

Official Proceedings
Special Meeting of the Board of City Commissioners
August 9, 2018 - 12:00 pm
City Hall – Williston, North Dakota

1. Roll Call of Commissioners

COMMISSIONERS PRESENT: Deanette Piesik, Tate Cymbaluk, Chris Brostuen (via phone), Brad Bekkedahl and Howard Klug

COMMISSIONERS ABSENT: None

OTHERS PRESENT: John Kautzman, David Tuan, Anthony Dudas, Jordan Everet, David Peterson and Shawn Wenko

Mayor Klug presented a quorum.

CHANGES TO AGENDA: None

2. Sloulin Field Runway Emergency Repair

Anthony Dudas Airport Director presented the following;

During routine inspections of the pavement, rutting of approximately ¾" has been found on a 1000' section of the runway. This rutting causes ponding of water and holds snow in the winter; this is caused by large aircraft operating at our facility. The City of Williston approached Burns & McDonnell to give a recommendation on how to repair this area and potentially allow for 76 seat regional jets to operate during the final 12 months that Sloulin Field is operational. You can see their full recommendation in the attached memo. Working with the City Engineer, Bob Hanson, a plan and specification was created to solicit for proposals. This includes a 4" mill and 4" overlay of a 1000' long by 12' wide section of the runway as well as grooving this area. Grooving is the process of cutting small lines in the pavement across the length to create greater friction, especially during rain and snow. The rest of the runway is grooved; therefore the FAA requires this patch to be as well. The construction will occur overnight on two consecutive Saturday's, September 8th and September 15th, with September 22nd being a weather day from 11:00PM – 11:00AM. This will affect the morning departures on the Sundays after the work and will require them to leave after 11:00AM rather than right away in the morning. This coordination with the airlines has already occurred. It's important to note that this repair will not allow the airport to accommodate the larger aircraft for more than 12 months. After that time, additional pavement repair will most likely be required. The facility may not accommodate these aircraft for more than this period of time. I recommend award of the Sloulin Field emergency runway patch repair to Northern Improvement in the amount of \$153,032.

Motion by Cymbaluk, Seconded by Bekkedahl to make a motion to approve the Sloulin Field runway patch to Northern Improvement in the amount of \$153,032. as presented

AYE: Piesik, Cymbaluk, Brostuen, Bekkedahl and Klug

NAY: None

ABSENT AND NOT VOTING: None

CARRIES: 5-0

3. XWA Taxiway A Contract

David Tuan City Administrator presented the following;

The Taxiway A contract at XWA is so far behind schedule that we are concerned it will jeopardize the opening of the airport. Every contractor team that we have on this project has faced a difficult challenge in that this is a tough project. We have constrained timelines, a site that is, at times difficult to access. This contract in particular is now to the point where work performance that has been executed, plans to remedy that and get back on schedule, in our professional opinion and in that of the Engineer, do not seem like they will meet our timeline to open the airport in October of 2019. Things have happened quickly over the past couple of weeks, where we have tried to accelerate work on this contract and give the contractor an opportunity to show us how this can be done, bringing in more material, equipment and personnel, to bring the project back on schedule and they have failed to do this and to date the work completed is so minuscule that we are really concerned about getting the amount of work done necessary in order to meet those objectives and guidelines that we've set forth to do with the FAA. We are going to walk through the important points of where we feel this contract left the rails and we would like to declare this contractor in breach of contract, by not meeting the timeline terms and pursue negotiations with the second low bidder, to bring this contract back to within the schedule that's necessary to open the airport in October 2019.

Dave indicated they just received a response from the contractor, he was given a period of time to respond, since an initial notice was sent out to him declaring that he was jeopardizing the schedule of this contract.

Mayor Klug indicated two sets of Engineers are present, Ulteig and KLJ and asked whom we are relying on. Dave indicated it's a project team, on the Ulteig side is the program coordination team that oversees all the construction efforts and the coordination thereof and KLJ team is the construction observation and on-site group that documents performance, materials for pay applications and what staff is on-site on any given day. Dave also stated both teams are on-site at XWA every day.

