Minutes of the
Special City Council Meeting
July 8, 2003

A special meeting of the Fayetteville City Council called by the Mayor was held on July 8, 2003 at 6:00 P.M., immediately following the Agenda Session in Room RCED 120 at the Sam Walton College of Business, University of Arkansas, Fayetteville, Arkansas.

Mayor Coody: This is a conference for Design Build Operate for a major public works projects. Right now this is going to a special City Council meeting. I would like to ask our City Clerk to take the roll and I will call this meeting to order. Would you please call the roll.

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

ABSENT: Alderman Don Marr was present by audio via telephone.

Opening Remarks and Workshop Overview given by Mayor Dan Coody: Workshop presentations and discussions are centered on the means and methods by which the City of Fayetteville could use a design-build-operate project delivery method for its $125 million wastewater improvement project. Discussions, case histories, comparative analyses and other aspects of project delivery alternatives will be discussed.

Mayor Coody: That was the disembodied voice of Don Marr who is in South Carolina right now. Don we're glad to have you with us in spirit. We'll look forward to an interesting conversation.

Alderman Marr: Thank you mayor.

Mayor Coody: The reason that I wanted to bring this subject to Fayetteville, Arkansas is because United States is one of the last countries, if not the last country to embrace the design build operate process. This is prevail in Europe and Asia and other parts of the world. States in the United States have begun to find the benefits of the design build operate process. Any use of this process, in any part of this project we have in Fayetteville, would be the first use in the State of Arkansas, because of legislation they recently passed and actually becomes law in about another week. If we don't use it in Fayetteville, Arkansas, someone in this state eventually will. We have a lot of good important state regulators here today to listen to this conference so everyone can be very well informed about how this works and the reasons why so many people are going to it. We have a very good cast of folks that have come to speak with us about this tonight. If I didn't think this were very important I wouldn't have had everybody go to this much trouble. I very much want to thank Greg Boettcher because he did yeomen's work pulling all this together in almost no time at all, and all the folks that have come up here from Little Rock, Massachusetts, New York, and elsewhere. I appreciate everyone's participation. This has the potential as you will see in the presentation, to save cities enormous sums of money and quite a bit of time and history as shown and logic shows that it saves a lot of potential litigation as

well. Now I think that all of us who have to look after the taxpayers' dollars are very interested in all these aspects.

We'll be opening up with Mr. Jim Binder, he is the principal at Alternative Resources Incorporated in Concord, Massachusetts, then Mr. Eric Peterson with Hawkins, Delafield & Wood, from Wall Street in New York City will be a presenter to help address some of the legal questions that we all have. I'd like to introduce Mr. Don Evans, who is the President of OMI, CH2M Hill, following him will be Mr. Dave Butler, former mayor of Atchinson, Kansas, after Mr. Butler will be Mr. Bill Rosenbaum, an engineer and Vice-President of U.S. Filter which is a large global company that specializes in this work along with OMI, CH2M Hill. Following Mr. Rosenbaum's presentation will be Mr. Pat McManus, former mayor of Lynn, Massachusetts who has direct experience with this.

We will then have a break for a few minutes. After the break, we will then come back to Mr. Binder to basically close this up. I will then open the floor for a public question and answer period at that time. While we're going through the presentations I'd like to limit the questions from the audience. The City Council, regulatory staff, Soil & Water, and EPA might have a direct question for a presenter. At the end of the presentation I think then would be a good time to open it up to the general public. We have the building until 9:00, however thanks to the generosity of the University and not wanting us to cut off in mid question they have allowed us to extend this as much as we need to past 9:00 up to 10:00, although all of us would like to see this to be a short concise productive meeting.

So right now I would like to invite Mr. Binder up to the podium to begin the conference. Thank you very much for coming here today.

Presentation:

Introduction To The Design-Build-Operate Project Delivery And Methodology: Mr. James Binder, P.E. President of Alternative Resources will be speaking. A general description of the alternative project delivery system including: (A) definition of the alternative process, (B) comparison of design-build-operate (DBO) process to the conventional design-bid-build (DBB) process, (C) description of current alternative project delivery applications in the water and wastewater industry and (D) presentation of comparative advantages and disadvantage of each process.

Mr. Binder: My name is Jim Binder from Alternative Resources in Massachusetts. Thank you Mr. Mayor for that kind introduction. So you will know who we are, our company is an independent consulting firm that advises communities who are considering alternative delivery of environmental infrastructure projects, water projects, wastewater projects, and solid waste projects. We normally assist those communities in what I will call a procurement advisory role where we would provide management engineering and financial services to help go through a DBO type procurement, so if an RFP were to be written we would help write the RFP. We would help review the proposals, and we would help negotiate a contract. We would be part of a team along with legal counsel and other advisors that the city might have if you were to go through this type of process.

On a personal note, I'm an engineer, I have been practicing for about thirty years. I have to say this is my first trip to Arkansas and I'm enjoying it so far. I was very pleasantly surprised last evening when I came in by plane to the airport. I met a very nice family on the plane and they refused to let me take a cab or van from the airport to Fayetteville. They insisted on driving me here personally last night. So it was a very nice way to be introduced to Fayetteville and to Arkansas. So I'm pleased to be here. I've been asked to present in two parts tonight. The first part is to discuss in a general way what a Design Build Operate Procurement and Delivery is. We'll refer to that tonight in shorthand as DBO. We will compare DBO and the potential advantages and disadvantages of that concept to the traditional procurement technique which is referred to as design bid build or DBB in shorthand tonight. I will then call several speakers and at the end of the evening, as the mayor said, what I'll do with the second part of my presentation is try and take experience that has been gained nationally in doing these DBO procurements and describe how specifically it might apply in Fayetteville.

I hope to take about 15 minutes to get through this and move as quickly as I can. At best--at this point as I understand the project, I have spent some time reviewing information sent to me by the city describing the waste water improvement project that is intended here. It is a project of about $125,000,000 for design and construction. It includes improvements to the east side or the Noland Plant, constructing a new waste water treatment plant on the west side for the west plant and their connecting pump stations. The project issues as I understand them to be, are meeting scheduled astringent effluent requirements, and being aware of not only what they are in Arkansas but Oklahoma regarding effluent limits. Preserving the $125,000,000 what I call SIF or RIF, and the low interest rate from the Soil & Water Commission, and looking at a tight schedule. The concern with growth of the area and the existing plant being near capacity, the question is being able to allow expansion in this area and not have EPA impose some type of construction moratorium. Those are some of the constraints and issues that we are thinking about when we discuss this. Just so you know that you're not alone, DBO's have been a common practice for delivery of the environmental infrastructure projects now in the United States for many years. There was tremendous involvement in many states using DBO for solid waste projects in the early 80's, and then there is lots of focus on applying that same concept with waste water projects starting in the early to mid 90's. The federal government has been supporting those kinds of partnerships where the private company and public entity get together to view one of these projects where DBO is a major trend for doing this work for many years. There have been IRS tax rules changes made, the most significant one was made in 1997 which will allow for long term operating contracts in addition to design and construction of improvements for these facilities. And there's actually been EPA guidance published in 1998 regarding how theses concepts apply to waste water treatment facilities. There is a fully staffed EPA office in Washington, D.C. that addresses public/private partnerships in these DBO type of procurements, so you are not alone, but one hasn't been done in Arkansas and we understand the enabling legislation which passed in April was just effective this month.

I'm going to talk about briefly what is DBO, and how does it compare to the traditional procurement method, the positive compared to the traditional contract. Very simply a DBO is having a single entity responsible for designing, building and operating either an improvement to an existing facilitiy or putting up a brand new facility; and being accountable for as a single

entity for the results, in other words there is one party that the city would deal with as opposed to multiple contractors. There is a single point guarantee under a DBO for the services that are provided, so the city doesn't have 15-20 separate contracts. You don't have essentially retention of management of a design engineer, general contractor or any of the contractors working for the general contractor, and in doing so with this single point of responsibility, the performance and business risks are transferred to that private company, that single entity.

What's some of the advantages of this DBO option? What is the potential for all the costs. I'll show you some slides from projects elsewhere that shows potential savings as much as 10 to 50 percent. So there's a potential for significant costs saving, on the other hand one of the major benefits to this approach is transfer of risk to that private company. The private company under this DBO concept will sign a contract that guarantees fixed price for design and construction of those facilities. Under the operations part they would sign a contract and most of the long term deals operations now have the fixed based operating fee that's subject to escalation on an annual basis, there's a CPI or some other adjustor, also the party will guarantee to schedule for construction completion, and importantly there is certain environmental requirements that need to be met. The company would guarantee that technology, and design, when constructed will meet those performance guarantees not only when you first turn the plant on but if you sign a long-term operating contract for the full-term of operation of that contract. You don't get that under a standard design bid build package.

This slide illustrates some of the additional benefits, under the technical end of it. The company is responsible for making sure that it works. If it doesn't, they fix it, they pay for the fix. That's any time during the operating term, not just after construction is completed. Environmentally, if a permit limit is exceeded the company does whatever fix is necessary to come back into compliance, the company pays any fines that are levied.

On the operating end having a fixed operating fee subject to change on a CPI index but that would take the risk relative to labor costs that would be different than that index, utilities costs, any electricity typically and chemical costs. What all this results in and why this concept is really gaining popularity and is being used more in this country is that it's much simpler for a city to implement and that there's one party that they are dealing with, and that one party will assume risks that the city would have otherwise borne under the traditional DBB approach. There are fewer requirements because the day to day management is with that company. An added benefit because of the capabilities and resources that the companies who provide these services bring to the table both on a national resource level and international resource level is just amazing in terms of research abilities, and planning capabilities.

They'll invest in training of the people over the long term. If they need to optimize an operation they have the resources to that, this is very effective in helping in terms of regulatory review and pending regulations and how they might impact the facility. What could be done to a facility in term of compliance with new regulations. So there's a whole resource pool out there that you have available to you if you retain such a contractor.

Very briefly, how do I know there's going to be any money that possibly would be saved. I just extracted from Public Works Finance which is a journal that tracks public/private partnerships

and DBO contracts, these are primarily contracts that have been put into place in about the last ten years. You can see that there has been both water and waste water plants that illustrated by this example and you can see plant sizes on the waste water are on the 2 or 3 MGD size and go all the way up to a larger site. I think this slide kind of illustrates what I pointed out earlier that there's the potential for savings of million of dollars, and again this is not something that I put together, this is published by Public Works Finance.

That sounds great but what's the downside to this, there are concerns obviously. I'm not sure that in the history that we've had with them that these concerns have been borne out, but let me go through some of the concerns. Initially you always hear we'll lose control of the process, because we might not be doing 100% of the design as you would do under the traditional method. You might do some level of design on the order of 15 to 30 percent and then you put it out and negotiate for remainder of the design to be done by this DBO contractor. The point to keep in mind here is that you set these contracts on a performance base specification, so very simply if you have effluent requirements in your permit for the existing facility and the new waste water plant, those have to be met. During the process of going from the design level you are at say its 30% to 100% the legislation requires and makes good sense to have an owner rep or an engineer representing the city, retained by the city that actually reviews the design work done by this DBO contractor, then during the construction flows actually monitors the construction and makes sure it's done in compliance with the design specifications.

Now from the operational standpoint, you've already got kind of an operation here so it's not much of an issue if you were to switch with public operations and private operations through your contract. The issues I'd like to address here down are relative to some of the issues that have been raised here in Fayetteville. In terms of the quality of construction or the maintenance and the upkeep of facilities will somewhat be diminished under a DBO contract. The level of service that could be provided operationally will be diminished, I don't think that you have that concern here. Again because you have private operator, those other concerns are, if ten years down the road if you are on a twenty year contract there's a change in law that requires a modification to the plant, how can we make sure that modification is done and it can be. It is done through contract provision.

Right now the trend is one time operating contracts for 15-20 years. There are certain efficiencies that can be brought on an operating basis to reduce costs as compared to short term operating contracts. And also now the trend to have capital improvements tied in with that so design construction of the improvements will be tied in with the long term operation and that's how it becomes a DBO. For new facilities to have a contractor from day one be responsible for the design build and operation. But the trend is to go long term on the operation basis. Once you do that then the responsibility for asset management is borne by the private company, meaning that in the operating period over the long term they are responsible for repair and replacement of equipment and that is included in their fixed operating fee. For protection, that is always guaranteed, again there is a shift of risk to the private contractor.

Traditional approach, DBB. This is where the city contracts out to the engineer to design and a project contractor to construct the project. The decision on construction is based on the lowest cost bid from responsive and responsible bidders. So you really don't have the flexibility here to

take anything but the lowest cost. What does that mean in terms of quality, you might be subject to greater quality concerns under this type of approach then the other. Under this type of approach if you go the traditional to design and build a project you can continue the process of having a private operator and you could look to extend the term of that operator from a five year basis to a longer term if you chose too.

Advantages to the traditional. I think that people have used it so they are comfortable with it. The procurement procedures are in place and people are used to working with them. So there's a comfort factor there. I think it is the feeling that unless we as a city are responsible 100% for the design we are not going to get exactly what we want. I think some of these advantages can be turned around and looked at as disadvantages.

Disadvantages under the traditional approach as I see them, there's an issue of quality associated perhaps with a low bid for construction. There is certainly a potential for higher cost of construction and the potential for I think a greater number of change orders during construction which go to increased costs. So there's no fixed price guarantee from any party to the city for completion or guarantee of completion date. The city can hire a private company to be responsible at risk for performance after it's turned over to the operator. If it breaks and the operator says it's broken because of when I received it, it wasn't built properly, it was designed improperly, you've got an issue of finger pointing. There's no security for what I term performance. Leaning others in to single point guarantor, that's standing behind this with their guarantor resources, in addition to that, the lack of credit for bonding for the full term of a 15-20 year operation. There are increased potential claims and litigation since again there is no single party responsible for the design, construction and operations.

What delivery method makes sense for Fayetteville, and why? I'm going to get into this into my Part 2 description. That concludes some of the general comments and introduces some of the process' advantages and disadvantages.

Legal Perspectives: Mr. Eric Peterson with Hawkins, Delafield & Wood will be speaking. A primer on the legal and contractual issues associated with different project delivery methods, including comparative risks, advantages and providers.

