

**MINUTES
City of New Berlin
Utility Committee Meeting
Tuesday February 27, 2007**

Members Present: Alderman Gallagher, Alderman Harenda, Alderman Ament, Commissioner Bob Dude and Commissioner Jim Morrisey

Others Present: Rick Johnson (Utility Manager), Jim Hart (Utility Supervisor), Mayor Jack Chiovatero, City Attorney Mark Blum, JP Walker (City Engineer), Steve Schultz (Ruekert & Mielke) and Sue Hanley (Office Coordinator Utilities & Streets)

Alderman Gallagher called the meeting to order at 5:01 p.m. declaring a quorum with all members present.

ITEM UT A-07 Approval of minutes from January 23, 2007 meeting

Commissioner Dude said that Superintendent Dr. Benfield's name was spelled incorrectly in the minutes.

Motion by Alderman Harenda to approve minutes from the January 23, 2007 meeting, after the spelling correction is made. Seconded by Commissioner Morrisey and upon voting the motion passed unanimously.

Closed Session

Alderman Gallagher read the following:

The basis for the items to be discussed in Closed Session is as enumerated in Wisconsin Statute Section 19.85(1) (e) and (g) Discussion and possible action to enter into closed session pursuant to Wis. Stat Sec. 19.85(1)(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session. More specifically to the purchase of water from Milwaukee, and Wis. Stat Sec 19.85 (1)(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved. More specifically the State of Wisconsin notice of claim for alleged radium standard noncompliance in City wells.

Motion by Alderman Ament to go into Closed Session at 5:04 p.m. Seconded by Commissioner Dude. Role call vote: Alderman Ament yes, Commissioner Dude yes, Alderman Harenda yes, Commissioner Morrisey yes, Alderman Gallagher yes.

City Attorney Mark Blum arrived at 5:18 p.m.

Motion by Alderman Ament to return to Open Session at 5:47 p.m. Seconded by Commissioner Dude and upon voting the motion passed unanimously.

Return to Open Session

ITEM UT 12-04 Request for Additional Funds for Milwaukee Water Diversion

Motion by Commissioner Morrisey to approve the proposed amendment No. 1 for the original contract dated July 25, 2006 for additional services for Lake Michigan Water Negotiations to Ruekert & Mielke in the amount of \$15,000. Source of funds: 91004923-56220. Seconded by Commissioner Dude and upon voting the motion passed unanimously.

ITEM UT 11-06 Update on School District sharing of costs of construction for Regal Manor Liftstation

Alderman Gallagher asked if there had been any update on payment for this project. Rick Johnson said that he had not heard from anyone. Alderman Gallagher said that someone needs to make some phone calls regarding this issue.

ITEM UT 08-06 Update on Design of Proposed Treatment for Radium Compliance

Alderman Gallagher said that Ruckert & Mielke sent a request to begin the process of bidding for the HMO treatment projects for radium at Wells No. 3, No. 5 and No. 7. The contract that has been presented is for the Professional Engineering Services in the amount of \$258,831, with an account number to be determined prior to the next Council meeting.

Motion by Commissioner Morrisey to recommend to Council to approve the contract to Ruckert & Mielke in the amount of NTE \$258,831 to begin the process of bidding for the HMO Treatment projects for Radium at Wells No. 3, No. 5 and No. 7. Source of Funds: 90-107000. Seconded by Commissioner Dude.

Alderman Ament questioned the wording on page 4, Section V, Part C and asked if the delays resulted in fines, would the City be protected if those delays were the result of the consultant. Who is responsible for the fines?

City Attorney Mark Blum said that ultimately the City of New Berlin is responsible to the State. The Delay section is intended to deal with delays in the performance of the contract, but it doesn't provide a specific right of action at least in the terms of the contract. He advised the City could go back to the Consultants if there was an inordinate amount of delay or negligence on their part and you could make a claim there, but there is nothing there that would deal with that specifically.

Alderman Ament asked because there is nothing in there, would any claim against the consultant be typically impossible?

City Attorney Blum said that it is always fact dependent. He explained that the situation you run into is that the Consultant is working with the City in performing these activities, it would have to be something in the level of responsibility of the Consultant as opposed to something jointly in the hands of the City and the Consultant; otherwise it would be hard to say that if we were jointly responsible that the Consultant should pay the expenses.

