

MINUTES

CASS RURAL WATER USERS DISTRICT

October 24, 2024

The Cass Rural Water Users District Board of Directors met on Thursday, October 24, 2024, at 6:00 p.m. at Cass Rural Water Users Office in Kindred, North Dakota. The following Directors were present:

Keith Finger	Toby McPherson	Alan Idso
Barry Bowman	Mark Johnson	Todd Ellison
Jon Zuther	Jeff Dahl	

The following Director participated by phone:

Brad Koetz

Also present was Manager Brent Brinkman, Sean Fredricks of Ohnstad Twichell and Kellen Grubb of AE2S.

The minutes of the September 26, 2024 regular meeting were approved as presented.

Manager Brent Brinkman presented the summary of cash and investments for September 2024.

Director Dahl moved and Director McPherson seconded a motion to approve the consent agenda. Motion Carried.

A. PAY CERTIFICATE NO. 16 – NDSP ERF – PKG CONTRACTING

Director Finger moved and Director Johnson seconded a motion to approve Pay Certificate No. 16 NDSP ERF from PKG Contracting in the amount of \$106858.50 Motion Carried.

B. PAY CERTIFICATE NO. 4 – CRWD RESERVOIR D SUPPLY PIPELINE – DAKOTA UNDERGROUND COMPANY

Director Ellison moved and Director Dahl seconded a motion to approve Pay Certificate No. 4 Reservoir D Supply Pipeline from Dakota Underground Company in the amount of \$42,885.00. Motion Carried.

C. TASK ORDER NO. 25 – AE2S – CRWD 100TH AVENUE LOOP CONSTRUCTION SERVICES

Director Johnson moved and Director McPherson seconded a motion to approve Task Order No. 25 for \$36,300.00 Motion Carried.

D. 2025 RATE INCREASE

Director Dahl moved and Director Finger seconded a motion to adopt 2025 rate changed as presented. Motion Carried.

E. OFFICE PROJECT CONSTRUCTION

The Board next discussed the proposed office construction project. Roers Construction was the low bidder on the project. EAPC and Sean Fredricks have been working with Roers to finalize a construction contract for execution by the Board and Roers. The parties are utilizing AIA construction contract documents provided by EAPC. Fredricks previously prepared a number of proposed revisions to three AIA documents: AGREEMENT BETWEEN OWNER AND CONTRACTOR, SUPPLEMENTARY CONDITIONS, and EXHIBIT A TO THE AGREEMENT BETWEEN OWNER AND CONTRACTOR. Fredricks' proposed changes included the addition of liquidated damages; pay request procedures to more closely coincide with the Board's meeting schedule; elimination of interest for late payments by the Board; several revisions to indemnity language; addition of payment set-off provisions for the Board's benefit (i.e., ability for the Board to reduce payments for various reasons, including defaults by Roers, liquidated damage set-offs, etc.); addition of insurance endorsement provisions to protect the Board; and other various items.

Roers rejected many of Fredricks' proposed revisions; they rejected the Board's set-off rights, rejected the payment procedures, reintroduced interest obligations for the Board in the event of "late" payment, and other items. Fredricks, Brent, and EAPC worked through the items Roers rejected and agreed that, though Roers' revisions were not favorable for the Board, we could accept many of their rejections but also agreed there are some provisions the Board could not accept.

The indemnity language was of particular importance. Fredricks explained that, under North Dakota law, the Board could not legally agree to indemnify Roers and, with that in mind, he eliminated all language in the proposed contract that required the Board to indemnify Roers. Roers did not object to those revisions. In addition, Fredricks enhanced Roers' indemnity obligations to track the construction contract language Fredricks includes in all construction contracts for the Board and for other North Dakota rural water systems and water resource districts. No contractors have ever refused to enter into a contract due to that indemnity language.

Roers initially accepted Fredricks' proposed indemnity language and the parties appeared to be in agreement in terms of acceptable construction contract language. However, very late in the process, Roers provided another set of proposed contract revisions, including proposed revisions to the indemnity language. Fredricks described Roers' proposed revisions. First, Roers eliminated indemnity language that would obligate Roers to be responsible for the negligence of Roers' subcontractors, consultants, and other third parties. Second, Roers eliminated indemnity language that would ensure their obligations are not limited by their insurance coverage (i.e.,

that they are obligated to indemnify regardless of whether or not their insurer will cover their indemnity obligations).

Fredricks, Brent, and EAPC all agreed Roers' last-minute indemnity revisions were not acceptable. If the Board accepted those changes, the Board would be accepting additional exposure and liability, at the potential expense of the Board's users and customers. Those are standard indemnity obligations for North Dakota contractors on public contracts; the Board should not have to accept additional liability exposure, should not have to pursue Roers' subs or consultants directly if they are negligent, and should not be limited by Roers' insurance.

In addition, EAPC expressed concerns regarding some of Roers' proposed contract revisions related to cold weather charges on concrete. From EAPC's perspective, Roers' bid included their cold weather accommodations, and EAPC further indicated that was part of the proposed project. Roers evidently disagreed and EAPC worried Roers would propose a change order for those expenses.

The Board discussed these recent developments and agreed that Roers' proposed indemnity and concrete contract language presented unreasonable exposure for the Board. The Board believed the bids came in extremely high for this proposed project already and was not comfortable accepting additional exposure at the possible expense of the Board's users.

Director Finger moved to reject Roers' proposed construction contract language revisions, to withdraw and reverse the Board's previous decision to award the construction contract to Roers, and to reject all bids for the project. Director McPherson seconded the motion. Upon roll call vote, the motion carried unanimously.

The Board may consider re-bidding the project. The Board will re-visit this proposed project next month and will consider how to proceed.

The Board next discussed the prospect of conveying property to the Bowman family. Director Bowman's dad, Chuck Bowman, owns a parcel of property and he had previously conveyed a small portion of that property to the Board. The Board no longer needs that property for any facilities and the Board is considering conveying it back to the Bowman family, possibly to a partnership consisting of Director Bowman and his siblings. Before discussing the merits of the possible conveyance, the Board conducted conflict analysis regarding Director Bowman's potential conflict in the matter. Sean Fredricks explained North Dakota law regarding conflicts, Section 44-04-22 of the North Dakota Century Code, provides the relevant standard. That statute provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member,

and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

In this case, Director Bowman clearly has a “direct and substantial personal and pecuniary interest” in the matter that creates a conflict. Director Finger moved to conclude Director Bowman has a conflict in the matter and to prohibit Director Bowman from voting. Director Ellison seconded the motion. Upon a roll call vote, Chairman Zuther and Directors Dahl, Idso, Koetz, McPherson, Ellison, Finger, and Johnson all voted in favor of the motion. Director Bowman abstained. The motion carried.

With the conflict issue concluded, the Board proceeded with discussion regarding the possible transaction.

Manager Brinkman reported on the District’s operations for the month of September 2024.

The next regular Meeting was set for Thursday, November 21, 2024 at 6:00 p.m. in Kindred, North Dakota.

There being no further business brought to the Board, the meeting was adjourned.

Barry Bowman, Secretary