Eric Peterson: It's nice to be here. Just to mention my name is Eric Peterson and my firm is Hawkins, Delafield & Wood, we are a firm of 515 lawyers based in New York City, we have seven offices. I have the public contracts group at our firm. We have been active in the alternative project delivery field for a good thirty years, we have a lot of experience around the country in trying to review the choices, neatly, practically and with communities like yours. I'm very pleased that the Mayor has seen fit to invite us here to present to you tonight. What I'm going to talk about is a little elaboration on several things that Jim mentioned.

DBO risk and contract considerations in design build projects. Try to keep in mind the status of your planning efforts so far, at the end of the presentation I'll talk a little bit about the new statutes that you've got to work with which has some interpretation issues associated with it. But let me proceed to the presentation and give you overview why I think design build operate in particular is one several alternative project delivery methods and is coming to the fore around the

country. We've worked in Georgia and Arizona for example, on their first projects under new omibus procurement law which allow design build operate as one of the procurement methods. We have seen the concerns and considerations that draw the enactment of the law change in the first place as well as the decision to attempt it on a particular water or waste water project in those states. The main driver I see is great payer resistance versus capital needs. I know that your community has approved a sales tax back bond issue to pay for the capital costs of the new projects. That's certainly a giant capital need and maybe one of the largest the state has seen to date. Because of the impact on rates people will naturally ask themselves is there a way we can do this faster, better, cheaper, that is the main driver for design build operate in my opinion and it's manifesting itself here in your waste water project. There's a greater openness to having competition and cooperation among the various participants in the project development. In the last ten years laws have been changed around the country to allow alternative project delivery. In general the laws allow competition among design firms and operation firms as well as construction firms. In general traditional design bid build as Jim described you've got very vigorous, almost vicious price competition among the construction companies but very little among the design firms or the operating participants. On the other hand the present design bid build procurement method traditionally doesn't allow cooperation among those three primary participants. In fact if you have cooperation among designer, a builder or an operator traditionally the law would call that fraud, corruption and conclusion, you can't do that. New forms of competition allow people to work together to create better solutions. Also what's happening is what we would call full service water companies are emerging from a mix of private companies that are engaged in the water and waste water business. There are companies that will take on the responsibility for managing the design and managing the construction as well as operating the plant. Without them you wouldn't be having this meeting, there would be no industry to talk to, but they do exist and they do a great job. The success of design build operate has been manifested. We're not aware of any failure of any design build operate in any sense whatsoever, cost overruns, failure of performance, or failure to achieve the acceptance test. It's been a very excellent track record on these projects. Jim had a number of 10-50% of savings. I'll boil that down to 20-30% is basically a significant savings as against what you would project the cost of the project, if would be doing it traditionally, it's been a solid record there. Raising up to address the procurement process in a new forum or advisory teams, advising the municipal side, Jim and I are both specialist in that business. Jim from the procurement and technical side and myself from the contract and legal side. This has been in all environmental sectors, water, waste water and residuals management, and of course, new state procurement laws such as yours has arisen to address these new competitive possibilities.

In traditional design bid build method essentially trifurcates the responsibility for the project between three unrelated entities that have to present their work and accomplishes their work in a way which anticipates what the other participant might be doing or not doing. You get a lot of redundancy in these processes because of that traditionally. As Jim mentioned design build unifies the responsibility in a way that I'll describe contraction in a few minutes. And as he said you have comprehensive three party participant process in the development of the assets and management under a single contract, this is true in the equipment side as well. You have one contractor dealing with all the subcontractors and equipment suppliers both during construction and operation, and it avoids the risk obviously and disputes between all those participants and it is easier to administer.

Let's take a minute on the vendor market because as I said before this would be a theoretical exercise if there weren't companies out there willing to assume these responsibilities to this on a single point responsibility basis and back the contracts unquestionably with deep financial resources. This market is deep in international. It's consolidated recently down to about five major players, two of them are represented here tonight. You'll hear from them later. But the competition among these firms to establish a leading position and good share of the market and to establish their reputation in excellent in design and construction as well operation has resulted in excellent projects proposals and pricing. One of the parent companies of these market participants does execute a parent, what's called a parent company guarantee and that is where you get the single point of responsibility. These companies have generally worldwide research and development capabilities and operate dozens of plants, many internationally as well as in the United States. They have a very active comment to the market and excellent performance record. When you send out, if you elect to proceed this way and send out a request for proposals you would get interest I believe from excellent firms.

How are these contracts backed? As I mentioned there are companies that usually have, and I think they all have investment grade credit ratings which is a very significant factor. They all have net worth in excess of a billion dollars, and the parent company guarantees the performance of all aspects of the serve and design build operate service contract. You have essentially three contracts in one. Design contract, build contract and a construction/maintenance, operation/ maintenance contract, and it all in one document that is guaranteed by one investment grade company. That guarantee shows up as contingent liability or a footnote in their balance sheets. The trend now days is to have a limitation on their liability at some reasonable high number. It's acceptable to the company and to the communities. Sometimes you get a small letter of credit backing the transaction. You also have traditional construction performance bonds and sometimes an operations performance bond. So the security for performance package on these transactions is outstanding. And it's much deeper than it is among the three contracts you would otherwise execute in the traditional design bid build. Jim showed you a slide that presented a scorecard of savings as against so called benchmark project of what it would cost if you did it traditionally, what you achieve by doing it in design build operate basis.

I've selected six examples from projects that we've actually worked on. Several of which the contractor is OMI or US Filter represented here tonight. Fulton County, Georgia; Stockton, California; Lynn, Massachusetts; Cranston, Rhode Island; Seattle, Washington; Phoenix, Arizona; four out of six of those were waste water projects. Two out of the six were water. And you can see the absolute dollar savings as against the base line or benchmark projection of what it would have cost to do the same three functions on a traditional basis. One of the things I would note here is that these savings are calculated on a life cycle cost basis. One of the things that the process of thinking in terms of design build operate naturally leads you to is let's focus on the total costs of this project, to what are the design costs? What would a low bid construction cost? What are the costs to operate, maintain, repair and replace, and separate unrelated matters. It forces you to think of them as a unified whole. In a traditional method of analysis in comparing the proposals of DBO companies is to think in the terms of 20 or 30 year life cycle cost analysis, so when the RFP's go out on these things usually the request is what you are going to propose to design and build this project and we'll have our bond issue pay for that.

And we'll even propose to operate, maintain, repair and replace for 20 years, we'll pay that out of our rate. What is the net present value of the totality of the fixed design build price and your fixed operation fee, that is the number by which one proposer is traditionally compared to another and compared to a project of what it would be if you did it on a traditional basis. Thinking in those long term life cycle costs I think it's been a great benefit of this kind of procurement thinking. People wonder where do you get the 10, 20, 30, the 50% savings through this procurement method, you could say after all this just another form of privatization. Right now you have a private operator on your plant. Are you going to hire private design firms if you stay traditional, you'll hire private construction. The private companies are doing the work. If you do design build operate the same thing, private companies doing the work. How can it be done so much more economically?

This is my list of reasons. You are dealing with major international based or operating water service companies whose core competency is the management of water assets. That certainly brings value to the table. As I mentioned before, ordinarily you have competition as to the design. Sometimes it's called operator driven design where they bring their operating practices to inform and benefit the design for the plant. Competition is to operation obviously. They mentioned before a cooperative relationship between designer, builder and operator. Let me give you an example there. In the Seattle project that we worked on, when the designer and the builder of the project got together the proposing team that won, they were looking at a primary design from the design engineer that called for 18 foot high retaining wall, the project was in the cascade mountains and needed a strong retaining wall. The build said why do you need 18 feet high retaining walls, could you do a 16 foot wall. The designer said well I think that would probably be safe as well. And he said good because if you can, I can save you 40% of the costs of building those walls, my concrete forms that I pour my concrete in are only 16 feet high. If I have to add two more feet it's going to cost me a lot more money. And so in the planning processes where the designer and the builder cooperate together you come across a whole array of savings by knowing who it is that you are going to be working with. What your other partnership is capable of and what their limitations are and how far they are willing to go in putting together a great project.

And that produces my bullet there, Small or Contingency Allowances. When a company proposes a job they've got to put in contingency allowances for what others may or may not do. And you have smaller contingency amounts in these projects. You bulk consumables buying power from these operators which you've probably seen so far in your present operating contract. As Jim mentioned, broader technology access in general, particularly by pulling the resources of three firms.

Another source of savings is preventive versus breakdown maintenance. By selecting the equipment in the processes and the technology to be used in the project you can pay a lot of attention to preventive maintenance issues and you can think about trade offs between operating costs versus capital costs investments of the equipment that you would be buying and operating; and make the optimal choice so when you look at a 20 net present value life cycle costs analysis you've got the lowest optimized cost. As I mentioned before you're eliminating some redundancy because basically you know who is going to be operating the project, yourself or one of your partnerships. You have an excessive amount of redundancy. Here's a point I don't think

that is stressed often enough in these projects. I call it early stage price certainty, if you look at the assessment what is this project going to cost. I'm sure a lot of work must have gone into that question in Fayetteville to come up with a number of $125,000,000 on the capital side. I don't know if work was done on the operating side. But typically a design cost 8 to 10% of fee of projected the construction costs. And of course, that's a guess. And you don't know what it's actually going cost. If it's higher, you've got problems and you may have a delay or redesign.

Now on design build operate your costs are much less than that. You'll pay maybe one, two, or three percent of the costs to do a transaction, to do their primary design, the conceptual design, the planning and negotiating work with a DBO contractor. What will happen you will select a proposer, however we end up doing it, if you elect to go this way. The proposer will put in a lot of work at their own risk. And they will design on a guaranteed performance basis to the level necessary to guarantee the price that they are offering you. So basically you can obtain a price guarantee for a low cost in general. Disputes in monitoring as Jim indicated and I think that as many of you may have already experienced. I don't know your experience here in Fayetteville or in Arkansas is, but in design bid build bid, protest can be common. You're six to eight percent. We see a lot of monitoring of the actual construction work that's performed by the winning construction company under the traditional method. You're looking at a lot of change orders typically. I don't know if that's been your experience. We see that a lot, and often times litigation, the companies have change order disputes. In design build operate I think all that are here associated with industry would agreed with me that the bid protest are quite uncommon.

With a DBO the construction monitoring cost is very low for reasons I'll go to in a minute. Change orders are rare to nonexistent. We've worked on over 100 of these projects. In thirty years we've never seen a traditional change order, and litigation is rare. The primary reason is that you're shifting design liability over to the company. And it is their responsibility to complete the design and make it work. Jim Lutz the performance guarantee, said basically performance based contracting is another word to describe what we're talking about. The service contract in which the design build operate commitments are made will contain a plant effluent guarantee. So whatever standards and performance you want to see whether it's in a permit or it's an anticipated permit conditions or better than that, you will write in the contract and they will design it to meet those limits. There are ancillary guarantees as well as odor goes. Trucked in materials if you have trucked in sludges and sewerage. System residuals disposal is a guarantee that's offered. Traditionally environmental guarantee is air emissions guarantee as well.

Performance base contracting. Jim eluded to some of these as well. I'll give you my summary of them. These are the risks you are going to transfer. A lot of risk transfer goes on in these contracts and again it's a risk taken by a company with investment grade credit. A strong company. Specialist in the business.

Construction costs exceed budget or contract. That's the company's risk.

Operating costs exceed budget or contract. That's their risk. If it happens, they absorb the risks, it's part of the cost of doing business.

Completion risks. This is one that ought to be stressed for a minute. Generally it's the risk of will the facility work or not and work well. Will it achieve all our standards? Will it achieve effluent standards? Will it have the capacity to achieve the waste water that you have. There is no one in the traditional procurement process, design bid build that takes the completion risk flat out without excuses. If there's a problem in any of those areas in the examples that I just gave you, you would have to try and figure out was it a design issue, the builder's issue or the operator's issue. And naturally people will elect to play hide the ball. In this form of contracting if it doesn't work, you're only looking at one entity. And that entity will not be able to say to you I was not negligent. Negligence is not a defense.

Mayor Coody: If you have a question during the presentation feel free to ask for the City Council and the regulatory folks we would invite those questions now, and for the rest of the audience after the presentation is over.

Alderman Rhoads: What's your experience from a practical standpoint of what happens to the operation say after the contract expires in 15, 20, 25, 30 years? And then what are you contractually doing different now as far as taking care of what happens with the expiration of the contract?

Eric Peterson: I call that the capital maintenance risk. Essentially that is one of the benefits of this form of contracting. Under traditional contracting the plant gets built. And it's either managed by a municipal or a private company. You have a private company right now as I understand it. And that contract will expire and I think they are on renewable five year terms. So the issue of how well the plant is maintained is intrinsic to any transaction. And you either manage your municipal workforce well traditionally or you work with your private contractor on a five year operations contracts to make sure that the capital reinvestment is made. But as far as the initial designing and construction of the project goes the builder will never, as far as I've heard, give you a warranty of the condition of the equipment for more than a year. But it's certainly not a twenty year warranty of the equipment. The effect of a 20 year operation contract the words warranty never appear in the design build.

Alderman Rhoads: Perhaps my question wasn't that clear? My question is what happens after the term. What in practice what has been happening?

Eric Peterson: In practice what happens is that the company has got to operate the plant for 20 years. Therefore they've got to maintain it or they can't meet the performance standards. And when it comes to the end of the contract, I'm presuming the plant will be publicly owned here and the contract will expire. So you will have to make the decision as municipal operations or private operations at the time. In general the record company in coming to the end of either five year operating contract, or the longer terms of it. Jim and I have seen longer terms than 20 year in the solid waste industry for example. And they've done a great job in maintaining the plant because they've had to perform the service.

Alderman Rhoads: Those by and large cities are renewing with their original bidder with their original building and operator?

Eric Peterson: Yeah, I think Filter & OMI will be able to tell you what their renewal rates are. Jim you want to jump in here.