Anthony Dudas Airport Director presented the following;

The City of Williston opened bids for the taxiway project on August 18, 2017 with the intention to give the Notice to Proceed (NTP) on September 27, 2017. The original scheduled contract dates were from November 9, 2017 to November 15, 2018. There was a delay in review of the required documentation, namely Disadvantaged Business Enterprise (DBE) participation. This delayed the FAA grant award which delayed the NTP until November 27, 2017, rather than September 27, 2017, to J.M. Marschuetz Construction (JMMC).

JMMC had from that date, November 27, 2017, to begin mobilization of any equipment and materials necessary to meet the contractual date of the project. The staging area for JMMC was available throughout the winter in the condition the area was in during the bidding effort. The bid documents require all bidders to visit the site to fully understand the state of the staging/storage area. As per the bid documents, this area was not graveled, nor was it intended to be improved by the City. JMMC began mobilizing equipment on May 7, 2018 and began excavating work on May 10, 2018. As work commenced the project team asked JMMC for a "recovery" schedule to detail how they plan to accomplish the project within the time frame required in the contract. On June 1, 2018, JMMC estimated they would need additional compensation in excess of \$276,000 to meet the desired completion date in November 2018.

The project team requested a meeting on July 12, 2018 to discuss the schedule. From this meeting, a request of JMMC was made to provide a schedule for completion with and without acceleration costs. JMMC provided a completion date of November 2, 2018 with acceleration and September 15, 2019 without acceleration. This information can be found on **Tab 52** of the information binder. A full narrative of communications between Ulteig and JMMC can be found in the binder titled "Correspondence Between Ulteig and JMMC". After extensive performance analysis of JMMC's progress in building the Taxiway at the Williston Basin International Airport (XWA) it has been reasonably assessed that the construction progress is behind schedule by 89 days. It is further reasonably understood that their offer to complete this project by September 15, 2019 (over 10 months later than the contract completion date) does place them, in default of the stated contract. This issue does directly put in jeopardy the planned XWA opening date of October 10, 2019, which is the know goal of the City of Williston, FAA and State. I recommend termination of the Taxiway A PCC Pavements, Lighting and Signage contract with J.M. Marscheutz Construction Company for breach of contract.

Commissioner Cymbaluk asked how did they get so far behind, when they had since November to do this. Anthony indicated there was no mobilization prior to May 7, 2018.

City Attorney Jordan Evert asked to briefly go through and discuss the materials that were received by J.M. Marschuetz today and have, either Ulteig and/or KLJ or Anthony make some statements as to allegations contained in this letter and weather this changes the City's position on their recommendation.

Anthony Dudas, Airport Director presented the following;

We did receive a response from J.M. Marschuetz, in regards to our notice of Breach of Contract. Throughout this letter, they outline there was some mis-communication that Marschuetz felt was part of our request for an accelerated/non accelerated schedule. We feel that with all the allegations they provided in the letter, our team feels that they haven't made any efforts to accelerate in any way shape or form. Both KLJ and the Ulteig team have prepared a summary of people that have been on site, as well as equipment and it has shown that had not changed since their initial construction starting date in May. We, as a team, do not feel that J.M. Marschuetz has provided adequate action to make us believe that they are able to accelerate to the date we need the project completed by.

David Tuan stated that in an attempt to measure progress, which is tricky, we typically measure with pay applications, so we can measure work completed and then pay on that on a monthly basis and we have gone through this process, the process of measuring resources on site, counting the number of individuals, going through scheduling, to get a complete picture of what efforts were made to keep up and get back on schedule. This is where we are developing our

