

MINUTES

North Dakota State Water Commission Telephone Conference Call Meeting Bismarck, North Dakota

June 14, 1995

The North Dakota State Water Commission held a telephone conference call meeting in the Governor's conference room, State Capitol, Bismarck, North Dakota, on June 14, 1995. Chairman, Governor Edward T. Schafer, called the meeting to order at 9:30 AM, and requested State Engineer and Chief Engineer-Secretary, David Sprynczynatyk, to call the roll. The Chairman declared a quorum was present.

MEMBERS PRESENT:

Governor Edward T. Schafer, Chairman
Sarah Vogel, Commissioner, Department of Agriculture, Bismarck
Mike Ames, Member from Williston
Judith DeWitz, Member from Tappen
Elmer Hillesland, Member from Grand Forks
Jack Olin, Member from Dickinson
Harley Swenson, Member from Bismarck
Robert Thompson, Member from Page
David Sprynczynatyk, State Engineer and Chief Engineer-Secretary,
North Dakota State Water Commission, Bismarck (by phone from Devils Lake)

MEMBER ABSENT:

Florenz Bjornson, Member from West Fargo

OTHERS PRESENT:

State Water Commission Staff
Robert W. Harms, Governor's Office, Bismarck
Carmen Miller, Assistant Attorney General, Bismarck
Willie Mastel, Southwest Water Authority, Dickinson
Loren Myran, Southwest Water Authority, Dickinson
Jerold Backes, Bartlett & West/Boyle Engineering Corporation, Bismarck
Ken Royse, Bartlett & West/Boyle Engineering Corporation, Bismarck

The attendance register is on file with the official minutes.

The meeting was recorded to assist in compilation of the minutes.

Since this was a special meeting of the State Water Commission, Secretary Sprynczynatyk made reference to the North Dakota Century Code chapter 61-02-08 relating to meetings of the Commission. Chapter 61-02 states, in part:

Notice of any meeting of the commission shall be given by written notice sent to each member of the commission at least three days before the meeting. No notice shall be necessary for any member who has personally signed an admission of notice and consent to holding the meeting.

Because written notice was not provided three days prior to June 14, 1995, Chairman Schafer asked each member to consent verbally, and in writing, that prior to the meeting he or she was verbally notified of the meeting and consented to holding the meeting. (The Commission members consented verbally, and written consent forms are on file with the official minutes of this meeting for each Commission member.)

APPROVAL OF AGENDA

the agenda approved and requested Secretary Sprynczynatyk to present the agenda.

There being no additional items for the agenda, the Chairman declared

SOUTHWEST PIPELINE PROJECT - CONSIDERATION AND APPROVAL TO FILE NOTICE OF INTENT TO TERMINATE CONTRACT 7-1B (SWC Project No. 1736)

Tim Fay, Manager of the Southwest Pipeline Project, provided the Commission members with information relative to Southwest Pipeline Project Contract 7-1B.

Mr. Fay made reference to, and read, a facsimile addressed to Murray Sagsveen and Carmen Miller, received on June 14, 1995, from William A. Herauf, of Reichert, Buresh, Herauf & Ficek law offices, Dickinson, ND. The facsimile is attached to these minutes as *APPENDIX "A"*, which states, in part:

Mr. Herauf stated that at approximately 4:10 PM on June 13, 1995, he was informed of the upcoming special meeting of the State Water Commission on June 14, 1995. At that time, he said they were in the process of preparing their response to the June 12, 1995, letter but, as of that time, had not completed the response.

Mr. Herauf said there are many issues to be addressed and the form *[sic]* being provided by the Water Commission is unacceptable. This is to put you on notice that Roy Clause will not be attending via conference call and we are objecting to the meeting being held absence *[sic]* sufficient notice to allow the parties to attend, together with counsel.

Mr. Herauf stated that a representative of Mainline Construction, Inc., counsel for Mainline Construction, and counsel for the bonding company are willing to participate in a meeting with the Owner provided that a 24-hour notice is given of the meeting.

The June 12, 1995, memorandum and attachments from David A. Sprynczynatyk, State Engineer, which were provided to the State Water Commission members, are attached hereto as *APPENDIX "B"*.