Jim Binder: There's been a change in the length of operating contracts as I tried to bring out. Before 1997 you essentially could not do much more than a five year operating contract without jeopardizing the tax exempt status of any outstanding debt you have on your treatment facility. IRS changed the rules in 1997 to allow 20 years or up to 20 years if you want to do that without jeopardizing that tax position. And there are certain requirements to do that in terms of the operating fees. Eighty percent of them have to be fixed on an annual basis and 20% can be variable. But most of the contracts now that we have private operators as you have seen here in Fayetteville, on the short term, the history is they've been rolled over either through renewal clauses or if there is not a renewal clause then if they've been happy private concept of operation they've gone out and competitively procured or continued operation. It may end up being the same operator or may end up being a different operation. We've been associated with many of these where they actually kept the same operator and there's been other incidences where they've gone through a competitive operations procurement and changed their operator in time because they got a better deal from another operation who was competing at that point. So we can't point to a 20 year contract because statutorial change happened in 1997. And say that it's been rolled over. I can tell you that the history to date of those contracts of which we've been involved under long term operations have been successful in that the municipalities have been pleased with the service that is being provided and we can go in and talk about the difference between a contract like what you have here now for operation and what the contract would look like on a twenty year operating basis. Because there is a difference in terms of risk transfer and how the fees would flow. But the history has been good. So a short term contracts I think Filter can talk to a facility in Burlingame, California that where they had short term contracts that have been rolled over for close to, how many years, since the mid 70's. OMI has quite an experience here, right here in Fayetteville in terms of successfully continuing to be your operator and please you with their service.

Eric Peterson: I am going to further point out a capital maintenance issue. With a municipal operation or with a five year short term contract, the responsibility for capital reinvestment in the facility does rest with the community as generally, that is kind of within your own control. And many communities actually, around the country, unfortunately have elected to engage in differed maintenance.

Under this form of contracting you're essentially agreeing not to engage in differed maintenance, differed capital maintenance. Because you're including an allowance in the fixed operation repair and maintenance fee to pay for the capital maintenance. So that the burden shifts now, it's not an election for you to invest in it or not its enforcing the contract to make sure that you get your money's worth because they're agreeing to do the capital major maintenance in the contracts.

Couple more items on risk transfer. Often times the companies will agree to take some risks in the permitting area, that they would agree within their control. Sometimes the timing of the permits if it's not issued at all. Terms and conditions might be imposed by Soil & Water upon the project were perhaps not anticipated, they might take that risk. There is some possibility of

risk transfer in that area. We've talked a lot about internal disputes among the various participates.

Schedule risk is an important one. The companies will be your guaranteed schedule not only for building the project but also for achieving the acceptance test, and making sure that it works. Two different things, they'll take the so called as is risk. I understand that one of plants right now is going to be revamped, expanded and rehabilitated and the companies will accept the risk of the current condition of that plant as they plan their capital program.

We talked just a minute about capital maintenance risks. Jim mentioned regulatory compliance. You have to have probably in your contract right now if there's a regulatory compliance fine, for example the companies will pay that.

Sludge market risk. This is something that we see coming in more and more. The companies will agree to get rid of the sludge from the project as part of the fixed operation maintenance fee and they'll take responsibility for labor relations as well.

In general those risks that I just summarized that you are transferring to a single provider are seen as within the control of the company and that's why they take them. There's free lunch here so things that are absolutely outside their control and these are unusually listed as exceptions in the contract, and if they occur they'd be the responsibility of the community as they would be under any procurement method. If the effluent was outside a range of agreed upon perimeters that wouldn't be their risk. If there's a change in law the new permit ten years from now that requires more stringent treatment, they're not taking that risk. That would be a risk under any scenario.

Inflation. In cost over 20 years is indexed so it's not a cost plus deal, it's a fixed price escalated based on an index deal. Obviously not taking interest rate risks.

Electricity rate risks, generally not. They do take the risk of electricity consumption. Risk of any deciding is really put on the deciding companies.

Unususal surface conditions, particularly hazardous conditions in the construction of the facilities, and generally the repair of varied infrastructures as seen as generally outside their control.

All these are risks of municipal government under any scenario.

Jim referred to municipal control. It is an important issue. We've heard presentation from mayors on their successes with this kind of procurement over a long time. And many of them actually say they feel they have more control with this form of procurement than with traditional.

Assets are managed comprehensively not partitioned out. You've got clear performance standards they've got to meet clear cost guarantees. Here's how we measure it by a full service contract. And most importantly the contracts universally included convenience termination rights which allows the community to terminate the contracts for its convenience. Upon

payment of a negotiated reasonable termination fee if you don't like what's happening. It's important to know what isn't turned over to a company in a design build operate process it's certainly not conveying ownerships of the public works assets. You're not conveying any ownership of any system revenues that would be municipal revenues. City Council will continue to set user rates that's the way it is set now.

Capital planning responsibilities remain with the city. You're certainly not transferring bond financing to the company. You continue to issue taxes and debt to the entity of the system.

Just let me conclude here by a few comments on the new state enabling legislation. You know you have very seasoned advice coming to you from your city attorney on this and I've discussed this to some extent with Kit Williams. The issues that he's raised in the memos that he's sent you are real issues. The one thing that is not an issue is can you sign a contract that includes the elements of design build operate, I don't think there is any issue there. You couldn't do that until this law passed to unify all those functions in one contract but now you can. The real question in the ambiguity in the statute that's got to be graveled if you want to consider this further is how you select the winner, what's the process, what's the selection process? The law says that proposals must be solicited and uses the phrase as you can see "qualifications based competitive sealed proposals" and there's uncertainty as to what that means. It says that you should establish and apply selection criteria and only identifies two. Perhaps suggestions that there's only two criteria that you can consider in selecting the winner, previous performance on other similar projects and environmental compliance record. As you mentioned the law does provide a role for independent professional both setting up the process and monitoring him.

I mentioned the law clearly intends to allow for design build operate contract. But as it has been clearly noted this would be the first contract under the law and selection issues really come down to a few. Are you going to be evaluating the entity that's proposing in terms of the experience and qualifications or are you going to evaluate the actual project that they technically proposed and its price, and can you consider that. Can you solicit that? Can you consider that in the process and what is the role of price and when is price offered? When is it evaluated? When is it confirmed? The word price is not mentioned in the statute. So at least, in my view I think Kit and I talked earlier today, the better reading probably is that the law intended that the municipalities will select a design build operate proposal team based on its experience and qualifications. The issue of what the project actually is going to be and what it's going to cost will have to be worked out after the most advantagous proposer is selected.

As he mentioned in his memos, there's another view that you can take. Its probably isn't the right view but is can be argued that now you have to ask for receive and evaluate technical proposals and price proposals at the same time, as you look at qualifications and experience. That way of doing it would be by far the normal way of doing it as we've seen it around the country. As I alluded to earlier, a lot of the benefit from this process is competition. If you don't have technical proposals and price proposals at the time you pick the winner, the first company you negotiate with the only competitive aspect, is the threat of going to number two, if that's allowable. The law doesn't say anything about that but presumably would be part of custom and practice in Arkansas that you could go to number two. You can work out a good DBO contract number 1. I would note that it is not usual, it's not totally unheard of to follow the DBO

selection process that seems to be intended by this law. I'm aware that in Florida a lot of design build, not design build operate, but design build procurements that have been done based on selecting the most qualify firm and going to negotiate a design build contract seems to be an acceptable arrangement. The law in Arizona allows that too. And we're doing some procurements with Phoenix right now on that same basis. It's less than norm but it;s not totally unheard of and it is workable. It may not be optimal but if that's the proper reading of the intention of the law, my own feeling is that it still would be a viable process.

Kit's memo also talks about the issue of what happens if there's a challenge of the validity of the procurement. Any procurement anywhere can be challenged as not being lawfully authorized or conducted, and usually what happens there is an aggrieved company that will say you didn't follow the selection process properly, or you often times see taxpayers sued as well to the extent that they're challenged. In the normal relief that is given if the contract is found to be illegally procured its simply invalid declaration of the validity of the contract. Kit may be aware of special considerations here in Arkansas which he discusses in his memo which really put extra emphasis on the idea of illegal exactions and apparently the city has had two unfortunate experiences with that whole legal authority. And it's also the aspect of lawyer's fees which can be quite significant in those cases that heighten the risk of consequences if a judge that the selection method that you were to choose, you followed was not proper. So that's the one area that I think needs to be developed a little bit further if the discussion you hear tonight about design build operate has any appeal to you. That would have to be I think examined in much more thorough and cooperative basis among everybody involved in the process to see what the exposure there is and how it might be litigated.

Aldermen Thiel: Based on an article that I obtained from the Laredo Morning News or Morning Times, July 4, 02 article, apparently Hawkins, Delafield & Wood exceeded their $250,000 not exceed contract by $118,000 and without notice to or authorization from the City Council. I think one of our main concerns is the additional cost of hiring a firm, an outside firm, I think that might be one of the questions that's asked a little bit later. The cost of the legal services that are going to be involved. And I'm very concerned about the fact that your firm had this situation in Laredo. Can you explain this?

Eric Peterson: If you were to contact the City Manager and City Attorney in Laredo they'll give you the explanation. Basically with the additional work involved at the tail end of a very intense process. Normally what happens is that the City Council has authorized work of any consultants to be performed up to a certain time budget and an associated dollar budget with it. And then if the scope of work exceeds, what was established in the original budget you return to council for additional authorization. In this particular case the process of the negotiations went at a very rapid clip and intense work done over a six to eight week period to wrap it up, so we asked the City Manager should we proceed or do you want us to stop and he said proceed and we'll present it to the City Council. We kind of proceeded on a risk essentially, but you can review that with the City Attorney. The important point here is that the budgeting for this process, the procurement advisory process that Jim and I participated in or any advisory consultants that you would work with has to set out a reasonable consulting contract based on certain assumptions, and you have to monitor as it goes along to see if the assumptions prove to be true. I think the broader point though is the one that I made earlier that the total budget to run

a process like this could range any where to a half a million to a million and a half depending how long it goes and how complex it is. And the comparison of that to other ways of doing it is obvious.

Alderman Davis: Well didn't that one take 20 months to get to that point?

Eric Peterson: Yeah, in Laredo, they did a procurement that maybe Don can comment on because we were only involved in about the last three months, but it did take about 20 months and that was not a design build operate, in Texas you can't do it, the law still prohibits it. That was simply a 10 year operations contract, and they did a procurement that lasted quite a while. There's a lot of uncertainty among the City Council members as whether or not to do it all and which company to pick. When they finally picked the company they wanted to deal with they called us in as the business attorneys to negotiate the contract in crash schedule to the last three or four months.

Alderman Davis: Jim and Eric, I've got a question. I guess I don't understand how you do your comparison of the cost of a DBO and a DBB? And how is that cost different, how is it proven?

Eric Peterson: Well, you've heard Jim and I use the phrase baseline or benchmark.

Alderman Davis: And who sets that benchmark?

Eric Peterson: This is probably more up Jim's alley. Let me let Jim go for it.

Jim Binder: Basically whether you consider a benchmark or a baseline study, there are various ways of getting that number that ultimately you would compare to a number from a private proposer. The technique that's used most often now is for the municipal entity, the city, have its engineers take the design to the design level which they can do take offs and come up with something better than a planning level estimate which is what you've got now in your $125,000,000. Typically that's a 25, 30 percent design level. The problem with that is not so much in getting a better estimate of design and construction costs, the issue arises in how you estimate the operating costs, and typically the engineers that do design and construction didn't have the experience of operating these facilities over a 10 or 20 or 30 year period. But estimates are made based on the design that's intended, therefore, the use of chemicals, power and labor that goes with that in terms of the operating costs, those are put together so you have a design cost, a construction cost and an operating cost and you run a live cycle analysis. So you're going to do it over a 20 year term. You predict the present valuation is $100,000,000 or whatever it is, that's your baseline. In some cases when those baselines are prepared the engineers have actually gone to the market and gotten construction bids to go along with those designs depending on what level of certainty the city is interested in. When the prices from the private proposers, they'll give you a price for the design and the construction and operation, do essentially the same present value analysis on those numbers over the life of the contract. Say 20 years or 15 years, whatever it is intended to be and you compare those numbers and the difference or the savings. You can present those savings in present value or you can do them in

what they call future dollars. You without discounting the dollars back to present day. But that is essentially how those comparisons are made.

Alderman Davis: The reason I asked that is because we've had two local bid situations in the area and one Beaver Water District which the guesstimate was 54.7 and the actual bid was 42.4. So there's 22% savings there doing it the conventional way. And you also had the City of Fort Smith's water facility which was guesstimated or estimated, or whatever word you want to use at $80,000,000 and the bid came in at $50,000,000. You're looking at 40% savings there doing it the conventional way.

Jim Binder: What I don't know in either of two instances is how the estimates were made initially and what level of design was done in making those estimates? You would have to investigate that. Perhaps they were only planning level estimates like you have now, and the design didn't go to the next level where you can do take offs and actually come up with more precise figure. I don't know. Typically on a planning level you are more conservative in that you estimate a higher figure or you try to because you don't want to be short when you go out at that point and you're planning your financing and so forth for a project. Again I don't know what level they went to when they did their estimates in those two instances. If they went to a higher level of design then I don't know why there was such difference other than perhaps in the estimate, again there wasn't enough knowledge of actual construction costs for those types, or there wasn't a lot of experience in it. Sometimes when you go to the market and get bids sometimes you're surprised and no matter how much work you've done in trying to come up with your best estimate, and hopefully you're surprised on with the prices being lower than what you've estimated, and in some instances the prices come in higher.

Alderman Davis: How are you going to help the City of Fayetteville because you are looking at $120,000,000, fifty percent of that is going to be line expansion or taking care of the lines that are already. You're looking at $60,000,000 there. How can you save us dollars on that portion?

Jim Binder: It might be that there aren't a lot of savings in that portion of it. Typically there aren't. Typically the larger savings come on the treatment plant. And one thing we are going to discuss you know, at the end of this presentation is trying to bring some of this down to this actually could apply to Fayetteville. That it might be that you consider not doing the entire project under DBO, perhaps just those parts of the project where you think the greatest benefit might be achieved. And maybe that's the treatment plant. This is the kind of thing that needs to be thought about at the city level and discussed and the strategy ultimately developed. But I agree with you that the greater potential for savings isn't in the pipes. Okay is going to be in the facility?

