

**Haines Borough**  
**Borough Assembly Special Meeting**  
**May 3, 2006**  
**MINUTES**

**Approved**

THIS IS A SPECIAL MEETING HELD ONLY FOR THE PURPOSES OF 1) HEARING THE HAINES SCHOOL IMPROVEMENT RFP PROTEST BY MCGRAW CUSTOM CONSTRUCTION, AND 2) TAKING ACTION ON THE SELECTION COMMITTEE'S RECOMMENDATION TO AWARD. NO OTHER BUSINESS WILL BE DISCUSSED.

1. CALL TO ORDER/PLEDGE TO THE FLAG Mayor **SHIELDS** called the meeting to order at 6:30 p.m. in the Assembly Chambers of the Public Safety Building and led the pledge to the flag.
2. ROLL CALL **Present:** Mayor Fred **SHIELDS** and Assembly Members Norm **SMITH**, Stephanie **SCOTT**, Jerry **LAPP**, Scott **ROSSMAN**, Luck **DUNBAR**, and Deborah **VOGT**.

**Staff Present:** Robert **VENABLES**/Borough Manager, Julie **COZZI**/Borough Clerk, Lisa **LASHINSKY**/Project Clerk, and Brian **LEMCKE**/Project Manager.

**Visitors Present:** Bonnie **HEDRICK**/CVN, Don **TURNER III**, David **AMMON**, Debra **SCHNABEL**, Judy **EREKSON**, Brian **CLAY**, Dave **STICKLER**, Raymond **ROYCE**/Attorney, Steve **NOURSE**/Attorney, Chuck **MCGRAW**, Pete **DAWSON**, and others.

3. APPROVAL OF AGENDA

Motion by **LAPP**: Approve the Agenda. It was seconded by **SCOTT**. The motion carried unanimously.

4. **HAINES SCHOOL IMPROVEMENT RFP PROTEST**

**VOGT** asked to be recused from the matter since she sat as a member of the Selection Committee, and it was granted.

**ROYCE** introduced **MCGRAW**, the sole shareholder and president of McGraw Custom Construction in Sitka, Alaska. It was agreed that assembly members could ask questions as they occur. **ROYCE** proceeded with his presentation which reiterated the statements presented in the written protest document. **ROYCE** said he understands that the RFP review occurred in two phases that were scored separately. He said his remarks will be restricted to the pricing proposal aspect (phase) because the company's ability to perform the technical aspects of the project were never disputed. **MCGRAW** believes he was treated unfairly in the proposal pricing review process. The GC/CM process is fairly new in Alaska. At least 51% of the

available scoring points must be based on cost. McGraw Custom Construction is a responsible business that has done 300 million dollars worth of construction projects in Alaska. **SCOTT** asked for the definitions of *responsive* and *responsible*. **ROYCE** said *responsive* = conforms to all pages of the bid documents, and *responsible* = has financial, administrative, and technical capability to perform the services. Payment bonds guarantee that the subcontractors and suppliers are paid and performance bonds guarantee the owner's project will be completed in conformance with the contract specifications. **ROSSMAN** asked how many subcontractors were going to participate. **MCGRAW** said three and all agreed to do it for no fee. He said he bid 4.9% for his contractor's fee because he has performed in other projects for less than 5%. It was below the expected range but it was above another bidder who was not deemed unresponsive. He bid one penny for the design completion fee to try to win the bid. **SCOTT** questioned the willingness to do work for one penny with the risk of not getting the subsequent contract. **MCGRAW** said he was willing to take the risk. **SMITH** asked **MCGRAW** what the term "non-responsive" means to him. **MCGRAW** said non-responsiveness should have been determined at the time of submission; not ten days later. The additional information that was requested was not required by the RFP. He expects the Haines Borough to act in good faith as he has. **ROYCE** said the law requires the owner to act in good faith and not to act arbitrarily and capriciously. **MCGRAW** said it is his legal right to fight for himself. **ROSSMAN** said the assembly needs to determine if **MCGRAW** got a fair shake. **ROYCE** said this is a unique process and different than a lot of people are used to. Alaska law does not make you unresponsive because you decide to submit under an expected range. DEED requires the owner to be objective and not subjective. **MCGRAW** is asking for his proposal to be scored so the assembly can then determine whether or not it is responsive.

