

**EXECUTIVE SESSION MINUTES
REGULAR MEETING OCTOBER 27, 2010**

MOTION made at 6:02 p.m. by Freeholder Crabb to go into Executive Session for items of contract dealing with EMPCO and Bridge Q-11, seconded by Freeholder Zellman and passed unanimously.

Those present: Freeholder Crabb; Freeholder Space; Freeholder Zellman; Freeholder Zeoli; Freeholder Director Parrott; John Eskilson, County Administrator; Dennis McConnell, County Counsel; and Diane Eakman, Deputy Clerk

Items of contract dealing with EMPCO and Bridge Q-11

Mr. McConnell stated that he wanted to discuss the contract with EMPCO dealing with Bridge Q-11, which is another bridge on CR 620; this is the same bridge the Board just voted on the Change Order for; at the present time, the contractor is going to miss his completion date; he (contractor) was stopped for the month of June because he did not have what is called sheeting design for the County to review.

Freeholder Zellman asked if this was the contractor's fault or the fault of the County.

Mr. McConnell replied that it was the contractor's fault because it was the responsibility of the contractor to submit the design to the County for its review and approval prior to installation; this protects the temporary bridge and also the footings for the new bridge; as a result of that, it was pushed back a month; all the footings were ready to be poured and that's when there was four inches of rain in September and another three weeks was lost; the contractor has not asked for an extension of time; the County wrote a letter to the contractor and told him that he was out of time and would be in violation of the contract and that the County had the right to terminate him and seek damages.

A meeting was held on Monday in Engineering; the contractor brought his attorney and a discussion was held; the contractor is going to formally request an extension of time in writing; the County will get back to the contractor and say that it is the recommendation of the County that the contractor be granted an extension of time based on conditions; those conditions are going to be rejected by the contractor because the County's conditions are going to say that there are no additional costs to the County; the contractor will be pushed into the winter months, which means that the bridge has to be heated from above and below when special concrete is poured and this is a lot more expensive.

Freeholder Zellman asked when the completion date was.

Mr. McConnell replied that the completion date was November 15, 2010, and the bridge is nowhere near completed; that all being said, there are a couple of options; one is to go into what is called a "Forced Account", which means that the County does not agree with any of the additional costs the contractor will document; the County would pay the contractor strictly pursuant to the terms and conditions of the original contract; the contractor will keep a log and the County will review it as to the extra expenses the contractor will incur; the County will argue about this later under the "Forced Account" situation; the Board does have the ability now to terminate the contract and go out to a bonding company; Mr. McConnell said that it was his recommendation that the Board not do this because it will slow down this process; with the bonding company there may be another contractor to pick up the work of the first contractor which will just be a disaster, or it may keep the same contractor which will add time; the County does not want to keep this road closed any longer than it is going to be; Mr. McConnell reiterated that the County not go with the bonding company; he recommended that the "Forced Account" be utilized and argued about later; the County would go through non-binding mediation, and if the County has to go into litigation it will; he said that the focus now should be for the completion of this bridge.

Freeholder Zeoli asked if this was the result of low bids.

Mr. McConnell said basically, yes.

Freeholder Parrott explained that the metal sheeting needed to be on the side walls of the stream; a lot of times a contractor will not take the time to do this shoring; there is accretion and avulsion; accretion is erosion at a slow level and avulsion is at a faster level; State Statute specifically states that this sheeting is to be put in place; the contractor did not do this; if anything happened, and the County was aware that the sheeting was not done, the County would also be held accountable; this set it back a month; Freeholder Parrott said that his feeling was that public safety was paramount; get the job done and see what happens with the jurisdictional divide later on.

Freeholder Zeoli asked if the mediation was non-binding.

Mr. McConnell said yes; the other point is that if there is the ability for the contractor to get paid additional funds through the ARRA funding, the County will not withhold that; if the contractor can get paid for the loss because of the storm

in September, and can justify that and ARRA gives him the money, the County will not block that.

Freeholder Zeoli asked what would happen if the contractor took the money and did not do the work.

Mr. McConnell replied that the contractor does not get the money until after the work is completed.

Freeholder Crabb said that it buys the County a little more time for the contractor to do the work; if the County ever gets to the point where it is compelled to go after the bonding company, there will be more of the work completed.

Freeholder Zeoli asked if the County did this, when the project would be completed.

Mr. Eskilson said that it was hoped within the year, but he said that was probably optimistic.

Mr. McConnell said that it was possible that the bridge may be installed, but the paving would not be done.