Eric Peterson: Can I add to that to supplement a little bit. We just finished up work on a major project for the City of Phoenix, Lake Pleasant Water Treatment Plant. It's 80 million gallons a day and they selected American Waters to team with McCarthy Construction and Black & Veatch. That came--the selection came last week at the end of a four year process and the Phoenix Water Services Department and the Phoenix City Council grabbled with all the questions that you are asking in pretty much the same form. To the question of establishing the benchmark or the baseline, they were very concerned about how much guess work is involved in

that number and is this all just numbers and manipulation basically. So they--they engaged a locally trusted firm to independently prepare the "benchmark." They paid maybe a little more money than I would have paid but they felt that it was really important to. I think they took their design to a 20 or 30 % level. It was a real alternative project. And if they would have received design build operate proposals that they didn't like or that they didn't "beat the benchmark" by 15%. They would fully prepare to sort of build on that 30% design and go forward traditionally. They also even previous to that did a massive study. I can make copies available from there if you'd like to see it on Alternative Project Delivery Methods. They invited members of the council. They basically took this kind of a form and made it into a six study project and made a lot of money for that. They decided they would try design build operate for the plant for some of the reasons mentioned but not for the piping that connected the plant treatment plants to the water distribution system. Part of that involved concern about how much money it could really save. Part involved one of the preserved work to local contractors in a traditional fashion and so forth. But there were a lot of considerations involved in that. The questions you are asking are very natural and normal and I've yet to see a city that didn't come up with some kind of benchmark or baseline that they thought was reasonably calculated.

Alderman Davis: Didn't Phoenix rescind the first award?

Eric Peterson: They had a proposal from Earth Tech. One of the five major players here. But Earth Tech, unfortunately for both sides I think, requested to be withdrawn. Earth Tech is part of Tyco and you've read about the problems with Tyco's management. They're still a solid company. They still have investment grade ratings from one of the rating services. But the--when it came time to deliver the performance bond to sign the contract they were having a hard time at this particular point in their corporate history of delivering it. Unfortunate because the savings there I'd put a $25,000,000 number on my Phoenix slide and that's what the selected company, American number two offered. They would have had 75 with Earth Tech if they had not withdrawn. But it's seen as a great success in Phoenix. I think a benchmark at Phoenix was low frankly but anyway they see it as a great success there.

I've taken quite a bit of time.

Alderman Marr: Before you go on I would actually like to ask a question if I could. My question is related to the savings benchmark, the 20 to 30 percent. What's the correlation of that as the project life cycle is lower. Is there direct correlation or does the percentage of a project hold true?

Eric Peterson: I think it's a general rule. The larger the project I think you are more able to achieve that level. Would you agree with that Jim?

Jim Binder: I am not exactly sure.

Eric Peterson: In other words is it different percentages savings based on the size of the project?

Alderman Marr: Well if I understood you correctly I thought that up until 1997 or 99 or some point when the law changed that the majority of the contracts were operating contracts or agreements of five years, and that they recently changed to life cycles of 20 and 30. The percentage numbers that you're showing us I'm assuming are based off these 20 and 30 year life cycles.

Eric Peterson: Yes, and to be a little more specific about the 1997 tax law change, you couldn't have taxes and bonds prior to 97 if your contract with a private company went longer than five years. And so--and also the laws were not in place in many states to design build prior to 1997. So those contracts you have, hundreds and hundreds of contracts for all five year con-op deals, as we call them, contractual operations with usually know design build component. So we're talking about the 20 year design build operate contracts that have come in since 1997 and that's the frame of reference that we have.

Alderman Marr: But if you had calculated savings on projects where you did a design build and a 5 year operating agreement, where would the percentages have run?

Eric Peterson: They would be lower in my experience. And this is true for your current five year contractual operations deal. I'd like to hear the comments from OMI and Filter on this but my experience is that at a certain level of savings is obtainable as against municipal operations by going to a five year contractual operations arrangement as you've done a long time ago. When you allow the company a 20 year contract you can increase your savings because they have the asset management responsibility for a longer period of time. And they are willing to make investments in capital assets and so forth on the commitment of the project because they know they have a long term contract. The contracts we've seen have saved maybe 10 to 12 percent. It's just simply by going five years to 20 years. You will get I think greater savings with longer term contracts. Okay?

Alderman Marr: Thank you.

Eric Peterson: Well I've taken much more than my allotted fifteen minutes and I thank you for your patience and attention.

Mayor Coody: Thank you. We appreciate everyone coming down because this a great low cost endeavor. I appreciate everyone's volunteers in this. Thank you.

Alternative Project Delivery System Providers and Case Histories: Mr. Don Evans, President of Operation Management International, Inc. Mr. Dave Butler, Former Mayor of Atchison, Kansas, and Mr. Bill Rosenbaum, Vice President of Municipal Design/Build Project Development will be speaking. Pat McManus, Former Mayor of Lynn, Massachusetts will describe the City of Massachusetts' experience using design-build and design-build-operate concepts to address various municipal projects over a period of 18-years. The presentation will include an overview of the challenges that were addressed relating to funding programs, sewer line construction and system repair issues.

Don Evans: Thank you Mr. Mayor. And thank you members of the Council and the public for letting us speak to you for a few minutes. I am Don Evans, the President of OMI. And my first comments is that, thank you very much for letting OMI work with you over the last 17 years. We've had a very strong partnership. We've been very pleased and proud to be a part of the Fayetteville team. Fayetteville had an incredible quality of life improvement in the past years. So with that I'll go through this project quickly. You've seen it before. You've got a project with the Noland Plant. You'll be upgrading and improving that plant and then building and improving the collection system on the Noland site on the east side of the city. And then building a new treatment plant and the collection system on the other side of town. Mr. Davis mentioned that about half the project is those collection system improvements and about half of the project is improvements to the Noland plant and the new treatment plant on the west side. So you've got a project that complex and large. A very sophisticated project that takes you into the future and continues your strong commitment to environmental stewardship. You've had an incredible commitment to that over the entire time I've been coming to this community. I first came here in 1985. Worked on some of your early projects then. You're commitment has been unwavering during that period and that's resulted in the quality of life you've got.

If you look at what we are here for today. Design build operate and key considerations for Fayetteville. This is your decision. You know that. This is a new opportunity. What has happened? Well Arkansas was the 37th state that passed legislation providing design build, design build operate in the United States. So 37 out of 50 have passed that legislation. Different cities are going forward with it. If that legislation is passed in this state you have the opportunity to consider it. That's really all that has happened to your--and the legislation as people has mentioned goes into effect next week. But its something that people had done and you really ask what's the driving force. Well you've seen it and we've seen it. You're being asked to do more with less. And as you look as doing more reflects to your state. And other states have said well we want to give our municipalities options. Give you options to pick from. Again as Mr. Davis said for certain projects the design build, the design build operate is the perfect option. If not perfect for other projects. You have to look at it. But you now in this state have the option as a city to look at it. And Mr. Binder mentioned and the mayor mentioned, eventually a city in this state will use it. There will be people who will go forward with it. Maybe your community or maybe another one. But people will look at design build and you'll ask why and Mr. Binder and Mr. Peterson have mentioned that we've seen from our customers that they do it to reduce the overall risk on the project, to save money and to save time. They've said gee we've got to do this and go forward with the project and they've done it with those goals in mind and looked going forward with design build and design build operate. And as the mayor mentioned it's the primary system that's used overseas. And we participate with a lot of private sector firms. And some of the larger firms, General Electric, one of the larger firms in the United States. They've changed their entire procurement process for capital projects to design build and design build operate. So you want to know why would a private firm like that do that. It's because they've seen the savings going forward. They've said gee we think is the preferred method for going forward with our capital improvement project. So it's happened in 36, now 37 states. It's been really legislative bodies giving cities an option as you get pressed on to do more with less. And as you look at that now you've got to say what options do I have.

This is a checklist that's in my comments but it's also been in Mr. Binder's and Mr. Peterson's which is a checklist of going forward. The legal issue being addressed.

The benefits. Are the benefits enough to want you to consider design build and design build operate. Can you maintain the access to state revolving funds? And what are the next steps as you go through and evaluate the regulatory and permit compliance issues.

DBO can reduce the overall risk profile. This is really something you seen in a graphical form. When you do a design bid build you basically contain and maintain and control all that risk yourself. You have some agency contracts with engineers. You do other things but it's still your risk.

As design build operators you sometimes can share that risk with a design build operator. And that's why people do it.

I'll step down after this next slide and introduce the mayor of Atchison, Kansas. Because I think its best for you to talk to people that have done it and see why they did it. But these are some cities recently that have done design build and design build operate. In Seattle. Phoenix is job that Mr. Peterson talked about. Atchison, Kansas, Stockton, Augusta and another project in Seattle. So there have been major projects where projects have gone forward with substantial design build and design build operate projects in the water and waste water industry. And they've done that because it makes sense to them. And that's really your opportunity today, is does this make sense for the City of Fayetteville.

So now I will introduce Mayor Butler. Atchison, Kansas, has been a client of OMI since the early 1990's. I've got a long term relationship with Atchison. Atchison is beautiful community on the river. They have a water treatment plant that they had fully used. Mayor Butler and the community had made a long term commitment to improving their utilities. They worked with us and developed a program to build and design and build and then operate a water facility there in Atchison so I thought it would be very appropriate for Mayor Butler to be here and share his experiences and then be open to any questions you've have as a fellow elected official on building a water system in Atchison.

Mayor Butler: Thank you Mr. Evans and distinguished colleagues, I guess would be the way to put it. I'm just delighted to be here this evening and it gives me a great deal of satisfaction to know that you're asking the very same questions we ask in a town of 10,642 people.

We have five commissioners in Atchison. It's been my honor to be the mayor of Atchison four times in the last twelve years. One of them was when we decided we had to do something with our water treatment plant. EPA was making the standards drop down to where you have to make it pure and pure. I as mayor was sitting there saying if the technology is there to help make the water pure we need to because we don't want to jeopardize any of our future leaders in our young children. So we were forced to undergo a--same type of discussion you are as to what can we do to upgrade our water plant to make it compliant. Not only with the state regulations but also with our EPA regulations.

We began working with OMI as Don said earlier in 1990s, late 1990s, and CH2MHill at one of the facilities. We have a population of 10,600 although we have several rural water districts in our area, so we actually serve approximately 15,000. We have an aging water treatment plant which was built in the 30's, we upgraded in the 50's, we upgraded in the 70's and we upgraded in the early 90's. The last upgrade was in 1994 and was mostly done with the standard DBB. Here it was the year 2000 and all the sudden we're having to do some more things to it because our plant as aging as it was, still was not going to meet the needs we needed to be met.

CH2M Hill began working with the telemetry again. We had pretty much gone ahead and hired OMI to be our operations and management team for the water treatment plant. We had taken over the plant in 1983 from the private company that was running it. We began to look at the cost every year going up, you're trying to give the employees one, two, three percent raises, the cost of running the plant was going up. Our expertise was getting less and less and less as the technology got finer, finer and finer, that's why we decided to go with OMI.

The other reason we went with OMI basically was that they were backed up by CH2MHill. Having the combination of the two working in concert really made a difference, that we saw from the standpoint of hiring OMI to run our plant. We began to see some savings right away just from the standpoint that we dropped about 12 employees off our payroll and put them on their payroll, so right away we begin to see some changes.

We began to talk about what we could do and started talking about this new design build of the new water treatment center. OMI again was already onsite and delivering our operation management, they also brought in CH2MHill engineers and the CCI which then gave us a guaranteed maximum price with a performance incentive. We didn't want to leave them out in the cold and not give them a chance if they did a good job reward them some way.

Probably in just looking back I think we may have had just one change order. And that came about from the fact that OMI operators looked at the builder and said look, what you're going to do here is not going to work. It will not really be the most beneficial for us as workers, therefore the builder said okay lets go back to the engineers and find out what we do to make this better. The operators were happy, they worked it right in to the plan and it was just very little cost to us. Having in concert, engineers working with the builder and working with our operators made a big difference.

Our plant, the slide says 8,000,000 gallons per day was really only operating at about 6.5, that was about the maximum we could get. We have one supplier in Atchison that uses between 4 and 5 million a day, so we were looking at if they were to expand their business we would need to have a whole lot more water. We're located right on the Missouri River.

We went through a lot of the same systems you did. We looked at whether or not we should drill wells, we spent a lot of monies to drill a well. The well, would make the water easier to treat. We looked at the long term cost of what it was going to cost to do well water versus what we already knew. This was river water and after spending a couple hundred thousand dollars we decided to stick with what we already had. As city commissioners you've got to have all the

options before you. It really tugs at my heart that you're asking all the same questions we did and it makes me feel good that we're all thinking along the same lines.

We had the response of the aging facilities and what could we do to meet the regulations. We ended up having upgrades, we looked at the filters system, the new micro filter systems and looked at the cost of those at the present time. We decided not to put in the new micro filter systems but we decided to build in somewhat of a way that we could add those later once those became cheaper and easier to use. We might be able to utilize those because we know that the standards are going to get tighter, tighter and tighter, they're not going to get any less stringent. EPA is not going to come out next and say hey it's okay to be turbid tomorrow, that's not going to happen. We needed a new chemical feed building. We'd been using an old style building and doing it all very. It was almost dangerous for the workers the way we were doing it. We changed the building esthetics a little bit, and of course with today's things, everything with the security enhancements went up too.

High points. We were scheduled to be finished sometime in November 2000, we were actually done and had cutting in July, we saved roughly $600,000, probably a little less than what you're being told, but I think it was well deserved and everything was probably about as good as could be. We have one City Commissioner that is a plumber and scrutinized every invoice that went through the place, not to say that that's bad. It came in at $9.6 and we had estimated it at $10.2. We asked for bonds for 10.2 million to get the project started. So our $600,000 savings will go to help pay off the debt.

I have City of Atchison pins if anybody would like one afterwards. I'd be glad to talk to you about the project. This was a new system for us, we looked at it. When you think about having your engineers work in concert with your builder as they're going through making the changes as needed I think you'll see that it really works well. I know it worked well for Atchison. With that I'll thank you.

Bill Rosenbaum: Mr. Mayor, Council members, on behalf of my colleagues of U.S. Filter, we appreciate the opportunity to talk to you tonight about the design build operate project delivery system. My name is Bill Rosenbaum. I am the Vice President for Municipal Design Build Project Development for U.S. Filter Engineering and Construction. Let me introduce quickly a couple of our other people that are here. Stew Kinsey is our vice president of the southern region. Rod Nichols is a vice president for project development and along with us today is Pat McManus the former mayor of Lynn, Massachusetts.

What I'd like to do is just talk about maybe a little bit of a different perspective on the design build operate project delivery method. Some of the things I would say would be a little bit redundant with some of the good presentation that's been made. So I'd like to give a little bit of a different view of it and feel free if you have questions as we go along to chime in.

