GARRISON DIVERSION CONSERVANCY DISTRICT

Contract Review Committee
DoubleTree
Fargo, North Dakota
January 19, 2018

A meeting of the Contract Review Committee of the Garrison Diversion Conservancy District was held at the DoubleTree, Fargo, North Dakota, on January 19, 2018. The meeting was called to order by Committee Chairman Walter at 9 a.m.

MEMBERS PRESENT

Ken Royse, Board Chairman, Garrison Diversion Conservancy District (by conference phone)
Alan Walter, Committee Chairman, Garrison Diversion Conservancy District
Ken Vein, Second Vice Chairman, Garrison Diversion Conservancy District
Jay Anderson, Director, Garrison Diversion Conservancy District
Roger Fenstad, Director, Garrison Diversion Conservancy District (by conference phone)
Geneva Kaiser, Director, Garrison Diversion Conservancy District
Bruce Grubb, City Administrator, City of Fargo
Todd Feland, City Administrator, City of Grand Forks (by conference phone)
Duane DeKrey, Secretary

OTHERS PRESENT

Staff members of the Garrison Diversion Conservancy District were present along with others. A copy of the registration sheet is attached to these minutes as Annex I.

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

CONSIDERATION OF MINUTES

Motion by Geneva Kaiser to dispense with a reading of the November 30, 2017, committee minutes and approve them as distributed. Second by Jay Anderson. Upon voice vote, motion carried.

CURRENT CONTRACT DISCUSSION

A PowerPoint was provided outlining the meeting topics in regard to the current contract discussion.

Liability

Tami Norgard, Vogel Law, reviewed the liability and insurance coverage provisions that exist in the current engineering contract between Garrison Diversion and Black & Veatch.

Ms. Norgard commented that the contract states the engineer is being hired to do design and final design. After the point of final design, it is up to Garrison Diversion whether they are going
to continue the contract for construction observation for the Red River Valley Water Supply Project (RRWSP). There is a provision in the contract that states if Garrison Diversion does its own project observation, review of contractor’s performance or any other construction phase service without the engineer who put together the contract documents, the engineer is not responsible for the owner’s interpretation of the contract documents.

Ms. Norgard added that the engineer is also not liable if the owner reuses information and plans without the engineer’s involvement.

Board Chairman Royse asked if the owner could do construction observation and let the engineer do contract administration and, thereby, all interpretation goes to the engineer, and the owner is only completing the construction observation based on the direction of the engineer.

Ms. Norgard said at the point that final design is complete, moving forward after that is an opportunity for Garrison Diversion to do whatever they like. If Garrison Diversion decides to do construction observation, they sure can. If they would like Black & Veatch to continue in some role, the task order would need to be structured accordingly.

Director Fenstad stated that Garrison Diversion would end up with a separate task order at that point no matter what.

Ms. Norgard reviewed the insurance requirements of the engineer, which include:

- Employer liability $1 million
- General liability $3 million per accident and in aggregate
- Automobile coverage $3 million combined limit
- Umbrella policy $5 million per occurrence and in the aggregate
- Professional liability $5 million/claim and in the aggregate annually covering all sums engineer has to pay

The contract says that the owner can require additional coverage, deductibles or limits, but it is at the owner’s expense.

Director Vein asked about the limits and how long they are liable.

Ms. Norgard said the liability period would run for the period of the statute of limitations.

Chairman Royse questioned when writing a construction task order and a contract is let with a contractor, can an extended insurance provision be included. Perhaps the contractor could be asked to go beyond the statute of limitations. Instead of having a seven-year insurance policy, a 15-year might be required.

Chairman Royse also questioned when doing task orders for a project, for example a 28-mile pipeline and concurrently an intake project, how does the engineering liability on that work. Would it be covered separately on each project?

Ms. Norgard stated that the insurance requirement is associated with this contract and the employment of Black & Veatch. Black & Veatch is the primary engineer in charge of the entire project. So this policy covers anything they do for the project.
Chairman Royse said he understands when Garrison Diversion makes modifications they will pay for the additional risk being shifted to the engineer or the contractor. As it stands right now, if there is a pipeline project underway and there is a claim against the owner, the coverage would be $1 million. What if there were multiple claims; one on the pipeline, one on the treatment plant and one on the reservoirs and those claims collectively would be $7 million. Do we only have liability for $1 million?