Mr. Fay stated that on June 6, 1995, field personnel of Bartlett & West/Boyle Engineering Corporation, the Owner's Representative under Southwest Pipeline Project Contract 7-1B, received threats of physical violence from the Contractor, Mainline Construction, Inc. The affidavits describing the incidents are attached hereto as *ATTACHMENT "A"*. The personnel receiving these threats did not return to the job site because they felt that their personal safety was in jeopardy.

The Contractor was informed, through their legal counsel, that the Owner and the Owner's Representative considered this a very serious issue. They were informed that unless they guaranteed the safety of Bartlett & West/Boyle Engineering Corporation and the State Water Commission personnel, and removed the employees who were involved in the threat from the job site, work would be suspended and the Owner would seek an emergency meeting of the State Water Commission to discuss the future of the contract. *SEE ATTACHMENT "B"*

The Contractor responded by dismissing the threats of physical violence as "construction talk". Although the Contractor did consent to guarantee the safety of the Owner's Representative's field staff, they refused to reassign the individuals involved. *SEE ATTACHMENT "C"*

Mr. Fay said that although the above-stated incident is the most serious to date, there have been many other difficulties on this contract including:

DISREGARD FOR THE AUTHORITY OF THE OWNER'S REPRESENTATIVE (General Provisions 5-1, 5-3 and 5-6)

The Contractor has generally been reluctant to follow instructions of the Owner's Representative under the contract.

The Contractor was reluctant to cease pipelaying for the winter, as provided in Standard Specification 01012(D)(1).

In addition, on one occasion this spring, the Contractor refused to acknowledge a verbal stop-work order issued by the Owner's Representative and delayed full compliance with the stop-work order. The Contractor has refused to comply with the suspension of work order issued on June 8, 1995, continuing to string pipe and appurtenances. *SEE ATTACHMENT "D"*

COOPERATION AND COORDINATION

A) **Landowners** (Standard Specification 01012(B))

For Contract 7-1B, forms and procedures for dealing with landowner complaints have been developed. Complaints from more than 100 landowners have been logged. Most of the complaints deal with the Contractor's failure to do the required cleanup work following pipe installation. However, there are numerous examples of the Contractor's failure to respond in a civil manner to landowners' claims of damages.

B) **Utilities** (Standard Specifications 01010(G); 01012(A); 01012(D(2)); General Provision 505)

Consolidated Telephone Corporation has a list of claims totalling approximately \$2,000 resulting from cut cables and dating from last fall, which the Contractor has not settled. In addition, the Cooperative has informed the Owner that the Contractor typically requests a location, then changes plans, and does not return to the requested location for a long period thereafter. When the Contractor does return, the Cooperative must re-locate their lines. This is becoming very time consuming and costly for the Cooperative. *SEE ATTACHMENT "E"*

PROTECTION OF PROPERTY (General Provisions 4-6 and 7-7; and Standard Specifications 02233(D) and 02933)

The Owner and Owner's Representative have received numerous complaints from landowners and utilities regarding damages caused by the Contractor's actions. Many of these damages were a consequence of the Contractor's failure to take steps to protect property. *SEE ATTACHMENT "F"*

UNAUTHORIZED CLAIMS AND WORK (General Provision 5-13)

The Contractor regularly submitted claims for payment for stream crossings, road crossings, and utility crossings where none were shown on the plans. Even after being informed that these crossings are unauthorized, the Contractor said that he expects compensation for them. The Contractor has also made claims for adding changes to his copy of the contract plans.

FRAUDULENT CLAIMS

Among the claims submitted by the Contractor were 82 road crossings. Of these, the Owner agreed to consider paying for those claims which passed compaction tests. Thirty crossings were located in spots where there was no discernable road. Upon field inspection, the Contractor acknowledged that three had previously been paid. At five of the sites, the Contractor was unable to find the location where the crossing had supposedly been constructed. The Contractor had certified and requested payment for these crossings.