sense of whether or not there is any ability to complete by acceleration or getting back on schedule. We have seen no measurable effort made, to date, to make this happen. The materials brought in, the work completed has been far below our expectations, when we have other contractors working directly alongside them and are out pacing them and are facing the same site conditions, and it is hard to come up with any response for why. We still have, within the letter, that there will be a claim for additional costs that we never agreed to from the beginning; there has been an acknowledgement that the award date was later than what we would have liked on that notice to proceed, because of the DBE audit and document review that was requested by one of the contractors, however, we were willing to negotiate on some of those days, but when you have a deadline of November of 2018 and a date offered of September of the following year, it really means we are very far apart on this and the work performance and with the engineers recommendation really puts us at a point where we can keep going and believe their commitment that they will get it done for an extra \$270,000., however, what happens a month from now If this does not happen and we are beyond the point of no return and coming up with another alternative at that point would cost us more time than it would gain us. At this point we feel the timing of this decision is critical and if we don't decide now, we may lose the opportunity to bring this project back on schedule.

Mayor Klug commented that in most cases he is able to make decisions, however, finds himself with three different groups here tonight that he'd like same thing from, our owner's representative, Ulteig and KLJ. I'd like to hear from someone from each group.

Roger Leonard the Program Manager and Planner from Ulteig presented the following;

We have reviewed this closely and have watched it evolve over the last several months and we have communicated extensively, which we have referenced in our submission to the Commission. We have tried to inform the City that there are two issues here relative to time; first is an effort to understand the problem and take action to cure the situation before it is too late to meet the October 10, 2019 opening date. The other is to gauge the performance of the contractor on a reasonable basis and as the City Administrator had indicated the metrics for this can be somewhat complex. We use two metrics to look at this to derive the statements and recommendations within our summary; the first metric is completion of projects that are built to the project, against the aggregate cost of the project, in other words, when a project element is completed it is billed to Ulteig for review and then sent to the City for payment. What we found is when the analysis (up to a few days ago) did the contractor was at about 9.1% completion by this metric. We also as a secondary check, to validate what we found, we took a look at another metric that is quite different. We tried to gauge the contractor of interest performance against another contractor doing a similar thing in the same environment with the same challenges. When we compared by scale the completion of the runway project and one element of the sub strata, which is the first element, which is the geo-fabric and the P154, which is a gravel. When we compared one project against the other the runway project was at 100% for this element and we took a look at extrapolating the accomplishment of this same element on the other project and it was at approximately 30-38%. We took a look at the aggregate delivery of the performance that got us to the point at that comparison of both these metrics and we determined that if we did not complete the taxi way in the allotted amount of time and sequenced it in with the other projects we would end up with a situation where the airport would not be functional. If we do not have the taxi way, having the runway, the apron or the terminal would not do us any good. On this basis we did an exhaustive analysis of what was going on, we communicated extensively with the contractor, which we have documented in the submission we provided. The conclusion was, we had cure this problem one way or another, obviously Ulteig is not here to tell you what to do, we just bring the facts to you to consider

them. When we look and have seen nothing to date that we believe that would cure this situation, we believe this conclusion is reasonable. The two elements to consider in this decision is if the situation is not cured to satisfaction soon we will run out of time to meet the opening date, the other element is if the cure does not happen, will we be able to bring another company in to compete this project. We have paid close attention to process necessary with this federally funded project. It appears we are following the appropriate course for due process and providing all the elements to make a decision. We have engaged with the contractor to try and resolve this, we believe there are challenges to whether or not what they proffer today is reasonably attainable. Past performance where we have looked at manned material and equipment indicates that they have not given it the effort we expect, which is the primary result of what we see on the schedule, the schedule is proof, either they are there or they are not and they are not where we expected. I think we have provided a factual basis for where we are at, what we extrapolated forward and what possible options can be looked at, as far as outcomes. If no decision is made to change the paradigm we are on now, we will not open on October 10, 2019. We have communicated in three meetings with City Staff, one with the contractor where we solicited their input and to be honest, when we received the correspondence back indicating without the acceleration and the \$270,000., which was the base ask and the correspondence also indicated there may be further escalation of this cost, but looking at the response that comes back with September 15, 2019, set off some bells. We appreciated the fact they took a close look and determined what they could do, however, this will not work and we also have to consider all the other sequencing that needs to occur.