**NOURSE** addressed the assembly. He was retained by the Haines Borough to assist in this matter. This type of procurement is relatively new in Alaska but has been around for a few years. It has been around for even longer in the rest of the country, and there are many cases that clearly show the borough has the right to determine unresponsiveness. Case law shows the courts give the owner broad discretion. The owner is allowed to look beyond price to get the best value for the contract. The borough's GC/CM RFP was carefully crafted to not allow bidders to "game" the system. Twelve preconstruction services are outlined in the RFP, and it

specifically stated that the price proposals had to be reasonable. A one penny bid did not conform to the RFP. It asked for hours times the rates. **MCGRAW** provided the hours (480) but bid only one penny. The case law is very clear in giving the borough incredible discretion in determining what is and what is not responsive. He said that clearly given the twelve preconstruction services expected by the RFP, the one penny bid was nonresponsive. **DAWSON's** bid was below the \$12,000 recommendation, but he did supply the examples of similar projects that the Selection Committee asked for. The Committee determined **DAWSON's** bid to be responsive, and it was within their discretion to decide that. Don Carney is a representative of DEED and a member of the Selection Committee. He voted to find **MCGRAW's** proposal nonresponsive. No evidence has been presented by **MCGRAW** or his counsel that he has been treated unfairly. \$12,000 wasn't an absolute number. Any number below that just had to be supported by documentation of prior projects, and **MCGRAW** did not do that. Again, it is within the discretion of the owner to determine whether a bidder is responsive or not.

**ROYCE** said in response that, in Alaska, DEED requires the owner to have objectively calculated proposed pricing in the proposal. If you are going to use DEED funding in Alaska, you have to score cost more than 50%. Bidding is a game to some degree. He asked that the assembly overturn the decision and go back into the scoring and selection process. **SCOTT** said a big part of the value to the borough is having the contractor come on board and be part of the team. The preconstruction services are a very important part of the contract and the one penny makes it appear that the bidder doesn't understand the importance of the required services. **MCGRAW** said he has been doing construction for 30 years. He would have to do a good job on the preconstruction portion in order to get the subsequent construction contract.

**NOURSE** said under Alaska law the owner has the right to reject any and all bidders. He pointed out the Laidlaw case that was before the Alaska Supreme Court. He added that the Selection Committee unanimously found **MCGRAW's** bid to be unresponsive because it didn't follow the RFP process. It was a flat attempt to avoid the requirements of the RFP and an intentional manipulation to try to pick up all the points in the scoring.

**ROYCE** said the owner is still under a duty to fairly consider every proposal that is made.

**DAWSON** said his bidding approach differs from **MCGRAW's**. He

has never been sued or sued anyone. **SCOTT** said the GC/CM process was designed to create a less litigious process so it is ironic that the hearing is occurring. **DAWSON** said he submitted a subcontractor markup of 12.5% compared to **MCGRAW**'s 8% markup. The lowest he has ever seen is 12%. Southeast is very busy with construction projects at this time. Dawson wanted to make the project as appealing as possible because of the many competing projects in Southeast, including Juneau. The preconstruction fee he submitted was \$10,000 compared to **MCGRAW**'s one penny. You get what you pay for. He wanted to have funds to offer incentive for the subcontractors to be committed to the project.

**SCOTT** said she was not sure an executive session is in order. **SHIELDS** said there may be some wisdom in deliberation, and it could be handled in either open session or executive session.

**Motion** by **SMITH**: Deliberate in Executive Session because open deliberation could adversely affect the finances of the borough. It was seconded by **DUNBAR**. The motion carried unanimously.

The assembly was in Executive Session from 8:25pm until 8:42pm when the regular session reconvened.

**Motion** by **SCOTT**: Deny the RFP protest appeal by McGraw Custom Construction. The motion carried 4-1 in a roll call vote with **ROSSMAN** opposed.

#### **5. SELECTION COMMITTEE'S RECOMMENDATION TO AWARD**

**Motion** by **LAPP**: Award the GC/CM pre-construction contract to Dawson Construction as recommended by the Selection Committee. The motion carried unanimously in a roll call vote.

#### **6. ADJOURNMENT - 8:46pm**

**Motion** by **LAPP**: Adjourn the meeting. It was seconded by **SCOTT**. The motion carried unanimously.

ATTEST:

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Fred Shields, Mayor

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Julie Cozzi, Borough Clerk