VIOLATION OF EASEMENT AND PERMITS

A 30-foot wide easement is provided for the work. The contract documents require that if a greater easement is required, it must be obtained by the Contractor and the Owner must be informed. To date, the Owner has not been informed of any cases of landowners granting extra easement. There are numerous cases of the Contractor exceeding the 30-foot easement.

The damages to utilities also violate the permits issued by the utility.

DEFECTIVE WORK (General Provision 5-13)

Of the road crossings shown in the plans, and authorized, many have settled. Settlement around meter pits and other appurtenances is the rule rather than the exception.

Numerous problems have been encountered by State Water Commission operation and maintenance staff who attempt to complete the hookups to bring new users on-line. These problems include plugged lines, leaking lines, valves and meter assemblies installed incorrectly, and foreign objects in the lines.

SEE ATTACHMENT "G"

The contract documents require that when a backhoe is used to dig the trench, the topsoil must be salvaged and replaced. Although the Contractor generally salvages the topsoil, this soil is often mixed with other backfill during replacement. The Contractor has ignored the Owner's directives to adhere to the contract requirements.

Cleanup has been a continuing problem with this contract. The specifications require jobsite cleanup (consisting of rock removal and construction debris) to be completed within seven days of construction. So many areas were in violation of this specification that in April, the Contractor was ordered to complete it within 45 days or the Owner would do the work and deduct the cost from the Contractor's payments. Although the Contractor did begin this effort and was making progress, much of the work being done now should have been done last summer. The affected landowners have lost their patience with the Contractor and the State Water Commission.

Secretary Sprynczynatyk advised the Commission members that for several months, extensive efforts have been made to attempt to work with the Contractor to prevent these problems and to remedy them when they occur. However, he said the problems have become so prevalent that they are no longer tolerable, and it appears at this juncture, the Contractor has no intention of conforming to the contract requirements or performing the work in an acceptable manner.

Carmen Miller, Assistant Attorney General for the State Water Commission, referred to Southwest Pipeline Project Contract 7-1B, General Provision 7-14, Termination for Breach. The provision states, in part:

TERMINATION FOR BREACH (General Provision 7-14)

If the Contractor refuses or fails to prosecute the work or any separable part thereof with such diligence as will ensure its completion within the time specified herein, or any extension thereof, or fails to complete such work within such time, or if the Contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he files a petition to take advantage of any debtor's act, or if he or any of his subcontractors should violate any of the provisions of the contract, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials to complete the work in the time specified, or if he should fail to make prompt payment to subcontractors or for material or labor, or if he should persistently

disregard laws, ordinances, or instructions given by the Owner or Owner's Representative, the Owner may, without prejudice to any other right or remedy, serve written notice upon the Contractor and his surety of his intention to terminate the contract, said notice to contain the reasons for such intention to terminate the contract, and unless within ten days after the service of such notice such violations shall cease and satisfactory arrangements for the corrections thereof be made, the contract shall upon the expiration of said ten days cease and terminate. In such case, the Contractor shall not be entitled to receive any further payment until the work is finished.

It was the recommendation of the State Engineer that based upon the information provided to the Commission members and advice from its legal counsel, the State Water Commission serve upon Mainline Construction, Inc., a Notice of Intent to Terminate Southwest Pipeline Project Contract 7-1B, pursuant to General Provision 7-14, Termination for Breach.

It was moved by Commissioner Swenson and seconded by Commissioner Thompson that based upon the information provided to the State Water Commission and advice from its legal counsel, the State Water Commission serve upon Mainline Construction, Inc., a Notice of Intent to Terminate Southwest Pipeline Project Contract 7-1B, pursuant to General Provision 7-14, Termination for Breach.

Commissioners Ames, DeWitz, Hillesland, Olin, Swenson, Thompson, Vogel, and Chairman Schafer voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

There being no further business to come before the State Water Commission, it was moved by Commissioner Olin, seconded by Commissioner Swenson, and unanimously carried, that the State Water Commission telephone conference call meeting adjourn at 10:00 AM.

SEAL

/S/ Edward T. Schafer

Edward T. Schafer
Governor-Chairman

/S/ David A. Sprynczynatyk

David A. Sprynczynatyk
State Engineer and
Chief Engineer-Secretary