Commissioner Bekkedahl asked if the Ulteig team has seen any increase in activity level in manpower, materials or equipment on site since the letter from KLJ was delivered in regards to not being in compliance. Roger indicated yes, they have seen a spike in activity, starting around July 24th, moving from about 5% accomplishment prior to and up to 9.1% and as much as 11% if you include the mobilization costs, which is a payment that is made to them on the metric of money, they indicate, as of last night, 13%. You have to be cautious of including the mobilization costs, because it is not a physical accomplishment relative to the analysis that we are doing. I would say they have gone from 5% to about 3-4 weeks ago to about 11% of physical work.

Commissioner Bekkedahl pointed out they indicated they would have product for the base and the sub-base and the completion of the project at their pit and already through the inspection process and approved. It was clarified there are four elements to the strata that makes up the taxiway, first is the geo-fabric, then the first strata is P154, the next is P209 and believe they are talking about having the test completed for P209, which we did get a response to, we assessed the P154 as the first strata and they have about 38% of this completed. They have not started the P209; the other contractor has 100% of 3 times the project already completed for P154, which is the comparison element we used. Commissioner Bekkedahl asked if they have moved this material from their pit to on-site. It was indicated that the P209 has not arrived on site yet, as it has just passed testing and these are sequenced on to 501, these elements make a cake strata, as one moves forward another begins and so on and all four could be being put on at once. They are so far behind; they did not need the P209 as they did not have any P154 to put it on top of, they have about 30-38% of the P154, which is the beginning base, if they bring in the P209 now, it is coming on late and now the whole project is backed up and if you don't get these strata's on the runway is not being constructed as designed. Commissioner Bekkedahl asked if the approval of the P209 could have occurred earlier in this process. It was indicated there have been challenges at the pit and other contractors have also had issues with it on the runway, but what they did was move forward to complete the P154 and if you look at the schedules of both contracts right now, they are both behind on the P209, but the other

contractor is so far on everything else, that he will be able to make this up quickly. The problem is that the performance we've seen in the manpower that has been applied, even though it has ramped up recently, they have gone from maybe 3-6 people initially to maybe 6-9 and are still quite a bit behind. It is difficult to believe that what we have seen for performance and management of the project from the contractor would be a reasonable expectation that they would finish by November 2nd. Commissioner Bekkedahl asked in regards to an accelerated progress do they see the level of equipment on site, currently, would attain that or do you see a deficiency in the level of equipment also. It is our understanding in regards to equipment on site, that they have not done much since they started other than bringing an additional roller of a different type; they are just setting up their concrete plant, whereas the other contractor has already completed this and have it up and running. We are concerned that the sequence may be interrupted, relative to the potential for getting back on schedule.

Commissioner Bekkedahl asked if the preparation of the staging area that seemed to be a conflict, was this a major issue in putting this behind or a minor issue that could have been addressed earlier. It was indicated that in the assessment, as the Airport Director indicated, there was a pre-bid meeting requirement, for them to come and look at the site they were to be given and that they did not attend this meeting. We offered the site, as it was offered in the bid, just a chunk of ground. They had made a statement of a concern that it was not prepared with a gravel base for them to set up on and this was never indicated in the bid. They have made this claim; however, in an attempt to accommodate the contractor, the City let them know they would provide asphalt millings to set this yard up at no cost to the contractor, that was pretty much a gift from the City that was not required by contract, but to facilitate the relationship, in the process, this was offered and given. Setting up the yard was the contractor's responsibility from a green field state.

