

Aldermen

Ward 1 Position 1 - Robert Reynolds
Ward 1 Position 2 - Brenda Thiel
Ward 2 Position 1 - Kyle B. Cook
Ward 2 Position 2 - Don Marr
Ward 3 Position 1 - Robert K. Rhoads
Ward 3 Position 2 - Robert Ferrell
Ward 4 Position 1 - Shirley Lucas
Ward 4 Position 2 - Lioneld Jordan

Mayor Dan Coody
City Attorney Kit Williams
City Clerk Sondra Smith



**Special City Council
Meeting Minutes
May 10, 2005**

A Special Meeting of the Fayetteville City Council was held on May 10, 2005 at 5:30 p.m. in Room 326 of the City Administration Building located at 113 West Mountain Street, Fayetteville, Arkansas.

Mayor Coody called the meeting to order.

PRESENT: Alderman Reynolds, Thiel, Cook, Marr, Rhoads, Ferrell, Lucas, Jordan, Mayor Coody, City Attorney Kit Williams, City Clerk Sondra Smith, Staff, Press, and Audience.

Old Business:

Black & Veatch Amendment No. 1 Noland Wastewater Treatment Plant: A resolution to approve Amendment No. 1 to the agreement for professional services with Black & Veatch Corporation to provide construction and post construction services for the Noland Wastewater Treatment Plant in a not to exceed amount of \$1,478,000.00. *This item was tabled at the May 3, 2005 City Council meeting to a Special City Council meeting on May 10, 2005.*

Bob Davis, Water and Wastewater Director: We had a Water & Sewer Committee meeting last night and it was a unanimous vote by the three committee members present that we approve the contract amendment for Black and Veatch.

Alderman Reynolds: I turned my vote in today so you have four votes.

Alderman Jordan: One of the items that we discussed was how will we hold Black & Veatch responsible because in the contract I did not find any wording that holds them accountable other than professionally.

Bob Davis: I think the ultimate answer to that is we do have a certificate of professional liability insurance from them that we received when we signed the initial contract with them. This is an

amendment to their design and bidding phase contract. Black & Veatch has done work for the City of Fayetteville in the past and there has never been a problem with that work. The work that they just completed they did a great job with no problems so I don't see that not continuing. There are tasks that we can hold them accountable to as we go through the project and if those don't occur then we would sit down with them and visit with them about how to resolve those issues.

Alderman Jordan: We will be receiving monthly reports on the status of the project?

Bob Davis: Absolutely.

Mayor Coody: The Water & Sewer Committee has agreed to monthly meetings. I think that will be a very good occurrence from here on out to have those monthly meetings.

Alderman Ferrell: You said the ultimate responsibility on this would stop with you. The buck stops with you and you are a hands on person. I enjoy hearing that.

Bob Davis: Yes. That is correct.

Alderman Marr: If there is a problem with this contract what is the recourse for citizens? You could be fired, and I understand the buck stops with you. What are the legal contract terms do we have the ability to hold them accountable? If a subcontractor finds something and they take it to Black & Veatch what is the protection for the City that we are going to be notified of that. It appears to me that all the language in this contract is City of Fayetteville related.

Bob Davis: As far as the contract goes and the way the contract is written it is my understanding that one of the tasks of the program manager was to come up with a standardized construction phase services contract. That was one of the things that they did for the City. I am assuming that was submitted to the City, reviewed and approved by the City. That is where this contract came from. This is the same contract that you are going to see for the other three construction phase service providers.

Kit Williams: I think that is absolutely correct. Greg Boettcher and I worked on a form contract to get a lot of the objectionable language that is in a lot of contracts removed. The contractor has a duty to perform under the contract and our basic remedy is if the contractor fails to do that duty then we sue for breach of contract. The insurance that they have will help us collect, it doesn't help us enforce it but in fact if the contractor fails to do his duty we will be able to prove that they were negligent and failed to do their duty. Then we would be able to sue if the plant does not work within the perimeters of the contract. I think that the contracts that we have designed and that Burns & McDonnell now have created for the various engineers are much better than they have been in the past. They can not do more services than what we have already authorized without coming back to the City Council before they perform the services and ask for additional money for increase of scope of service. We have those provisions and provisions on the Freedom of Information Act in the contract.

The basic security the City has is that this engineering company was selected by a professional selection committee because they were the most highly qualified of the group that submitted applications to be selected for this project. After they were selected we negotiated this contract with them and they will be held to the standard of being a highly qualified engineering company and if they fail on that standard and don't do the job then at that point we certainly can take

remedies against them. In every project there will be problems it doesn't mean that there is always going to be litigation.