Obviously I'm here as an advocate for the design build operate project delivery method. In not only just because that's the business that I'm in. My roots go back all the way to consulting engineering. I've been an engineering representative for cities and have been through the design build process and truly believe that the design build operate method is the superior way to go for

a lot of different projects. To me the DBO method is really about innovation, risk assumption and total life cycle costs. It's really putting your money where you're mouth is. And I think most of all it's about service and partnering in its building long term relationships. There's multiple project delivery options. We've talked about design bid build and design build operate, and those are the two we want to focus on right now.

Additional variations include design build operate finance and design build own operate transfer, those are kind of hybrid. The ones I want to focus on is design bid build and design build operate, of course we've been through the whole discussion of the design bid build approach. This is just a graphical representation basically showing the relationship between the owner and the various contractors. And as you can see there are multiple parties in the design bid build approach. You've got the general contractor or the architect engineer all of who individually report to the owner and then of course the operator. That can be under a contract relationship or if the municipality has its own staff that would be their own people.

So what this approach represents is a significant management challenge and burden for the municipality, for some municipalities have that infrastructure, others it can be a problem. I think as you go through this process you also find that it's a sequential stepwise approach. Where you're doing the engineering that's passed off to a contractor which is then passed off to an operator. And as you're going along you're slowly finding the real costs are becoming known. So you start out with planning of the cost. As you develop your engineering you get a detailed engineer's estimate. Then you get a contractors quote. Ultimately you get your real operating cost so at the end of the day you're cost won't be known until you're actually up and operating.

Of course in this situation the owner's in the middle of any disputes that might occur between an engineering contract or the operators. Any other owner ultimately bares the risk for performance price and compliance. Ultimately because of the multiple parties and the relationships there are no guarantees, nobody is going to stand up and say I'll guarantee this plant will work, and guarantee it's constructed properly.

Contrasting this a little bit with the design bid build operate approach as you can see there's a single line to the design DBO contractor. There also probably ought to be an advisor box off the side between the owner and the DBO contract, those would be the people who would provide the oversight for the contract and other services to the owner.

The DBO contractor in this arrangement manages all the elements of the project and essentially provides the owner in the proposal provides a fix firm price going in for the entire life cycle cost of the project. Before bonds are issued you know the firm price. You know what your operating costs are going to be for the entire life of the project. You've got one firm that will in fact guarantee the performance. They'll guarantee the performance. They'll guarantee that the plant will work. They're placing a guarantee that the prices are what you say they are.

The one thing that this provides in particularly when you're in an interim process that can consider other factors say then strictly qualifications is that it provides the potential for competition of ideas and development of different and more advantageous approaches for the owner.

The advantages of the DBO process includes risk assumption. That's the technology risk, cost risk and performance risk. The reason that the firm can take those risks is because we can control that. That we have control of the design, construction and the operation. We can manage those risks much more effectively then breaking out those separate activity.

We carry the responsibility for schedule and actually can accelerate schedules. In the standard DBB approach you can work the project in phrases. You can get elements permitted and accelerate a construction that way. You proceed all the way through the project planning for the start up phase which is the shake down and usually time consuming part of the project.

Then in the contract itself there's contractual requirements, liquidated damages, they require how you're to meet the stated schedule for the project. I think one of the primary features of this approach is innovation and its ability to allow for innovation. Going into the competitive process you are really looking rather than competing on prices you are really developing a competition of ideas, and essentially identifying the most advantageous approach for the city. I that the best technical approach, is it the best management approach, which will in fact give you in all likelihood the best price for the project. So this is a competition of ideas not just low budget and low price.

Cost management and control are important elements from the initial proposal development the emphasis is basis--is on optimizing cost throughout the project delivery cycle. In developing a proposal you've got the contractor the operator's as well as the designers at the table. They are looking at the entire project life cycle and net present value and focusing on that.

We find that frequently in a proposal we'll put more capital up front so that we can reduce our repair and replacement cost through the 20 years. That's a very common thing. We also have performance requirements established contractually, so that the interest and stress to control your cost doesn't overcome the requirements in contract to provide a plan at the end of the 20 years so that it's essentially in the same condition that it started out in.

One of the common concerns of the client control over the project, and from the beginning the client establishes specifications for performance, specifications for quality, these essentially aren't any different then what you would have for a design bid build approach. We observe all the standard design protocols and have to achieve state certification of our designs.

The client typically reviews and approves the project as we go through the design stages and also inspects it as we go through the construction, and of course as previously mentioned there are other options to include termination, that the worst case scenario. One thing I wanted to stress in this whole thing is that you know one of the best elements for controlling and managing the process is to foster and develop this partnering approach. And we've had a great deal of success in a number of our projects developing that where we're working we know we're in the community for 20 years and we work closely looking out for the clients interest and the clients working with us as well.

A couple of the projects I wanted to just give as illustrations, Woonsocket, Rhode Island was a 15,000,000 gallon waste water treatment plant upgrade. It was probably the hallmark of our close cooperation with the state and local industry. That had a history of compliance problems and we brought that into compliance and recently won some awards there for the most improved plant in Rhode Island.

Tampa, Florida, surface water plant, a 66,000,000 gallon a day plant that uses advanced technologies. That one highlighted a great deal of ping partnership with an ongoing relationship that we are continuing to work with them closely today. That project came in on time and on schedule.

The Lynn, Massachusetts, USFO project which Pat will talk about here in a minute, provided an alternative solution to significant CSO problem for the City of Lynn, Massachusetts. I'll turn it over to Pat right now for discussion on that project.

Pat McManus: Thank you Bill.

First let me compliment Mayor Coody, the Council, and entire team in Fayetteville for at least taking a little time to look at options and being open-minded. You may find at the end of this that your existing plan is the best plan for your constituents. But at least by taking a look at options you're making sure that you do get the best product for your constituents.

I was the Mayor of Lynn for ten years and I chaired the Urban Water Council for the U.S. Conference of Mayors which is a body that represents all the mayors in the country. The charge of the Urban Water Council was to find newer and more efficient, more economical models for addressing infrastructure and the many needs we have with water and waste water issues in the country. Because we know that as mayors we just couldn't afford to make all the improvements and all the changes to become compliant with the Clean Water Act which deals with your waste water issues, and the Safe Drinking Water which dealt with need for safe drinking water. Lynn is a city of 100,000 people we have 150,000 people when we include the surrounding community that we service. We had two major problems, one was we had an older waste water treatment plant, very similar to your Noland Plant, it needs capital improvements. We had a private operator with a five year contract just as you have now. The bigger problem was we had a combined sewer overflow problem which is common to many older cities in the country.

Lynn was founded in 1629. With the combined sewer overflow systems or CSO we had a sewer system and then we had storm water systems, two sets of pipes. The storm water obviously when you get rain and storms would run out in our case to the Atlantic Ocean in the harbor; and the sewerage would run to our waste water treatment plant, the problem is with many older cities you have combined systems. There were junctions where the pipes were designed opened, I don't know why anybody ever designs this, I assume because of some form of protection when you started having flows that might have jeopardized the systems but when you had heavy flows and in particular during heavy storms, we ended up with combined sewage and water running off into our harbor. It was a major problem and we had to clean it up. The Clean Water Act which governs your waste water treatment and your discharges into your harbors or your rivers, etc., requires zero overflows. I spoke with the EPA many times about this and they said we can give

you more time to try to address the issue but congressional intent says zero overflows. We can never over ride that, sooner or later you have to go to zero overflows into your harbor, no sewage to become completely compliant with the Clean Water Act.

I did want to point out that you are in much better shape than Lynn was timing wise. In 1990 we were sent a Federal Consent Decree, we were under a federal order to clean up the CSO systems and go zero overflows, it was done in three phases. Phase I ran from 1991 to 1996 and called for separation in a small portion of the city, by separation we mean building new sewer pipes or water pipes so we didn't have that combined overflow. When I became mayor in 1992 that was underway. In 1995 the Water and Sewer Commission announced a 53% rate increase for that year. They informed us that rates were going to quadruple over the next 10 years as we moved forward with this capital improvement program. At that point the City Council and I said wait a minute we're going to take a long hard look at this.

Phase II was a beautiful plan, it was a mile and half long, 10 foot in diameter conduit, 300 feet underground that was suppose to run to an 8 million gallon storage tank. During heavy storms they run all of the effluent and runoff water underground and into the storage tank, store it for a few days and gradually let it work through the plant, and that was design to get us down to four overflows a year which is admirable. We could never get to zero overflows with that. So Phase III called for total separation of a storage and storm water systems to bring us down to zero overflows, that actually hasn't had a time table designed on it.

The question you have to ask is why would you have a storage tank to cut you down to four overflows when the separation which you have to do would have permanently solved the problem. That was the plan they came up with in 1990 and that was the plan we were under a federal order to implement when we started looking at this. So in 1996 we went to the EPA, discussed it with them and said look we just think there's a better way and we can save money and they agreed to basically put a stay on our federal consent order. So we were a third of the way through our project when we actually took a look at it. You're much farther ahead of the curve then Lynn was I will say that.

As we worked through that we decided to come up with a program that I'll show you in a second to design bid proposals which went in February 19, 1999, and in November, 1999 we completed selection and contract signings, in 2000, our work began. In 2005, the CSO project is going to be completed with zero overflows to be fully compliant with the Clean Water Act.

Alderman Rhoads: What happened in between the three years from when you talked to the EPA, got the Consent Order put on hold and you went out to bid l February of 1999.

Pat McManus: We spent a lot of time talking with company. Our Phase II didn't have to begin until 1999. Even though we were under a federal law we still had some time to explore options and we just wanted make sure that we got the best option possible and really spent time talking to engineers, to contractors, to the private companies. Now remember as chair of the Urban Water Council, I was with these people probably once a month. In our case, to be honest with you we didn't have a lot of debate in the city, we knew we couldn't afford to do this. Rates were going to quadruple, we could not afford it, so the public pretty much told me, look go out and get

something else done or you're out of here, which really is an advantage in a sense because you know if you can figure out what to do it's easy to get it done. Ultimately what I did was I appointed myself to the Water and Sewer Commission. I was on it when they elected me the chairman and pretty much just moved it through. Again you know I had spent years working in the field and certainly you have a lot of interests, the mayor, the council and the level of expertise you would be expected to have on your wastewater treatment plant, and your sewer system is just one on 100 things you have to deal with in the course of your decision. He explained the cost involved in Phase II. Phase II was complete separation. We asked for three prices, our Phase II storage tank, complete separation and a price for any technological process that would solve the problem as long as they guarantee that it worked.

Alderman Davis: Asked about a report that was written by the Inspector General regarding the facility can you explain that.

Pat McManus: That was written by his assistant who had for years avodacated against Design Build and long term contracts. That report has been thrown out by the new Inspector General who advocated for our program, he said it was based on false information. We did not pay much attention to it.

Alderman Davis: I can see why.

Pat McManus: I could never understand anybody criticizing this because this was the best service for the people in our district.

Alderman Thiel: You are the former Mayor, what do you do now?

Pat McManus: I do consulting work.

Implementation Strategy Using A Design-Build-Operate Concept-Fayetteville, Arkansas: Mr. James Binder, P.E. President of Alternative Resources will be speaking. This discussion will be focused upon the Fayetteville Wastewater System Improvement Project with specific responses to: (A) issues associated with implementing a DBO procurement, (B) potentials for cost savings, (C) scheduling implications,(D) coordination with the Revolving Loan Fund, (E) perception of EPA perspectives towards DBO methodology, (F) description of a conceptual process for Fayetteville's project, (G) predicted schedule using alternative project delivery method and (H) future actions needed to evaluate alternative approach.

Mayor Coody: I would like to restate the reason we are here tonight is to learn as much as we can about this process because we have a job in public service to do the best we can to conserve the taxpayers dollars. All of us want to do the most we possibly can with the few dollars that we have and we have a deep obligation to the public trust to do the best we can with the available financing and resources that we have at our disposal. We obviously need research this to explore it and see if it fits our needs. I certainly hope you understood in the previous conversation what the potential is for this process in Fayetteville. We are going to be discussing now how this legetation and this process can affect us in Fayetteville directly and specifically. One of the things that I would like to reiterate is the fact that we have if we build the standard Design Bid

Build process, then we have a one year warranty on the plant, if anything breaks they fix it, after that all cost are going to the city. We have right now about 17 contracts that we are about to sign with private firms, all good firms, all of which I am assuming would be able to work well in any process that we decide to use, including changes or modifications that we might have in using part of the Design Build Operate process. Here are the options, one option is we can do DBB or DBO and we can use any of those options on any particular part of our project. There are several different options in doing this. That's the reason we wanted to take this short crash course on this. I would like to thank all of you for coming and sharing your experience with us. If you have any questions, please feel free to ask them.

Jim Binder: When we look at what processes might work best in Fayetteville, a DBO procurement process works best when you have a complex project, stringent effluent limits that you have to meet, when you have a costly project and a schedule. I think you would fit the mold for a DBO process. He went on to explain why this process might work in Fayetteville.

Speaker: Today we've heard a strong advocacy for design build operate. And certainly that is a valid procurement process that is employed in the industry. The city is to be commended and the mayor is to be commended for looking at it in light of the opportunity that you have here in the State of Arkansas. There have been a number of comments made that compare DBO to DBB, and I'm afraid that the advocacy suggests that DBB is poor approach to public improvement projects, I think we know quite the contrary. Your own experience with DBB, I think it has been quite successful over many years of history in the City of Fayetteville. Some of the comments that have been made concerning cost savings, our design group have had the opportunity to consider the DBO strategy and what kind of opportunities might exist for schedule and cost savings here. As has been discussed we don't see the opportunity for quite the magnitude of percentage savings that exists because of the specific nature of your project, particularly with respect to the schedule. The schedule that was put on the wall here just a moment ago in my opinion is quite optimistic. To think that we can accomplish and clear up some of these questions and uncertainties that exist in the procurement process and acquire a contract with a design build operator in nine months is quite fast and the experience of other cities would suggest that, that might not be accomplished. The difficulty that you have as council people and the mayor is, what's the likelihood we're going to make that. I just want to point out that at least with the design bid build process you know you have a system that works. It has the potential to achieve savings against benchmarks, nebulous benchmarks that sometimes exists as has been pointed out. Quality engineering and quality contractors can have projects that produce low percentages of change orders. I think that we would all stand behind the design work that we've done and be willing to share with you our change order experience which is quite comparable to what has been shown there. As you continue to deliberate the question of DBO vs. DBB I would ask that the DBB side have the opportunity to present to you much the same advocacy that has been given to the design build operate side tonight. I compliment you for looking at it. It's certainly something that should be looked at but at lease look at it within the specific constraints that Fayetteville faces and the project that you have. Thank you.