Alderman Ament asked Attorney Blum if he was comfortable with the language of the contract. Attorney Blum said that if you wanted to put some language of liquidated damage in there, that would be the best case scenario, but again you would have to establish that the Consultant Ruckert & Mielke was responsible for the damages occurring and he said he thought that would be difficult. He added that practically speaking it would be hard to write something here that would address the situation that you are talking about.

Alderman Gallagher that delays would much more likely be the result of construction delays. He said that it would be hard to imagine that the DNR would actual fine us at that point, although they actually could.

City Attorney Blum said that he would not like to comment on what the DNR may or may not have the ability to do. He said that suffice it to say if they felt that there should be fines, they could pursue that now because the deadline they set and was missed. Our response is that there are extenuating circumstances and some of that having to do with the actions of the DNR itself that would come into play, at least in our opinion, in looking at what the damages if any there should be under the circumstances. He said that we have a good argument for the justifications for delay and those justifications have nothing to do with the actions of the City.

Alderman Ament said that he had concern if there were fines from the DNR or EPA that the Consultant would take care of this if it was their fault.

Attorney Blum said that it does not address that specifically.

Commissioner Dude said that we are trying in good faith to comply what the DNR wants and this contract would be part of that compliance, and at the same time we are paralleling this with trying to get Lake Michigan water. I want to make sure that this is a \$258,000 contract, by the letter what we are saying we want to do a kickoff for the bids for Wells 3 and 7. So essentially, what we are saying that out of \$258,000 we want to proceed with about \$25,241. We presumably are not authorizing the consultant to go any further than the \$25,241 obligation.

Steve Schultz nodded his head in agreement to his statement.

Commissioner Dude said he sees the consultant shaking his head. He wants to make sure that although we have the contract out there for Well 3 & 7 equipment procurement and other costs, our intent right now is to parallel the process getting Lake Michigan water, staying in compliance with the DNR, but not get too far ahead of that.

Alderman Harenda should we amend the RAS to authorize \$25,241?

Commissioner Dude said that what we are saying is that we are going to approve the contract, but execution wise I am looking at the first two pieces for \$25,241 but I want to parallel our Lake Michigan efforts. We are not saying, go out and spend the \$258,000 tomorrow.

Attorney Blum said that the Scope of Work Description requires the City's approval to move forward. He said that as you move through each phase, the City would have to authorize the next step to proceed and I think that is Ruckert & Mielke's understanding.

Steve Schultz from Ruckert & Mielke the Consultant, said that is correct.

Attorney Blum said that while it doesn't specifically state in the document what you are saying, the practical reality is that in order for these milestones to be passed and moved onto the next one there has to be approval by the City and we are certainly not going to give that authorization to proceed further than we need to, based upon the information we may receive from Milwaukee Water.

Alderman Harenda asked if this should be written into the RAS. Attorney Blum said that you can state that authorization has to be in writing so that it is clear that it was or was not given.

Alderman Harenda preferred that this be part of the requested action.

Commissioner Dude said that the motion can be amended to state the consultant obtains written permission from the City to proceed past phases 1 and 2 in the project start-up for the bidding phase for Wells 3 & 7. Before we do the bid for Well #5.

Alderman Harenda said prior to the procurement phase as the construction phase that we require approval for Wells 3 and 7.

Attorney Blum said that under the procurement phase, under item A, after authorization by the City of New Berlin to proceed, the Consultant shall.

Commissioner Dude suggested to add the word "written" in the phrase "after _____ authorization". Alderman Gallagher said that we can make that friendly amendment, add the word "written" after authorization.

Attorney Blum suggested this change be made throughout the document.

Steve Schultz agreed.

Alderman Harenda asked if the City would be spending roughly \$30,000 to do this part of the contract.

Commissioner Dude said the amount is \$25,241.

Motion by Commissioner Morrisey to recommend to Council to approve the contract to Ruekert & Mielke in the amount of NTE \$258,831 to begin the process of bidding for the HMO Treatment projects for Radium at Wells No. 3, No. 5 and No. 7. Amendment to the contract to include the word "written" before authorization" to proceed any further than phases 1 and 2, the start-up for the bidding phase of Wells 3 & 7. Source of Funds: 90-107000. Seconded by Commissioner Dude and upon voting the motion passed unanimously.

Motion to adjourn by Commissioner Morrisey at 6:06 p.m. Seconded by Alderman Harenda and upon voting the motion passed unanimously.

*Respectfully submitted,
Suzette Hanley - Office Coordinator, Utilities & Streets*