Mayor Klug asked when the project is complete, there will be a period of time that things will need to be inspected and tested and what, in your opinion, is the last possible date that we can start these tests. Roger indicated, when we looked at the schedule and we analyzed the sequencing of the projects to construct the airport, the conclusion we drew was that if we did not have the runway, taxiway, ramp and lighting, etc., installed and have it striped and ready for testing, we would be in trouble. We need all the projects together, in support and have until the end of July and in order to make this sequence work, the taxiway would have to be completed by June 14th. We had indicated that if the City were to consider more time, that we not bridge this point because we have to tie everything and sequence it together to meet the pre-test, which is done by a contractor, which is a flight test of the environment and if this is not together this cannot be done. I have spoken with the FAA personally and they expect when they have their aircraft come to do their flight test all these things need to be in place and this flight test is set for August 16th for certification. There are other things that are tested, like the NAVAIDS, etc., but there is further testing that gets us to the October 10, 2019 date and this contract has to be done by no later than that early to mid-June or we cannot sequence everything together and keep in mind we are managing 15 different projects to make sure this sequencing works and this is critical to that since it sits right in the middle of everything and ties everything together and if we cannot bridge this, we fail and cannot make this work, if we get this commitment, can we be sure, based on past performance, the contractor can meet this deadline.

Lee Underwood Senior Engineer from Ulteig presented the following;

In regards to the question on if the yards affected the progress, the purpose of the yard is to stage material, stockpile equipment and set up their plant, they do not have their plant set up,

they are working on this now and the materials stockpile just occurred last week and the late access to this site has not caused any damage, as they have had it for a long time and done nothing with it.

Commissioner Bekkedahl asked when was the date the City had this site prepared. It was clarified that the City did not prepare it, the City offered it and then the contractor took possession and then they came to us with a statement that they believe that the yard should be prepared, even though it was stated clearly in the bid document this was not the case, we gave them the material and then the contractor prepared the site, this occurred around April 25th.

Mayor Klug asked if anyone wanted to hear from Cardon or KLJ.

Randy Conrad from Cardon Development presented the following;

Randy stated that he feels that Mr. Leonard and Mr. Underwood did a great job presenting, however, indicated for the record the Cardon full concurs with City Administrator Tuan's opening statements and with Mr. Leonard, as Cardon has been involved on a daily basis, it has been a lot of risk management and it is time for some risk mitigation, before we are unable to open this airport on schedule.

Commissioner Piesik asked if it has been made clear to J.M. Marschuetz, in regards to the time line. Randy indicated yes, there have been several meetings, plus the weekly meetings and the grave concern has been communicated and to date there has been no indication of a desire to work with this and this last attempt and the response of an outrageous acceleration amount of money and time of neither which were guaranteed as the dollars can go up and the schedule can go out. We feel very confident this timeline has been made abundantly clear.

Commissioner Bekkedahl asked to clarify that in the communications there were requests made very early on from the contractor to provide a schedule that was not provided in a timely manner and when did the schedule finally come. It was clarified that the schedule was part of the original contract and the contractor agreed to this schedule, it was part of their documentation and proffered this forward to us as this is our schedule. When we saw the lack of work being performed, we asked for updates to this schedule and that is when we got into this convoluted discussion in regards to where are you at, what are you planning on doing, how are you going to meet your objective and remember the original schedule in the contract had indicated they would complete the project on November 2nd and finish out the grassing and mulching by November 15th. We asked for further updates and we have had a bunch of stuff come back, we did not really find relevance to the question, we kept engaging and the schedule comes from the contractor not us. We do not provide them schedules, other than, we provide during the bidding process, this is the time period allotted for this project, their schedule and the various sequence of events, which I believe are over 30 different events in their schedule, they line them out, this is what they come up with by agreement and need. The discussion that happened, by us continuing to ask for updates, there was a period where we heard discussion on three different periods one for the DBE delay, another for weather delay and another for a claim delay of the yard set-up, we did an analysis and came up with a potential 79 day delay that could be considered by the City to determine what was reasonable and appropriate, some of the issues, we felt probably should not be in that and could be as short as 40 days. It appeared that maybe those 79 days could be absorbed and we could still deliver on time but could not go any further, this is where the June 14th date comes in. This does not take into account that since this discussion occurred several weeks ago, we have continued to see a loss in production expectation and are even further behind now. You don't just move an airport opening by a day

or a week or a month, you have windows that have to be accepted by the FAA, which could push our opening to the following spring or summer, flight tests would have to be rescheduled, etc. We also have to look at, how long do we have to cure this problem and still open on October 10, 2019. This window is closing every day we continue to talk about this.