Bob Davis: I think what we have to do is take responsibility for ourselves as the owner. We have to be continually vigilant of our contractor and our consultants, whoever is working for us. We need to monitor those people and we need to know what they are doing. The only way we can do that is to be at these projects on a regular basis and know what is going on.

We are getting updated schedules that we will be providing to the City Council and with this schedule we can keep close tabs on what is going on, if something starts veering off we will know it and we can do something about in a timely manner.

Alderman Jordan: That is why I asked for monthly reports.

Bob Davis: I would like to tell you that the professional liability insurance is something you can feel secure about but it is really not.

Alderman Marr: I am not questioning the integrity of the work. I am going to want to do more due diligence because I have citizens calling me about the project. I want to know what questions I should look at and progress reports that I am going to need to look at to know that we are not having a problem. If we do have a problem what I don't want to hear is that our contract doesn't give us any recourse for that because every project does have a problem. At some point if we get into a problem I want to know that the citizens are protected. I am looking for language on how it is going to be interpreted. I want to hear on the record from our City Attorney what he just said that we did this contract, we are comfortable with it and we have defenses with this contract, if he feels this way then I trust him. I am reading the language more generally I guess maybe. It is a confidence issue; I am trying to get citizens and my own confidence up regarding this project.

Mayor Coody: I would like to suggest that when the Water & Sewer Committee meets on a monthly basis to get updates and to get filled in on the progress that we are making that everyone on the Council show up please and listen. That will be the time to ask questions and be completely in the loop. We invite all the City Council and anyone else that wants to come to the Water & Sewer Committee meetings to be updated and kept abreast of the latest progress to please come.

Alderman Marr: Please don't take this wrong but I feel like we have been getting updates. I feel like we got an update at the City Council meeting two months ago and I heard that we were not that far off on the timeframe and the budget. Then today I read an article that was different. What it said to me is that I did a really poor job with asking that person some questions. We really need to make sure this is right because we are talking about the confidence of the public. There are a lot of other things that I want to happen, I want roads and I don't want citizens turning it down because they don't think we can manage this.

Mayor Coody: Yes. The construction cost a week and a half ago was estimated at \$119,000,000. The latest update brought that down to \$116,000,000. There is a 10% contingency which is going to be roughly \$12,000,000. The easement acquisition money is in there and all the engineering fees were in there. At least we are doing everything we can. We are looking at other options to try to save money. I think we are back on the road to recovery. I feel more confident than I have in a while.

Alderman Rhoads: Does the professional liability insurance cover anything other than negligence?

Kit Williams: I am not sure I would have to look at it. Most of our contractors are required to have other insurance for their employees and things like that is that what you mean.

Alderman Rhoads: Is it my understanding we would have to sue them for negligence if it just didn't work?

Kit Williams: Do I am sure what I would do is sue for breach of contract.

Alderman Rhoads: Will their contractor insurance it for breach of contract?

Kit Williams: I am not sure I would have to look at the insurance policy to make sure what it says. I would also say that we are dealing with very substantial companies here that hopefully will not go bankrupt. I would think it would be more likely to cover their professional liability and not a breach of contract.

Alderman Cook: We truly do not know the cost of this project. These are all estimates until the bids come out, so we don't know what the budget is right now. There are parts of it that we do but it may be on or off the budget. The real budget of the construction of the plant we have no idea.

Bob Davis: That is correct. The only real numbers that we know right now is what the City paid for consulting services for the design bidding phases, we know what the proposals are for the other three phases of this program, east line work, west line work and the west side plant work and we know the cost of what we are doing at the Noland plant. Other than that every other number is subject to change. When you received the first cost estimate there was a 2.4% contingency on the construction and we have put a 10% on there. It has been a number of years since that was done and changes in material, fuel and labor are more volatile now. We are a long ways from knowing what this whole project is going to cost and probably will not know that for several months.

Alderman Cook: That makes me nervous to some degree. The original estimates were based on the 2001 dollars, concept and engineering estimates of the concept.

Bob Davis: That is exactly right. The one thing that has changed the most is the construction. One reason that has changed so much is those numbers were put together before the design was ever completed. For us to be at the place we are at right now I am not sure it is as really as bad as it may be perceived.

Alderman Marr: I think that information is good. I do feel like that people think it is in a worse situation. That's a good explanation and helps us to know what to ask. I want to know what I don't know and I am relying on someone to educate me and the citizens through this process so that we don't lose credibility. I think this Council has been really good and I don't want to see us having people question that.