Freeholder Zeoli asked if it could be opened to the public; he said there was a litigation aspect and there was also a travelling public annoyance aspect; Freeholder Zeoli said that he felt it was a reasonable request for the contractor to take some public responsibility for this so the public would know it was not the County's fault.

Mr. McConnell said that the contractor would not take any responsibility at all; the contractor will say that it is not them.

Mr. Eskilson said that the work just gets done and the fight and what everybody says comes later; that's the mediation process; the mediator will decide and then the Board decides whether it likes it or not or whether it wants to take it to court.

Freeholder Zeoli asked if the Board could speak on this issue publicly.

Mr. McConnell advised not to; he added that it was important to get the job done; the County will allow the contractor the opportunity to pursue Change Orders through the ARRA process and if the contractor gets some money and is happy, that's fine; the County has made it very clear that the contractor will not get any more money from the County.

Freeholder Zellman asked if there was a way to let other agencies or political agencies know about the lag in time and the contractor's fault.

Mr. McConnell said that if the County disbarred the contractor everybody is notified; the County was not going to do that at this point.

Freeholder Zellman said that she felt it might be helpful in the future because if the County knew certain circumstances about the contractor, the contractor has probably done this in the past.

Mr. McConnell said that the County conducted a debarment search on every contract.

Mr. Eskilson asked that even if Morris County had a bad time with this contractor, would that matter on a low bid.

Mr. McConnell said that he thought there was new legislation out that would change that.

Freeholder Zellman asked about the impact on past Change Orders, adding that she felt this was critical.

Mr. Eskilson said that he felt Walter Cramp would say to keep your eye on the low bid where you do have discretion and that is on the Engineering contracts; when the County takes a low bidder, the County often ends up spending massive amounts of staff work and gets Change Orders; if the County follows the quality of engineering, not necessarily the low bidder there, often times the Change Order will work itself out.

Freeholder Zeoli said that it concerned him that the Board was not involved in the process until the recommendation reached the Board.

Freeholder Parrott said that he felt Mr. Cramp was extremely thorough with the bidding process.

Freeholder Zeoli said that he felt a Freeholder should be a part of the process.

Freeholder Zellman asked if a series of Change Orders could be used as criteria for rejecting a contractor with a low bid.

Mr. McConnell replied no, because, as an example, if an engineer designs a project and the engineer does not put his full staff and expertise in it, you get a design that has holes in it; the holes create Change Orders.

Mr. Eskilson said that it is a tough call to go to the next bidder, but often times it will translate into savings and avoidance of costs; the Board is in that process.

Mr. McConnell said there was an RFQ process where you get the qualified engineers and a series of names; there is the RFP process where you qualify these individuals.

Freeholder Zeoli asked if the Freeholder Liaison to Engineering was a part of the process; Mr. Eskilson said no; Freeholder Zeoli said that he felt this needed to be changed.

Freeholder Parrott said that he felt Walter Cramp kept them informed; Freeholder Zeoli agreed, but said it was just not Walter.

Freeholder Zellman asked who chose the contractors for the ARRA projects; was it a combination of the NJTPA and Planning and Engineering.

Mr. McConnell said the contractors had to be a DBE or a WBE; there were about 14 people on this particular project that bid, but only 7 or 8 of them qualified as a DBE or a WBE; all those names had to go through the DOT.

Freeholder Zellman asked if the DOT had a part in the scoring.

Mr. McConnell replied no, the scoring was done here and the documentation was submitted to the DOT and the DOT looks at the DBE and the WBE status and confirms that it is valid.

Mr. McConnell said that he has laid out a course of action that will take place; he said he could terminate the contract and go after the bonding company; there will be no action taken now because the ball is in the contractor's court; the contractor has to request an extension of time from the County; right now, a decision has to be made if the County will go after the bonding company.

The Board agreed that it was paramount to get the project done for the public's safety and then argue about it later.

Freeholder Crabb asked what the chances were that this contractor would miss another critical deadline.

Mr. McConnell replied that at this point it was all weather dependent.

Mr. McConnell said that the Board had the option to terminate the contract or to go with the course of action that he has laid out; if the Board decides not to terminate

the contract and go with the course of action he has laid out, no action need to be taken now.

MOTION made at 6:15 p.m. by Freeholder Zeoli to come out of Executive Session, seconded by Freeholder Crabb and passed unanimously.

Diane S. Eakman, Deputy Clerk

DATED: OCTOBER 27, 2010