Mayor Coody: Thank you. I think that is exactly what we tried to do here tonight is look at it in the context of Fayetteville's need. We haven't tried to say one size fits all, what works for Lynn, Massachusetts will work for Fayetteville, Arkansas. I don't believe any of us is

advocating that. One of the things we want to do is have an open airing of all sides issue because I feel and I'm sure the Council feels obligated if a new option shows up, on the horizon that has the potential, then we have an obligation to research and explore it. It may not go anywhere. We may use part of it, we may not, and we may stay on the same path. We have an obligation to explore it for the benefit of the citizens of the community. And I think that's what we're trying to do here tonight. I appreciate it your comments.

Mr. McManus: Thank you. You know you've talked a lot about the DBO which is really how this was pretty much addressed. But one thing I would seriously consider is at 20 year operation and maintenance contracts. Design build is one issue but with five year contracts there is a level of costs. If you allow the operators that come in recommend equipment that they would put in over a 20 year period they could get a return on their investment and recapture that investment. I'll guarantee you can save money on your operations on this. One thing I think about is that on your Noland Plant I would try if you don't go to design build, to get your operators to coordinate with the engineers and discuss it.

Jim Binder: DBB. I would probably think in this case what would probably make sense so you can get a refined estimate of the cost on the DBB would be to consider going from the familiar design level that you are at now and playing with the estimates to a more precise estimate. But perhaps having engineering advance to the 30% design level and then that be used to come up with a refined more detail cost estimate under DBB and they use under this approach as your point of comparison to price, you would get ultimately in negotiation under DBO.

Alderman Jordan: I'd kind of like to get to the bottom line here. How much money to do you think you can save the City of Fayetteville. How about that for a question?

Jim Binder: You tell me how good that $125,000,000 number is. If that estimate is going to save what percent, 25%, 50%, 10%. I cannot tell if the DBO approach will save you the 10 or 20 or 30 or 50 percent. You won't know that until on this schedule you've advanced to this under the DBO under a negotiated contract. You won't know the actual cost of completing the project under DBB until 2006. So all you have is estimates up until that point.

Alderman Jordan: We want to hold to $125,000,000 is what we're going to do.

Jim Binder: I hope that that can happen. I'm not suggesting that you probably would make sense to go a higher level on your design in terms of deriving a cost estimate under DBB then you have at this point.

Mayor Coody: One thing I want to remind folks is that it's not just the $120,000,000 construction that we are talking about as far as part of the design build operate process. We're also talking about the operational costs as well. And that is more than $120,000,000. As a matter of fact once you add the $120,000,000 construction cost and the estimated operation for both plants for 20 years you're starting to talk about $264,000,000. So a large part of the savings also comes from a long term operational contracts. I've heard tonight, even if we save nothing on the construction of the plant itself we still could see substantial savings in the 20 year contract negotiations.

Alderman Jordan: We don't know.

Jim Binder: In my mind you don't have final number under DBO until you have a signed contract under DBO. I'm telling you, you won't know under the DBB concept until you finish construction because there will be change orders. That's my view and I'm going to illustrate that in a moment.

Alderman Thiel: I have. Well, since the mayor brought this up I think I'll go ahead and pursue it because I mean generally it seems to me like any cost savings at the front end is going to have to be made up at some point. There are examples from cities all over the country that, that's exactly what happens, the operating costs exceed their expectations, they continue to go up. There's examples felt in California, Huber Heights, Ohio, and Peckin, Illinois. Anyway so I have a hard time understanding even though you've given us reason why this process saves so much money but you know material and labor costs the same. Somewhere you know these two processes are going to cost the contractor the same to build this plant if we just deal with the plant itself. So somewhere they've got to make up the cost to them and it seems like some of these other cities experiences have came in on the end at the operating costs and these of course are passed on to the consumer in their user rights increases.

Jim Binder: Well I guess to put your comment into prospective perhaps one needs to think about the number of contracts-the number of waste water plants that are privately operated. I think that you will find that in the United States there are literally hundreds. So if you cite three examples where they were short on operating costs I'd have to examine why. I'd have to examine was their price proposal initially too low. I'd have to take a look at the provision of the contract and do they have the ability to pass through under the provisions of that contract added costs. So really, it's a little dangerous to pull two or three cities or names out of the hat without understanding specifically the circumstances because I pull another 100 cities out of the hat where that hasn't happened, and so to be fair about one really needs to have broader perspective. I think Eric pointed out and you heard presenters from OMI and Filter speak as to why they think that they can get cost savings in the design and construction. And if you want an additional discussion on it I'd invite those speakers to come back up and help respond to that. This is a thought, it's an idea. We're not saying this is the right way to go but I don't think that in your minds you should give up and say I can't meet the same construction schedule because this says you can in my view.

This slide is meant to be a representation of some of the DBO projects where you do have the long term stuff that started after 1997 that we've been involved in at ARI, where we've been procurement advisors. I also picked a couple on that were actually asked by that particular city to stay on and be the owners rep during designer review construction monitoring, and operations monitoring. This is just to give you an idea of some of the size of the plants, of the waste water plants. The DBO savings in millions that are there in terms of the DBO. And when I say DBO it means over the term, it's the life cycle savings. In the next column I tried to break out for you how much was saved when one compared the actual design build costs to the baseline for just design build forgetting about operations for a minute. And you can see one case for example in Massachusetts, savings on the capital improvements, they saved $10,000,000 of what was

projected on the $20,000,000 project, it's a 50% savings. On this project the construction is done. It's been accepted, tested and completed for that $10,000,000, you can see the examples. I would also like to point out that if you look at the situation on Lynn, Massachusetts which is a brand new waste water treatment plant. The savings didn't appear on the design build portion they appeared on the operations portion.

Stockton was a contract just signed this past February and the commence date is to be August of this year so I can tell you in actuality that its going to end up being the way it's contracted to be. If you'll look at the contract and compare those prices you will see that there's a savings on design build portion of $49,000,000 representing 44% in compared to the baseline cost for design construction and improvements that give less of the savings. For $75,000,000 we took into account the operations. So its gives you a sense of these particular projects because it's done, finished and operation. He proceeded to discuss other contracts with other cities.

Alderman Davis: Jim, you mentioned Sioux City, Iowa.

Jim Binder: Yes.

Alderman Davis: From my understanding and from what I've got here from the Sioux City Journal it mentions the process actually began in 1999.

Jim Binder: Now the process, they've got an interesting situation in Sioux City in that they do not have any enabling legislation for DBO. As you saw on my slide of Sioux City that's a design, operate contract. So they spent several years trying to figure out essentially how to work the procurement process to give them a cost savings and reduce risk because they didn't have enabling legislation. So ultimately they came up with the design operate concept, they thought it was better than the traditional. The actual procurement process and so far, the RFPs only now penalize your proposals were received. Essentially, I think at the end of May of this year. You have to also be careful reduce paper accounts of when a process started because you have to really look at it again what are the initial stages of the project you're trying to deal with a situation where you didn't have enabling legislation or the concept that was being developed.

I'm going to just wrap and then get to the questions again. What do I think would need to be done to make a decision as whether it makes sense here in Fayetteville to go with the DBO option or not.

We tried to throw some things out here, or I did in this presentation, I think we need to address certain issues yet, and certain things need to be clarified. There needs to be additional thought given to the legal framework for a procurement under DBO considering Act 1297. I think we kind of agree that you can't do an upfront cost competition it has to be qualification based. But it can be approached, that I suggest you try to achieve some benefit on the cost savings end and contract end and the approach that it be done as I suggested. Is that not possible, I don't know. These are just thoughts right now but obviously I haven't had a chance to talk with you about how well this might fit together here, and that kind of discussion needs to happen. Just as important in my mind is meeting with several of your state agencies and spending some time

with them on how you would intend to apply this DBO approach in Fayetteville if you went that way, and seeing if they are comfortable with that approach. How would you do the funding?

When we did the Taunton, Massachusetts project that was the first DBO in Massachusetts, the state agency there was DEQ, they had never done SRF received a revolving fund loan but they did it and it was accomplished.

I would say the same things in terms that there needs to be some discussions with DEQ, and the Department of Health. You are on a schedule of permit issues, there needs to be some further discussions with EPA even though they're governmental supportive of this approach. You tell them you want to make sure that you're going to okay with them on the approach and scheduling. You don't want to get into a situation where you might have construction work and schedule issues.

There may be further questions addressed that we want to reflect on more. We've tried to give you off the cuff responses based on our experience tonight. And I'd like to talk a little bit more about some of the issues that have been raised too. And so what I would suggest is that an investigation be done. And then I would suggest that a plan. You've got to plan now for DBO procurement. I would suggest that you develop and take as a starting point, that schedule I threw up there as an idea under DBO and refine that, and talk about what approach would be taken and to try and garner a qualification based only on procurement. The advantages of a DBO you might get relative to cost savings contract term and technical approach. I think in that DBO plan you should go into their approaches as agreed to and see how that works relative to schedule. I know you're going to want to know how much it's going to cost to do this. You've already raised these questions tonight in terms of the advisors. Our experience has been the cost for advisors on this kind of procurement can run any where from ½ percent and to maybe a couple percent of your construction costs.

I would suggest that if there's enough interest in this approach these things can be done not in a long time frame. I'm suggesting maybe you need three or four weeks, four weeks if you could have it to come back and set the meeting to council and present a DBO plan that's more specific than what's been presented tonight and have it to compare that to your current DBB plan before. I personally would be comfortable in overseeing it. You're chaired with making a decision as to whether it makes sense to proceed with one approach or the other. And even if the cost savings aren't there and there's concern that you get the competitive pricing under the qualifications based procurement there is tremendous value in the guarantee of the construction price and the guarantee of construction schedule and the guarantee of performance over 20 years meeting permit conditions.

You're not going to have that regardless of price under a DBB procurement. Sometimes communities are willing to pay more for a DBO process just to get those guarantees. It's a matter of comfort level for the city.

I think, mayor, I'm going to end at this point.

Mayor Coody: Thank you very much. Right now I would like to open the discussion up to anyone in the room that would like to ask any questions. I know there are a lot of engineers in the room tonight that certainly have an interest in this. Some of the water folks are here. We have a lot of folks that might have a question. Does anyone have anything they would like to ask and we'll see that you get a microphone. Anyone want to break the ice with the first question? I know some people have questions.

Alderman Rhoads: I'd like to ask the city attorney for an opinion on probability of legal action if the city went ahead with the DBO approach? And how much might that delay the process?

Kit Williams: I've discussed this in a six page memo to the City Council that I was able to prepare today. Just getting back from vacation I couldn't get it to you earlier and apologize for that. I tried today to evaluate all the potential litigation situations we might have and the only one that really causes me a lot of concern is the potential taxpayer illegal exaction type case. What concerns me is that when the legislation was drafted it talks about qualification based selection process, but in a subsequent section it talks about the city should accept or shall accept the most advantageous bid. For me I've got a little problem in thinking you cannot consider cost at all when you talking about what is most advantageous to the city. I do agree with Eric that the better interpretation, I think would be qualification based only, and you wouldn't talk about cost. The problem is that if a court disagreed with us and said no it says most advantageous and that means you've got to think of cost and therefore you selected the wrong person. Therefore your $100,000,000 contract with them or if it's a design build operate for 20 years maybe it will be $250,000,000 contract with them is illegal and therefore an illegal exaction. And the very bright attorney that is saving the taxpayer's all this money not spending on this illegal exaction is entitled to about of 15% of all the money he saved. You can see there's such a payoff for the bright attorneys that we have in this area that specialize in illegal exaction lawsuits, they have been very successful over the years and we better not discount their abilities. Even if we are 90% sure that we are going to be right on qualification base 90%, if its only 10% then you hit the jackpot and you get $30,000,000 if you get that 10% there's a lot of attorneys that are going to take that shot. I would think that we certainly could be facing litigation from a taxpayer's suit if we go forward with the design build operate system the way the statute is currently written. I wish everything would have gone one way or the other, and made it clear one way or the other. I mean I'm not going to take a position where the design build operate is the best system, or the worst system. I'm looking from the legal perspective of whether or not it's likely or not that we would get sued. If we do get sued what do we do, do we continue with the project and potentially increase our damages, do we stop it right then. These are decisions that the City Council will have to make, so that's my main concern.

Alderman Rhoads: I'd like to ask Kit some questions. Kit could we be sued if we go the other way?

Kit Williams: Yes but unlikely.

Alderman Rhoads: Unlikely, okay. I realize that you just got back from vacation, I did read your memo. Thirty-seven other states have adopted this same type of enabling legislation. Have

we had a chance to look at other statutes and other court interpretations in other states that may be similar to what our statute looks like?

Kit Williams: No I haven't studied other state statutes, although you heard Eric talk about that there are some states that are kind of similar to ours, and then a lot of states are not where they clearly allow cost to be part of a selection process as you are aware. The Arkansas Supreme Court can look to other states if they want to or they can just say this is Arkansas law and we're the top judicial body of the state and we're going to decide for ourselves. The problem that I have is that until the Arkansas Supreme Court has interpreted this statute, nobody anywhere can tell us what this means for sure. Now we can get 90% maybe, but even at that I think maybe that is stretching it.

Alderman Rhoads: This is more of statement I guess to my fellow City Council members and I'm not arguing for this or against this I'm just talking about the issue of every time we turn around we will be faced with some one trying to sue us because of what has happened in the past, and if that makes us walk down a path that is too tentative and not in the best interest of Fayetteville, then I think we need to think long and hard about it. We've got good lawyers on the city staff and we just need to get the best interpretation of the law and not let the fear and the threat of plaintiff's lawyers keep us from doing the things that are in the best interest of the citizens of Fayetteville.

Mayor Coody: Any other questions? I'm certain there'll be some more questions.

Don Evans: Today we've heard a strong advocacy for design build operate. And certainly that is a valid procurement process in that is imploded in the industry. The city is to be commended and the mayor is to be commended for looking at it inlight of the opportunity that you have here in the State of Arkansas. There have been a number of comments made that compare DBO to DBB, and I'm afraid that the advocacy suggests that DBB is a poor way to approach public improvements projects. I think we know quite the contrary. Your own experience with DBB has been design bid build, I think has been quite successful over the many years of history in the City of Fayetteville. Some of the comments that have been made concerning the cost savings, we have, our design group has had the opportunity to consider the DBO strategy and what kind of opportunities might exists for scheduling cost savings here, as has been discussed we don't see the opportunity for quite the magnitude of percentage savings because of the specific nature of your project. Particularly with respect to the schedule, the schedule that was put on the wall just a moment ago in my opinion is quite, what's the word I'm looking for here?