Ms. Norgard replied there would be Professional Liability coverage of $5 million per claim and a similar cap of $5 million annually. Then there is an umbrella of another $5 million. It depends on what the cause of action is and how high the total limits would be, but, arguably, there is professional liability, general liability and umbrella. Multiple claims would then go toward the aggregate.

Director Vein commented if 160 miles of the steel pipe was installed and, in a certain period of time, there is a manufacturer’s flaw of some sort, it is going to be very expensive.

Ms. Norgard said that should be a manufacturer’s issue.

Director Vein said usually when you get into something like that everyone gets sued. That would be something we pay more attention to in the construction documents versus the engineer’s contract.

Ms. Norgard said when discussing manufacturer’s warranties and responsibilities and the construction contract, Garrison Diversion will be listed as an additional insured and probably the engineer.

Director Fenstad asked if there is a statute of limitation on defects.

Ms. Norgard said there is a statute of limitations on defects similar to product liability.

Director Fenstad asked what the limitations are timewise.

Ms. Norgard suggested asking someone who is conversant in insurance what would be typical for limits. Garrison Diversion may want to increase insurance limits at their cost, but what would be appropriate?

Ms. Norgard commented on 6.11, Allocation of Risk, Indemnification, which requires the engineer to indemnify and hold Garrison Diversion harmless if their negligence contributes to damages. The engineer’s responsibility financially is limited by their percentage of fault. There is no provision in the contract stating that liability is capped at fees.

Todd Feland, City of Grand Forks, said sometimes an additional insured can be named as a part of these policies and added that it may be a good idea for us to do in some of these cases.

Ms. Norgard said that is already in the engineer contract. It states when moving forward with a contractor, it is presumed that Garrison Diversion and the engineer will be name as additional insured.

Chairman Royse asked if Lake Agassiz Water Authority (LAWA) would be listed as an additional insured.
Ms. Norgard replied that there are no contracts requiring LAWA to be listed. They will not be taking a role in directing the contract. LAWA could be written into a construction contract if they were to take a role or their relationship at the time justifies adding that protection.

Director Vein added if there is a lawsuit, LAWA could be drawn in on it, and he asked whether there would be some advantage for LAWA to have insurance.

Ms. Norgard said it would not hurt to have LAWA listed as an additional insured, but it would depend on what the contract looks like at the time.

Director Fenstad said it is really important to check the certificate of insurance to make sure Garrison Diversion and the engineer are listed as additional insureds. Many times this get forgotten or omitted.

Dispute Resolution

Ms. Norgard explained that disputes will first go through mediation. It does not specifically preclude arbitration or litigation, but merely requires 30 days of negotiation, then mediation, before moving on to other options, including arbitration and litigation.

Scope of Work

Ms. Norgard stated that the original Request for Proposals (RFP) intended for the engineering firm selected to handle all engineering required under the Dakota Water Resources Act (DWRA) for the Garrison Diversion Unit. She added the contract does not include any limitations on the work performed by Black & Veatch, but to the contrary, it is also not exclusive.

In relation to scope, there is no termination in the current agreement. This was intentional because of the amount of time it would take to build the project. No one wanted to be in midstream and then be required to select and hire a new engineer. The engineer’s basic services will be considered to be completed after final design or bidding or negotiating, so Garrison Diversion will have some choices after that point. The contract does contain provisions for termination and suspension.

Ownership of Work Product

Ms. Norgard said while the base form document indicates that the engineer retains the ownership of the documents, this was modified in one of the exhibits and basically states that Garrison Diversion owns all of the work products.

Conformance with State Law

Ms. Norgard commented that the question was raised regarding the State Water Commission’s Cost Share Policy and whether new RFPs must be issued for new engineers every three years. She said the actual language of the Cost Share Policy says if the cost share is expected to be greater than $25,000, the local sponsor has to complete an engineering selection process similar to the state agency process. Alternatively, if you do not go through the state agency selection process, you will be deemed to comply with that so long as you are using an engineer that was obtained for the organization through the RFP process every three years.
Ms. Norgard added in this case, Garrison Diversion went through the state agency process in 2007, and there was representation from the State Water Commission on the selection committee as well as representatives from Fargo and Grand Forks.

Allowable Markup

Kip Kovar, District Engineer, Garrison Diversion, stated that current engineering contract is based on the Engineers Joint Contract Documents Committee’s (EJCDC) Standard Form of Agreement between Owner and Engineer for Professional Services.