Mayor Coody: That has been my main number one concern too. We have always been open with everyone; we have never tried to hide anything. If there has been a problem however it has been presented to us and we have presented that to the public as clearly as we can and we have

tried to resolve those issues. Every day we are looking at ways that we can effectively trim from the budget without trimming the effectiveness of the plant. We are going to keep that due diligence going and once we see a problem we will do everything we can to fix it.

Alderman Ferrell: Did I understand you to say Bob that you are bringing this back in house. So the watching and making sure everybody is doing everything is going to be a function of your department?

Bob Davis: That's correct.

Alderman Ferrell: I think it might be a prudent idea to take a look at these contracts and see how these contracts are worded and check with other areas that have had problems and see if they might have something we can learn from.

Bob Davis: We are really doing that right now. Instead of talking about what we are going to do after the fact, I think we need to more concerned in prevention and vigilance.

Alderman Lucas: What is pre-qualification?

Bob Davis: We get the contractor qualifications prior to letting the contractor bid on the project. The way these projects have been laid out before we actually were qualifying the contractor but it was after the fact.

Kit Williams: The most important thing is what Bob just said, you get the right engineer and the right contract and you pre-qualify them ahead of time. Then instead of worrying about what we are going to do and relying on the bonding company to finish the project you have a project that is going to be built right. The most important thing is to attack it early which Mr. Davis is talking about doing now. Lawyers can only do so much, it is much better to have the project built right, we don't want to go to court on it.

Alderman Marr: I agree that we want it built right and I agree that we don't have to use a legal contract. At the Noland plant the Council had to wait for the company to go bankrupt because there were not things in the contract that allowed them to pursue them.

Kit Williams: On a construction contract you always require them to have a bond to finish the contract and if they don't do their job that is when you fall back upon the bond and the bonding company must bring in a new contractor to finish the job.

Mayor Coody: The best insurance we have against any kind of problem is hiring a firm with a track record of successes.

Alderman Ferrell: And having a good contract.

Alderman Jordan: My main concern is the discharge permit. It doesn't make any difference what else we do we have to have the discharge permit before we can do much of anything else. It is vitally important that that is taken care of. Where are we on that?

Bob Davis: CH2MHill did a modeling study on the stream and that was submitted to ADEQ. ADEQ wrote a letter in early March to EPA saying they had reviewed our model and this is what our discharge limit should be. EPA wrote a letter back to ADEQ and said they conditionally

approve those discharge limits. Subsequently those discharge limits were published in a two way plan change. That went through the 30 day notification period; and it received comments from Beaver Water District and the State of Oklahoma. ADEQ had omitted by mistake phosphorous limits on a permit for the west side plant and for the east side plant. On the conditional approval letter that came back from the EPA those limits were there and they remain what they are right now at the Noland plant. All the State of Oklahoma had to say about the Noland plant was there was mention that we would stop the Mud Creek discharge. They wanted to make sure that was clarified. The main thing Beaver Water District was concerned about is USGS is doing a study right now and they brought that up and they also brought up the request for public hearing. ADEQ will make the decision on how those inquiries will get responded to. I don't believe they are going to send us a letter stating that we have to stop using the Noland plant. Because we have this conditional approval from EPA I don't really see any problems with our discharge limits changing from what those permit limits were that were published.

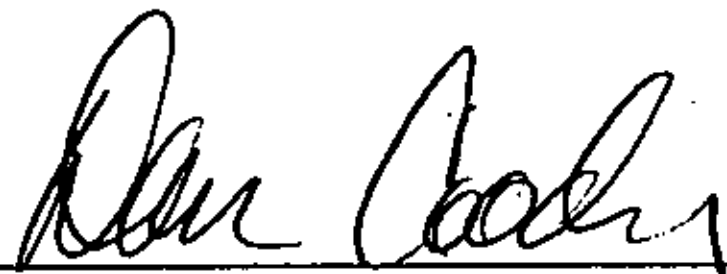
Alderman Jordan: So in your expert opinion everything is okay and this is not going to hold us up.

Bob Davis: That is correct.

Alderman Ferrell moved to approve the resolution. Alderman Thiel seconded the motion. Upon roll call the resolution passed unanimously.

Resolution 95-05 as Recorded in the Office of the City Clerk.

Meeting Adjourned at 6:13 PM



Dan Coody, Mayor



Sondra Smith, City Clerk