City Attorney Jordan Everett asked again to clarify, in regards to the materials we received from J.M. Marschuetz today would alter the recommendation being provided by the team. Also, would the materials provided cause the City to have to look further into the matter or has anything changed from what was previously stated.

It was clarified that we are very familiar with all the elements; it is our belief that Airport Director Dudas recommendation is very valid based on the window of change and need. Looking over the correspondence and the schedule as I saw it, it had them finishing on the original contract schedule which was November 2nd and then final completion November 15th. You have to asses and ask is this really a possibility for them to do all the work between now and then and given the history we have analyzed exhaustively, I think a reasonable person would have to construe this is a real high risk to believe. It is also correct that there is a lot involved to fix, whatever decision is made and if we fail, and more time occurs and we further move out the opening and I believe the basis of this submission does not change much from what we have heard, seen or analyzed to this point.

Mayor Klug stated after hearing all this info, it seems if we stay the course we are going to fail and this is tough decision

Commissioner Cymbaluk stated it is a tough decision; however, we have a window of time, window of need that has been presented and is incredibly high risk and could derail the whole project, based on past performance it is clear that there is a significant gap and believe the risk is too high, we need to move forward with what Anthony and his team have presented to us.

Motion by Cymbaluk, Seconded by Bekkedahl to make a motion to terminate the Taxiway A PCC Pavements, Lighting and Signage contract with J.M. Marschuetz Construction Company for breach of contract as fully presented by our City Staff, Ulteig and other engineers that have presented this afternoon

AYE: Piesik, Cymbaluk, Brostuen, Bekkedahl and Klug

NAY: None

ABSENT AND NOT VOTING: None

CARRIES: 5-0

Airport Director Anthony Dudas indicated with that motion and in accordance with local, state and federal procurement requirements related to our project, notice and negotiation with the second responsive bidder on the contract is authorized. In the course of the original bid process the second responsive bidder did place a responsive and conforming bid as reviewed by our engineering team and that contractor has performed at a very high and successful level in the same environment that we are currently working with at XWA. As such awarding the Taxiway contract to the second low bidder has a high probability of successful completion in the timeline we need to occur. I do recommend authorization of the City Administrator to proceed with negotiations with the next interested and responsive successive bidder on the bid tab and to

proceed with the balance of the Taxiway A PCC Pavements, Lighting and Signage contract to be accomplished on a to be determined, mutually agreed upon date.

Commissioner Bekkedahl asked who this contractor is and Anthony indicated it was Northern Improvement.

City Administrator Tuan indicated this will be brought back to the Commission for final approval and a commented on cost, the second low bidder, submitted a bid that is not the same cost as the low bidder, so there is a cost differential and in situations such as this there is a process that we must follow through the performance and payment bond of the existing contract to re-coup that, it will take time and this will cost more money. It is our hope that we will recoup all of these additional costs through our negotiations with the bonding company, as this is what this is for. This does not happen very often, so with our support of the City Attorney, we've worked through a lot of the documentation and the process that we are going to need for this. We will keep everyone apprised of the process as we go forward and it could take a period of a year or more, we are not sure.

Motion by Bekkedahl, Seconded by Piesik to make a motion to move that the Commission authorize the City Administrator to proceed with negotiations with the next interested responsive successive bidder on the bid tab and to proceed with balance of the Taxiway A PCC Pavements, Lighting and Signage contract to be finished on a mutually agreed date

AYE: Piesik, Cymbaluk, Brostuen, Bekkedahl and Klug

NAY: None

ABSENT AND NOT VOTING: None

CARRIES: 5-0

4. Adjourned meeting at 12:53pm

**Motion by Cymbaluk, Seconded by Bekkedahl to adjourn
UNANIMOUS BY VOICE VOTE**

Howard Klug, President
Board of City Commissioners

John Kautzman, City Auditor