Mr. Kovar reported that Black & Veatch has 29 labor categories and charges a five percent markup on subcontractors. Direct expenses for travel are direct billed. Miscellaneous expenses are covered by a flat rate of $7 per hour of labor charges.

Mr. Kovar added that the contract also allows for Black & Veatch to adjust their rates annually. It is specifically called out in the U.S. Department of Labor: Table 9 – Employment Cost Index, Professional and Related.

COMPARABLE RATES

Mr. Kovar distributed and reviewed a list of comparable rates charged by various engineering firms.

SUBCONTRACTOR PROCESS

Mr. Kovar referred to Section 6.01C, which identifies Black & Veatch as the prime professional with the authority and control to hire all subconsultants.

Mr. Kovar reviewed a list of subconsultants that have been used to date and explained the basis for hiring each.

Chairman Royse asked if Black & Veatch requires insurance requirements from the subconsultants.

Paul Boersma, Black & Veatch, replied in terms of insurances, it is important that Advanced Engineering and Environmental Services (AE²S) has similar insurance to them. A lot of the other niche firms that are hired would not be able to provide the $5 million of professional liability insurance, and it is not expected because they are providing more science, advisory or modeling type of expertise. If Black & Veatch were to keep hiring more engineering firms for actual design work, they would expect them to have similar professional liability to what Black & Veatch provides.

Ms. Norgard added that the contract indicates in the insurance provisions that the contractor needs to purchase and maintain general liability insurance similar to the engineer’s.

FEASIBILITY OF MULTIPLE CONTRACTORS

Mr. Boersma explained the process for hiring subconsultants, stating that Black & Veatch’s goal is to provide Garrison Diversion with the best engineering they can provide for each task. They look within Black & Veatch and AE²S capabilities and make a decision whether the work will be
internally or externally delivered. They will make a recommendation to Garrison Diversion if external delivery is decided upon.

Mr. Boersma said the project has been fairly dynamic and changes frequently. They are open to developing a process for solicitation of subconsultants. It would need to be determined whether it would be purely qualifications based or a combination of qualifications based plus price. As the project becomes more defined, there will be more of an opportunity to do that.

Chairman Royse asked if Garrison Diversion would like to see a process or a procedure that is used. How do we know we are getting the best possible subconsultant? What is the criteria for picking a particular subconsultant? Garrison Diversion may want to agree with who gets hired.

Mr. Boersma said he believes this is what Black & Veatch has been doing to date. They provide reasoning when suggesting a particular consultant and seek concurrence from Garrison Diversion before hiring them.

Mr. Boersma said there has not been a great deal of time spent thinking about the subconsultant selection process because it is not the primary question right now. The primary question is what is the overall project delivery method that will be used on the RRVWSP and, to a certain extent, the engineering strategy will come out of that decision. A Design/Build versus Design/Bid/Build versus P3 will all utilize a different engineering subconsultant strategy.

Mr. Boersma commented on delivery options and what to consider when choosing a delivery method for the project. Schedule and financing need to be a major part of the decision-making process.

BLACK & VEATCH BILLING STRUCTURE – EXECUTIVE SESSION

Motion by Bruce Grubb to enter into Executive Session in order to discuss confidential and proprietary business information from Black & Veatch. Second by Ken Vein. Upon voice vote, motion carried.

The committee went into executive session at 10:34 a.m. and reconvened in regular session at 10:52 a.m.

Motion by Jay Anderson to end the Executive Session and resume the regular committee meeting. Second by Geneva Kaiser. Upon voice vote, motion carried.

SCHEDULE AND DELIVERABLES

Committee Chairman Walter said there are few remaining issues regarding the insurance and liability provisions; therefore, one more committee meeting will be needed. Once these concerns are addressed, the committee can discuss the schedule and deliverables, along with the next steps.

Ms. Norgard stated that she does not wish to be included in any contract negotiations due to the fact that Vogel Law works closely with Black & Veatch as well as AE2S. They share many clients, which causes conflict.

Ms. Norgard added that she will attend the next meeting to address statute of limitations on claims and insurance levels.
There being no other business to come before the committee, the meeting adjourned at 11 a.m.

(SEAL)

Alan Walter, Chairman

Duane DeKrey, Secretary