Mayor Coody: Optimistic.

Don Evans: Optimistic. To think that we can accomplish and clear up some of these questions and uncertainties that exist in the procurement process and acquire a contract with a design bid build operator in nine months is quite fast, and the experience with other cities would suggest that that might not be accomplished. The difficulty that you have as council people and the mayor is what's the likelihood that we're going to make that? I just want to point out that at least with the design bid build process you know you have a system that works. It has the potential to achieve savings against benchmarks, nibulous benchmarks that sometimes exists as has been

pointed out. Quality engineering and quality contractors can have projects that produce low percentages of change orders. I think that we would all stand behind the design work that we've done and be willing to share to you our change order experience which is quite comparable to want has been shown there. As you continue to deliberate the question of DBO vs DBB I would ask that the DBB side have the opportunity to present to you much the same advocacy that has been given to the design build operate side tonight. I compliment you for looking at it. It's certainly something that should be looked but let's look at it within the specific constraints that Fayetteville faces and the project that you have. Thank you.

Mayor Coody: Thank you now. I think that is exactly what we've tried to do here tonight is look at it in the context of Fayetteville's needs. We haven't tried to say that one size fits all, what works for Lynn, Massachusetts will work for Fayetteville, Arkansas, I don't believe anyone of us are advocating that. One of the things we want to do is have an open airing of all sides of the issue because I feel and I'm sure the Council feels with me, obligated if a new option shows up on the horizon and has the potential, then we have an obligation to research and explore it. It may not go anywhere, we may use part of, we may not, we may stay on the same path but we have an obligation to explore for the benefit of the citizens of the community; and I think that's want we're trying to do here tonight. I appreciate your comments.

Mr. McManus: Thank you. You've talked a lot about the DBB which is really how this was pretty much addressed but one thing I would seriously consider is to look at 20 year maintenance contracts. The design build is one issue but with 5 year contracts a level of costs. If you allow the operators to come in and recommend equipment that they would put in over the 20 year period, they could get a return from their investment or recapture that investment, I'll guarantee you that you can save money on your operation under this. One thing I think about is on your Noland Plant I would try at a minimum even if you don't go to design build get your operators to coordinate with the engineers and discuss what equipment will get you a savings over the 20 year period. In a sense almost a modified approach toward design, DBB and DBO. There are a lot of approaches you could take that is short of a definitive DBO especially the issues of concerns of whether or not the legal action is taken against you. It could be a cooperative effort with the community engineers and the operators and take a longer term look because there's many saving that come from this program, the 20 year operational maintenance because the companies will put in equipment that will ultimately will reduce cost over that 20 year period. So as you go through this I don't think you should discount the advantages for looking at the longer term operation maintenance contract as the construction cost. And I think there's tremendous advantageous by having the engineers and the operators spend a lot of time together and discuss what is in the best interest of the long term cost and which equipment will serve the purpose with great savings.

Mayor Coody: Mr. Binder is there a way that we could take advantageous like Mr. McManus says if there is a way that we could go ahead do a procurement for our operator, say for example the City Council says we aren't going to do a DBO and strictly stick with DBB, can we get the operator on board early enough to work with these engineers. These engineers have never operated the plant, they've never probably poured concrete for a plant. Is there a way we can bring an operator in to be an interval part of this as say a consultant and work with the engineer and the construction people to gleam from the savings if we stick strictly with the DBB?

Jim Binder: I think that possibility exists and I think that there's merit particularly if you consider the longer term operational 20 year period as opposed to five. But what you're giving up if you separate the operations from the design build portion maybe a guarantee for the long term performance of those facilities, you might find a more sufficient way to design it. That's the whole point of the DBO is having one team come up with a combined solution, so once you start to split that team and if the operator only has the ability to make comment, but his comments might be well received or implemented and you might run into the guarantee issue relative to operational performance.

Mayor Coody: The way I look at this is not only the legislation is not optima because it's not bid based it is qualifications based. If the City Council decides design bid build is the way we want to go then if there are some other options to where we can gleam some increased benefit over the long haul and just throw the baby out with the bath water. I wonder if there is an option there if we're going to do DBB, then I wonder if there is a way we still gleam some of the advantageous there.

I'm thinking Don or maybe Mr. Rosenbaum might have input on that.

Don Evans: You know I'm the representative of OMI, your existing operator. We absolutely will coordinate and cooperate with the city in any method you choose.

Mayor Coody: What a politically correct answer.

Don Evans: Whatever you want to do. We're an advocate for the City of Fayetteville you have an option that you came up within April that's going to be law next week and it works well to coordinate.

Speaker: Any alternative that you can come up with gets you part way to where you want to be. Naturally I think the DBO approach as Jim indicated provides the full range of benefits from risk reduction and cost reduction. Just like with Sioux City they had a situation where they couldn't go the whole way. And they determined that an alternative approach might give them a lot of the benefits that they want, it can help without a doubt.

Mayor Coody: Thank you. Any other questions or comments?

Alderman Thiel: We keep hearing from the people that came down here to present this project plan. I think a very good point was made up here that we need to give equal opportunity the DBB to give the same kind of a workshop because I know at least one alderman requested that this workshop have both viewpoints. All we have seen tonight has been advocacy for the DBO plan. We've not heard with the exception of the one brief statement, from the other way it could work. I really think it is really unfair to us to just give us one process and the advantageous of that and it's strictly by people that their mayors seem to work for these companies that are represented here. I feel like we really do need to hear the other side if we're going to consider this at all.

Mayor Coody: Sure, I think to be more accurate I was asked to present not only the DBO successes but the DBO failures. I think that's a more accurate assessment and so far we've asked about failures. Atlanta, Georgia is one that did not go well.

Guest: It's not a DBO.

Mayor Coody: You're right. It's not a DBO. Thank you very much.

Okay good. I stand corrected. We tried to find some failures. Everybody that we talked to will confirm that when we spoke with them we said I don't want to bring a rosy scenario to the City Council. We need to bring the pros, the cons, the good side, the dark under belly, we need to see the successes, we also need to see the failures. Don't bring us just one side of the coin, bring us both side and I don't think that anyone here would disagree with the fact that this was put on table for them to bring to us, and it was just hard to find failures. That's the problem.

Alderman Thiel: These people that paid consultants to do this. We're not paid to do this but we will certainly make every effort to substantiate our sources of failures.

Mayor Coody: I don't mean to get into an argument with you. You don't have to do that. In about another five minutes or when the questions stop, I'm going to ask the Council what if you want to; as Mr. Binder has suggested, take four weeks to do some more research and talk to Soil & Water to see their take. If they say no it stops right here tonight. If you say yes, Soil & Water might say no. It would stop right there. If they would say yes then DEQ might say no. It would stop right there. If they say yes then the legal situation might say no and it would stop right there. There are a lot of off switches in the next step that would keep us right on track with where we are. You have to research the things that appear to be failures. You're welcome to say no design bid build do not want to consider any other options. If you do that tonight that's exactly what we'll do.

Alderman Rhoads: Mayor I can't speak for the rest of the Council but I am kind of getting a sense of the way people are pretty tuned into this conversation that everyone really wants to hear both sides of the story. I think most of us feel a little bit more about the old way of doing it then we do the new way and I think we felt that this was educational and very beneficial. What I think I would want, and I would bet that I'd be joined by most members of the Council, is somebody kind of rap all this up because if I were to try to make a decision here tonight I'd probably have about 100 more questions to ask; before I felt comfortable in voting. I think what I would need is what is the city's recommendation. Are we recommending that go completely back to the traditional way of doing it or go completely the other way or a blend. And if so, are we talking about a blend, for just either one of the plants. I would leave the pipe a lone. I'd want to hear something like that from the city. And based on some of the questions that have already been tossed out here, I think there's plenty to go on as far as coming pretty good recommendation. I don't know if you all can formulate something you know by the next City Council meeting, maybe three weeks from now, or something like that, but it seems that time is of the essence. I know these people probably definitely feel that. I know that other people that have called me telling me that time is of the essences. I don't think we can make a decision tonight, that'd be my take.

Mayor Coody: Don are you still on the phone?

Alderman Marr: Yes I am.

Mayor Coody: Do you have anything to add. We've missed you here tonight.

Alderman Marr: It's been very educational. I don't know that I have anything to add. The point that takes away the major advantages it sounds like is the guaranteed side of what you would get out a guaranteed time frame, guaranteed costs, etc. It's hard for me still to understand how we compare that to a benchmark because I think the benchmark seems too weighted towards the operational link. Without knowing how we break that out in comparison to the point that Bob brought up also about how much of our project has variable costs vs. laying pipe are things that I would need to know a little more about. My biggest concern is waiting, continuing to wait and I'm relying on the city staff and your leadership to make sure that we're progressing to a point that we're not going to be talking about development moratoriums because we can't make a decision. My concerns are that we did start our election in Fayetteville at the same time that Beaver Water District talked about, Fort Smith talked about, Springdale talked about and it seems that we're, and I think rightfully so, looking at the options. But at some point we need to begin to feel like we're really taking a step forward. My only concern is that we evaluate the information and make decisions and we move forward because I have this fear we're in paralysis of analysis.

Mayor Coody: I understand you're concern. One thing that has been clear from my discussions with folks is that everything that we have done to this point, as far as the engineering goes and all the research and the design development has been done, is usable no matter what we do. Also I think that I don't believe we're 33% design right now either. Before we could even make the decision to go with DBO or DBB we'd go ahead and at least get 33% design completion done. Is that basically what I heard earlier Jim?

Jim Binder: The point I was trying to make relative to 30% design is that would enable you to either confirm the $125,000,000 estimate or perhaps come up with a more refined estimate, and that might be the benchmark that you would use to compare. If you were going to compare it to something that comes back from the market place that would come back after that process I had shown on the procurement where you would have a offering from a private company to compare to that and then you would have to, through a negotiation process, to make sure that you get the terms and everything that you want. But I think you know that I don't know what level of confidence exists in the $125,000,000 estimate. If it's a planning level number only, then people need to recognize it for that. And I don't think that would be the number you would want to use as a benchmark for comparison to what a private DBO company might be able to do. So my thought was that maybe you advance the current project. One suggestion was that maybe you think about advancing the current project up to the 30% design level at the same time in parallel you consider this DBO approach to the next milestone of getting price information from the market side then making your final decision at that point. Certainly you don't have to do that. But I think some of the questions that has been raised tonight can't be answered until you move down this road a little further to be perfectly honest. I don't think that if you took the time to do

that you'd lose anything on your schedule, because the work you would do getting to your 30% design would be worth that. You were going to do that anyhow if you proceeded under the DBB approach.

Mayor Coody: Now if the highest likelihood for savings is in the construction of the east side, or west side plant, what would it be like to go ahead and continue on, I now Swifty wanted to ask a question, if we move forward with all the processes. Do the 30% design and take a special look at the west side plant as a possible DBO approach.

Jim Binder: And that's a possibility. I think that under approach what was meant was that you really need to think about do you want to subject the $125,000,000 estimate to the DBO approach or maybe you just try and pick those where experience tells you you'll have your greatest chance of getting a benefit by going to the market place under DBO. Maybe it is just the west side or maybe it is the improvements to the east side plant.

So I think that in order to specifically answer some of the questions that are being raised tonight by council you really need to take this to the next level beyond where we are at tonight and be able to come back at a second meeting to have something more definitive to say in terms of an approach that perhaps might work best in most peoples' mind under a DBO approach. We haven't had the opportunity to sit around a table and kind of kick things around too much.

Mayor Coody: So does anyone here have an estimation, if we needed to go to 30% design no matter what we do, DBB or DBO, we've still got to go through the design process. Does anyone have an estimation of how long it would be before we would even be at the 30% point? Either way we go. Any estimations? I hear several months. Would several months be a fair assessment? Six to eight months?

Unknown consultant: Mayor the larger project the longer period of time to get there. One of the difficulties we have in giving you an answer is that under the schedule that we have laid out we we're going to be under construction on some elements of the plant in six months.

Alderman Reynolds: Mr. Mayor, I'm on the Water and Sewer Committee, and Bob Davis, we've been around a long time and we've got some new members that's not familiar with what we do. So if they're not comfortable voting tonight I'm willing for them to meet with the DBB folks and get their schooling. But I'm not going to vote tonight if they're uncomfortable, but as far as I'm concerned I've road the wagon all the way through on this thing and I'm ready to vote tonight. I know what I'm going to do. The way I see that west plant is $43,000,000, the Noland Plant is going to be a $22,000,000 upgrade. We've got $60,000,000 on upgrading lines and pumps for a total of $125,000,000 so I really don't see where these folks are going to do us a lot of good. We've got a lot of cities that are shutdown that need to get rolling. We've promised a lot of these little towns our support back when they started getting water and sewer services from us. So I think we need to get the ball rolling and I don't think we need to go back to ground zero with a new organization. So I'm willing for these new council members to meet with the DBB and let them get their thing worked out. But I know how I'm going to vote. Thank you.

Mayor Coody: Alright. Swifty has basically made an assessment here that he would like to scrap the idea of moving with any kind of DBO assessment and move forward just as we were with the DBB. I saw some heads nodding there. Carl, do you want to go ahead and speak?

Carl Yates: I really didn't plan to say anything tonight. But after sitting here and listening to the presentation and it's a one sided presentation which we understood it was going to be. Mr. Binder you made several assertions about the design bid build that was actually quite contrary to what it really is. You should know better. You alleged that, I guess the feeling I got quite frankly when listening to your guys talk was that somehow all of the sudden the knowledge all resides not with the traditional engineering and construction firms but with the DBO people.

Mr. Mayor I just want to say this to the Council. I lived in Fayetteville all my adult life that's with the exception of the three years that I was out for the Korea War. We do have one of the contracts for design but I have a lot more interest other than just being able to do this design work. We've heard a lot of talk about the savings. I think those savings are an illusion and I think that it's been pretty much brought out.

