager, introduced Byron Freeland of the Mitchell – Williams law firm in Little Rock. Freeland said that he was representing the Commission in the H. Epps vs. The City of Rogers Waterworks and Sewer Commission lawsuit. To recap, Freeland reminded the Commission that Epps Construction Company, Branson, Missouri, had been awarded a \$1.2 million contract to install a sewer system in the area of W. New Hope Road and S. 26th St. Epps was given a notice to proceed in February 2001. After the original 210 day contract period had expired and less than half the project had been completed, RWU sent Epps a letter in October, notifying him that he had been terminated for convenience under the terms of the contract. At that time, Epps had been paid \$468,000. Several months later, Epps sued for damages in the amount of \$745,000, plus interest and reasonable attorney's fees. Soon after that event, Freeland was engaged by RWU for defense. Freeland promptly filed a counter suit for liquidated damages.

Meanwhile, RWU negotiated a contract with another contractor, Johnny McClelland and Sons, Inc., to complete the job. RWU paid McClelland \$541,000 to finish the job and clean up the mess left by Epps. Prior to termination, Epps had filed a pay request for \$466,000, Freeland said. RWU offered Epps \$160,000 for work completed. This offer was refused.

On October 2, 2003, Freeland, Tom McAlister, and Mark Johnson attended a court ordered settlement conference in Fayetteville Federal District Court. Epps and his attorneys were there as well, he said. A federal magistrate, Beverly Jones, acted as a mediator between the parties to the lawsuit. After several offer/counter offer iterations, the parties agreed to settle for \$305,000, pending approval by the Commission.

Freeland explained that the plaintiff's attorney said that, when the contract was terminated, the contract became a "cost-plus" contract, and his client was due all costs, plus overhead and profit. Freeland said Epps wanted over \$1.1 million for half of a \$1.2 million contract, which he thought a jury would not believe. He said a more realistic amount would be somewhere between the \$160,000 RWU offered, and the final pay estimate of \$466,000. The worst case scenario would be if the jury awarded Epps that amount, plus attorneys fees and interest, about \$500,000. However, he thought RWU had a good case. Even if RWU prevailed in the lawsuit, it would still have to pay Epps \$160,000, Freeland said.

Continuing, Freeland said he thought the \$305,000 settlement offer was probably a good business decision, due the attorney's fees, court costs, lost time for RWU staff, and the vagaries of the jury system. Pittman asked if the settlement would make the \$1.2 million dollar sewer project a \$1.5 million dollar project? Mark Johnson answered in the affirmative. Wanger asked Freeland to explain the "terminated for convenience" clause in the contract. Freeland said that the city could have terminated for cause, if it was willing to state the cause, and be willing to prove it. In those cases, the contractor is usually not due damages. If the contract is terminated for convenience, then the contractor is compensated for all work performed, plus overhead and profit. He said that hindsight is "twenty-twenty", and that it usually preferable to terminate for cause.

McLelland said that he agreed with Freeland, and made a motion to accept the \$305,000 settlement offer from Epps. Pittman reluctantly agreed, and seconded the motion. All in favor, motion carried.

The meeting adjourned at 2:50 PM.

Respectfully submitted,

Tom S. McAlister, Acting Secretary
Rogers Waterworks and Sewer Commission

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