Mr. Mayor, you asked me after your announce at the agenda session or after the agenda session, you said "Carl I perceive that you're not for this process," and my answer to you at that time was exactly what it's going to be for the Council. You have spent about year to year and half putting a process in place to see that this project is built in a timely manner and as economical as possible. You hired Burns & McDonald to do the program management, part of that worked. They have put together a value engineering. What they're going to do is and they are going to review our work at the, Jerry I'm not sure at the 30 to 35% stage and they're going to tell us, if we're gold plating anything they can say you shouldn't gold plate that so we've got this in play.

I've had quite a lot of conversation with various people around the country, including engineers that have experience with design build and design build operate, and also including several owners in many cities. While it's true in some cases the design build fits very well. I just think that given where we are and in this project that it's appropriate. What I found out was that in many cases we go through this process to making a selection and then all of the sudden the bottom drops out. The City of Fayetteville, in my view is just doesn't have the luxury of taking that chance. You've got a process in place, it's worked well say for 100 years, forever. At this stage of the game I just don't see any reason to chance.

I would suggest to the Council what you really ought to do is make the decision and I'm going to suggest that you do it tonight, Mr Rhoads to move ahead with the procedure that you had set up. Now certainly as Swifty suggested, we're more than happy to meet with the Water and Sewer Council and talk about it. But I would suggest that it's time to move on here. I just don't think its time to try this new process. I think the stakes are just too high. Thanks Mr. Mayor.

Mayor Coody: Thank you sir.

Alderman Davis: Dan I'd like to ask Kit, Robert asked him a while ago for a legal opinion could we be sued and things of that nature. My question is you've been researching this now for a couple of months pretty much or so. What is your opinion, what do you think.

Kit Williams: First I want to agree with Alderman Rhoads in that City Council should not be just intimidated and never take action because someone out there might threaten suit. And I don't think that the City Council has done that. For example in regulating Thunder Valley we knew very well that we're going to be sued by the owner's of Thunder Valley and yet you still went forward and I did not recommend that you not go forward. There'd be very few times I'd recommend that you not do action and it's only when there is severe danger to the city and taxpayers. It's true that the city could get sued even in a design build situation but it's not going to be an illegal exaction suit. It's not going to be a suit where the city could loose 10's of millions of dollars in attorney's fees. And we could potentially do that if we went with a design build operate because if the law is not clear we would do our best. But the best advice from the lawyer to his client is how to avoid trouble rather than try to get out of once you're there. So my advice to you will be no matter how far the engineering might be is that if you go down the design build operate route you are taking a giant gamble. Now maybe you think this gamble is worth it because you can save 10's of millions of dollars, and if that's your judgment I will do everything I can to try to make sure that we're safe as we can be. But you are risking the chance of not only a suit against us and of course, if you remember the Town Center suit when we were sued there, they asked the judge to suspend the project, to stop the construction and fortunately the judge did not. It was a close call, she very well could have suspended construction and then the Town Center would be right now being built.

In $125,000,000 suit they might ask the judge to suspend construction. I don't know what the judge would do. We would certainly probably ask not to suspend construction because we need this plant but that's a risk. So my advice will be on this particular issue that I could just never recommend a design build operate contract with the confusing state law that we have.

Mayor Coody: I'd like to add, Shirley Lucas hadn't spoken, go ahead.

Alderman Lucas: Well I'm one of the new members on the committee that we're talking about but I've read a lot about this and studied this very thoroughly. I think the reason we were interested in listening to the DBO process was the carrot that we could save money. And after listening tonight the question is we may not since we have to approach this on experience and on cost basis. So even if we took the west plant and tried to do a DBO we still could not do it on cost savings. If I'm understanding right we had to do it on experience of the people. So the carrot that we wanted to see is not there, for me at least.

The timeframe doesn't fit real good here, in four weeks when Phoenix took four years. They even took six months studying it. It kind of scares me and I don't want to put this off any longer. I want that west plant built to be honest with you.

Mayor Coody: Lioneld would like to speak as well it looks like.

Alderman Jordan: These are my concerns after listening to all this tonight. And I'm glad we've had this discussion but my concern is this, this is unproven any where in the state that I know of. Two, we could have possible lawsuits for illegal exaction. That's been given to us by an attorney. Another issue that concerns me we have made promises to people that we have

done business with in this city for years and years and years, and I think those need to be kept. I think we are gambling with $125,000,000 of taxpayers' money to possible buy a pig in a poke. We'd be going from the know factor the way we've always done business to the unknown factor, I really personally think it's too late in the game to change the rules, and that's my opinion.

Mayor Coody: If I might go ahead and intervene. The clear sense that I'm getting from the City Council is that there's not a whole lot of interest to research this any further. Basically the intent of this meeting was for everybody to come together which we have done, from all over the country to discuss this. Innoculate the idea into Arkansas because eventually, if it doesn't take root in Fayetteville now it may later. We're going have another project later on down the road where we might be able to use the design build operate method. Other cities in the state might be able to take advantage of this process with projects they have on the horizon, that they haven't gotten where we are right now. We'll have time to do more legal research. At the next legislative session we'll even be able to tighten up this legislation. This was manipulated before it was approved by folks that certainly had a financial stake in it and wanted to maintain that financial state. I know that Mr. Young and the Sewer and Water Commission probably know more about design build operate now then they did when they walked in the door. I don't know what your assessment is but I bet your, I hope at least that you are all glad that you've had this experience and can walk away feeling like you've learned something, this may be a process which might be beneficial to other taxpayers in some other town at some other time. It's clear that I think the City Council is more interested in moving forward with the existing structure that they have in place and I certainly don't have any argument with that. My purpose tonight was to bring forward all these options, discuss them openly, lay everything on the table and make a decision about whether this had enough merit to it to consider it further or not. The feeling that I get from the City Council is it does not, at this point I would just as soon go ahead and ask the City Council if you would like to prefer moving forward with the design bid build and not have further decision on design build operate. Is that a fair assessment?

Alderman Jordan moved to scrap the idea of DBO and continue to move forward with the DBB. Alderman Reynolds seconded.

Mayor Coody: Okay we have a motion and second to scrap the idea of design build operate and continue to move forward in the design bid build. Yes, ma'am.

Alderman Lucas: Can I say one more thing.

Mayor Coody: Please.

Alderman Lucas: When I first looked at all of these contracts that we have to begin with I thought gee, it seems like there should be one person that's ultimately responsible, and that's what I like about the DBO, so I agree with you. I think we should pursue this later on other projects, not just to scrap as you say completely. Maybe on this project go the original route but please continue to do the research on that, and also the legislation and everything. I like the idea there's that finish, that price and they have to stick to it and things like that.

Mayor Coody: I appreciate your comments there. The things that I found most attractive about this and the reason I brought this to you is because the fact that experience has shown so much cost savings from other cities that have experienced this is the time savings that adds up to money. The fact that instead of a one year warranty you get a twenty year warranty on your plant and the fact that you can extrapolate your cost out for the next 20 years and cut your cost savings not only in construction but operation as well, you really save money in the long term. Those were things that I felt were important enough to discuss to bring this for you tonight and I really appreciate you're taking the time to listen to this. I know that with the legislation not being optimum that put us kind of behind an eight ball, still the idea is worthy of consideration I would have felt like that we wouldn't have been doing our job to at least not consider and explore the options because we have responsibility to look after taxpayers' dollars, if we just do something just because that's the way we've always done it even when a new option becomes available, well we aren't even going to consider it we're not doing our jobs. We have considered it tonight and if the discussion is to move forward with existing status quo then that's exactly what we'd like to do.

Alderman Rhoads: The only place that I have difficulty with this whole process is I would have felt better if at some time in this meeting before or during or right now I had something from the city saying, "here's what we recommend and here's why, " and that's why I was advocating that we wait another week, another three weeks. I would hate to stick to the old ways just because we're use to it. I realize that we've done business with these people for a long time but we don't have a signed contract with them and that doesn't mean that they will be cut of what we do in the future, again I'm not advocating that we go to DBO. I just feel like I haven't had something from the city saying here's what I think you ought to do and here's why, and then City Council members you all vote on it. I don't know, maybe by the fact that you're not proposing something maybe what you're trying to tell us is that you don't feel like the time is right.

Mayor Coody: Well certainly with Kit's legal assessment its hard for me to stand up here and recommend we do something that he says is a huge risk. I don't want to do that, no one wants to do that.

Alderman Rhoads: Let's hear the percentage on it. What's the chances on losing and having to pay out 10's of millions of dollars? I'm trying to set the stage for what I think is the process in which you could make better decisions. Number 1 you get your city attorney to look things over and give you something that, okay here's his idea of what a huge problem this would be vs. someone else's might be different. So I'd like to know in percentages to back that up a little bit. If we're going to make a $125,000,000 decision to $264,000,000 decision whatever that number is, it would seem that we ought to allow Kit to get back from vacation, research a little bit more, have him check into 37 other states to see if there's applicable law that can help us. I'd also for future reference or future matters that we look at I want the city to give us something that this is what we propose and here's why we proposed it. As opposed to, here are some ideas that we can float around, what do you all think. That's my criticism of the process. Not the people, just the process.

Mayor Coody: I understand and it's a valid criticism. The only thing is where we're at a disadvantage is that it would have been tough for us to bring you a recommendation when we don't know what Soil & Water would think because they hadn't heard the ins and outs of DBO. We would need to go from tonight forward for another few weeks to found out more about what the possibilities are before we could make a recommendation. I would hate to make a recommendation to Council saying I think we need to the west side plant here and part of the east side plant and find out after two more weeks of research sorry you can't do any of that, and then we come back and made the recommendation but we did it two weeks too early, so we don't have a enough external information from people in the outside world who are key players with us. We don't have enough input from them yet or we don't have that tonight to be able to make a recommendation to Council. I wish we did but we don't have that and there's no way we really could have in the last three and half weeks which is really how long it's been, to do this huge assessment and then be able to develop some kind of recommendation. All we could do tonight was basically to bring you an idea and bring people in to discuss the idea and describe the big picture. If the big picture was attractive enough the first off switch is the politics of it. I agree with you but generally speaking the politics isn't there to move forward on this. We could even do four more weeks of research and we'd still wind up with the same conclusion by the tenor of the City Council. I wish that I could have brought you a recommendation tonight but we did not have enough information from the other key players in the process to be able to do that. I appreciate your assessment.

Alderman Marr: One thing I want to add on this is that what has intrigued me in this process probably more so is the longer term operation agreement. It appears from the information that you had presented to us that there are, the savings are more in the long term efficiency and productivity of how a plant operations when it moves forward. Certainly a part of this, I want us to move forward and I'm probably in more agreement with many of the council members who have spoken about continuing with the design and bid and getting the thing built but I would really encourage and I agree with Robert's point in this fact that I'd like to see a recommendation coming back from you as the leader of our city on how we might address the operational component. How we might go ahead through the procurement process of selecting an operator to involve them in the design process so that we get maximum efficiencies and lower cost long term because it appears that the bulk of the savings and you even said this earlier in the presentation tonight is not only in the build portion but in the long term operation of it. I hate to think that just after this discussion we would not advance further discussion related to that particular item.

Mayor Coody: I appreciate your comments very must and that's exactly what we'll do Don. We will bring forward consideration of whatever we can find that benefits from this process. It won't be the design build operate by any means but if we can take what we know tonight and roll it into what we're doing and save some money, save some time, have some long term security then that's exactly what we will do and we will make a recommendation at the right time. I appreciate your comments Don.

I'm going to wrap it up tonight because we're supposed to be out of here five minutes ago. I want to thank everyone for coming tonight.

Sondra Smith: You have a motion on the floor.

Mayor Coody: We have motion and second on the table to move forward with design bid build process.

Alderman Marr: Mayor, I have one other question. Kit, I think our Rules of Procedure is that I actually need to be present to vote. I just want to make sure--I'm not going to vote unless I should.

Kit Williams: I would be uncomfortable if you tried to vote Don.

Alderman Marr: Okay.

Mayor Coody: You can vote we just won't count it.

Alderman Marr: Okay don't count me.

Alderman Rhoads: I have a question, are we voting to do the whole project including the operational aspect of it, design bid build. I definitely agree with what Don just had to say about the operation for the next 10, 15 or 20 years. So are we voting to not look at a DBO piece for that?

Mayor Coody: Yes, essentially yes. We would be looking at design bid build standard just as we've been looking at for the entire process until tonight. That doesn't mean that once the City Council votes on this and if the motion passes to just stick with design bid build, that we won't talk to USFilter, OMI and whoever else might be potential folks and see if we can't strike a bargain with them some how to bring them in early on rather than later to gleam some of that prospective and experience, I don't know that we can, we'll talk with Kit. We'll talk with different people and see what advantages we can find and incorporate those into the process.

Alderman Rhoads: I just don't want to vote on some thing tonight that would keeps you from being able to do that.

Alderman Davis: Mayor I agree with what Robert and Don just said. I think that we need to go ahead and continue especially on the west plant and possibly on Nolan to look at those additional options. But I think we need to get on with the laying of the pipe. The new pipe and the old pipe in getting it replaced, I don't what to hold that up any longer.

Mayor Coody: Alright.

Mayor Coody: The best benefit that we have had tonight besides introducing this idea into the State of Arkansas is the fact that now we can take new information and blend it into the design build process and see if can't come up with a marriage that is going to be beneficial to everyone. We will get some good out of this meeting tonight.

Alderman Jordan moved to amend the motion that we continue discussion on the operational end of it. Alderman Reynolds seconded.

Alderman Jordan: On the east and west plants.

Mayor Coody: Alright the motion and I'm assuming the amend is seconded and approved. Alright. Shall the motion pass to stick with the DBB?

Upon roll call the motion passes with the amendment by 7/0 with Alderman Marr not voting because he was present by audio only (via telephone).

Alderman Thiel: Could I request that the contracts that were put on hold at the last agenda meeting be brought forward at this next Council meeting.

Mayor Coody: I guess that would take a special vote at the City Council to put those on the agenda.

Kit Williams: Well you could actually take a vote right here to put it on the agenda on the next council meeting.

Alderman Thiel moved that we put those back on the agenda. Alderman Jordan Seconded.

Mayor Coody: Shall the motion pass?

Upon roll call the motion passed 7/0. Alderman Marr did not vote because he was present (via telephone).

Mayor Coody: I thank you all very much for coming to night. We have accomplished our mission.

Meeting adjourned at 10:00 pm.

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Sondra Smith
City Clerk