

**MINUTES OF THE REGULAR MEETING OF THE BOARD OF DIRECTORS
OF
HEATHER RIDGE METROPOLITAN DISTRICT NO. 1**

Held: December 10, 2009, at 4:00 p.m. at 2811 S. Xanadu Way, Aurora, Colorado.

Director Attendance A meeting of the Heather Ridge Metropolitan District No. 1 (the "District") was held as shown above and in accordance with the applicable statutes of the State of Colorado. The following directors, having confirmed their qualification to serve on the board, were in attendance:

Errol Rowland	James Bruce	Mary Lou Braun
Jane S. Klein	Joan Beldock	Vincent Roith

Excused – Van Lewis

Also present for the District: Sean Allen, Esq., White, Bear & Ankele Professional Corporation, general counsel; Diane Wheeler, Simmons & Wheeler, district accountant. A public audience was also in attendance.

Call to Order & Quorum / Qualifications Director Rowland called the meeting to order. Director Rowland noted a quorum was present and all directors present were qualified to serve.

Approval of Agenda Motion made and seconded to approve the agenda. The motion passed unanimously.

Approval of Minutes The minutes from the November 12th, November 23rd, December 1st, and December 10th meetings will be considered at the January 14, 2010 meeting.

Bonds Closed/Golf Course Purchased Director Rowland reported that Series 2009 Bonds in the par amount of \$5,195,000 closed on December 1st with US Bank, and the District's golf course purchase is complete. Director Rowland noted that because the whole transaction was completed before December 4th, the District saved \$100,000 in purchase price costs.

2009 Budget Amendment Hearing Mr. Allen noted that notice of the public budget hearings for the 2009 amendment and 2010 budget was made pursuant to statute.

Ms. Wheeler presented the 2009 budget amendment. Ms. Wheeler indicated that a new enterprise fund has been created to deal with golf course expenses, and the capital projects funds increased to account for the District's purchase of the golf course. These amendments require additional appropriations. After the 2009 budget amendment discussion, Director Rowland opened the budget amendment hearing for public comment, after taking public comment, the hearing was closed.

A motion was made by Director Roith, seconded by Director Braun, to appropriate the additional revenues to cover the expenditures and otherwise approve the 2009 budget amendment as presented by Ms. Wheeler. The motion passed unanimously.

2010 Budget Hearing Ms. Wheeler presented the 2010 budget. After the discussion, Director Rowland opened the hearing concerning the budget for public comment, after taking public comments, the hearing was closed.

A motion was made by Director Roith, seconded by Director Braun, to

approve the year-2010 budget, certify the mill levies, and appropriate the revenues sufficient for the expenditures noted therein. The motion passed unanimously. The larger 2009 mill levy will be certified to the County by December 15, 2009, and collection thereof (i.e. payment of the larger 2009 mill levy by residents and property owners) will occur via the spring 2010 property tax payments.

Financial Matters

Ms. Wheeler presented invoices/claims payable to the board for consideration. After consideration of the invoices, upon motion and second the invoices were approved for payment. With the ownership and operation of the golf course, the district will experience an increase in monthly invoices.

Ms. Wheeler was directed to open a new checking account at US Bank, which will be more convenient since the net bond proceeds are also held at US Bank.

Golf Course Operation Agreements

Mr. Allen reported that the Masek Golf Cart Lease required an addendum to require there to be annual appropriation by the District such that the lease itself would not constitute multi-fiscal debt. Motion and second to approve the addendum was passed unanimously.

Mr. Allen reported that a subordination agreement is required as part of the lease assignment to the District because Yamaha will not allow liens to be placed on the leased golf carts by the District. Motion and second to approve the subordination agreement passed unanimously.

UAHR, Inc., Golf Pro and Dumitri agreements continue to be refined and are otherwise in place subject to finalization.

Mr. Allen was given direction to pursue consultant agreements with Director Roith to provide the scope of such agreements and compensation arrangements.

May 2010 Director Election

Mr. Allen presented a resolution calling for the May 2010 director election, and discussed the conditions upon which the election may be cancelled. Motion made and seconded to pass the director election resolution adopted unanimously.

Websites

It was reported that the established UARH web site with dedicated areas for the District will still be used, and that there is a separate website for the golf course.

Repair/Construction Contracts

Three bids were considered and discussed for roof and gutter work. Motion made and seconded to award work to Roof Brokers, Inc. Motion passed unanimously.

Adjourn

Motion made and seconded to adjourn. Meeting adjourned.

The foregoing minutes were approved by the Board of Directors on January 14, 2010, and constitute a true and correct copy of the minutes of the above-referenced meeting.

Secretary for the Meeting

GARY R. WHITE
KRISTEN D. BEAR
WILLIAM P. ANKELE, JR.
K. SEAN ALLEN
GEORGE M. ROWLEY*
JENNIFER GRUBER TANAKA**

WHITE • BEAR • ANKELE
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

CLINT C. WALDRON
LISA B. SANTOS
MARCUS R. SORENSEN
NEIL RUTLEDGE
EMILY C. JENSIK
BLAIR M. DICKHONER

MEMORANDUM

TO: Heather Ridge Metropolitan District No. 1

FROM: White, Bear & Ankele Professional Corporation

RE: Construction Bidding and Public Works Contract Requirements for Special Districts

DATE: January 14, 2010

This memorandum was prepared to educate the District, its advisory board and others conducting District business as to why, when and how a metropolitan district undertakes direct public bidding for the construction of eligible public infrastructure, contract requirements and final payments thereon.

Special District Contracts That Must Be Publicly Bid (Publication of Bid Invite):

Construction Contracts for Work and Materials Worth \$60,000 or More. Under Colorado's Special District Act (Title 32, Colorado Revised Statutes), metropolitan districts must **publish** bids on all construction contracts for work or materials or both involving an expense of \$60,000 or more of public moneys (Section 32-1-1001(d)(I), C.R.S.).¹ The special district may reject any or all bids, and has the sole determination in selecting the most responsive and responsible bid. Additionally, "if it appears that the special district can perform the work or secure material for less than the lowest bid, it may proceed to do so."

Any and All Contracts Between District and Director or Owner of 25% or More of Property. No contract for work or material including a contract for services, regardless of the amount, may be entered between a special district and a member of the board or between the special district and the owner of twenty-five (25%) percent or more of the territory within the special district unless a notice has been **published** for bids and the board member or owner submits the lowest responsible and responsive bid. Section 32-1-1001(d)(II).

¹"Publication" means printing one time, in one newspaper of general circulation in the special district" § 32-1-103(15).

Public Bidding - Article 92's Construction Bidding and Contracts with Public Entities (Competitive Bidding):

Title 32 does not contain specific bidding requirements for special district contracts which must have a **notice published** for bids as described above. However, as a general rule, special districts follow the competitive bidding requirements and guidelines found in Title 24, Article 92 "Construction Bidding for Public Projects" ("Article 92"). §§ 24-92-101, *et seq.*, C.R.S. Although the provisions of Article 92 do not apply to special districts, it contains general guidelines, as described below, with which most contractors are familiar, and which special districts often follow due to that familiarity:

- A. Publication of a notice of invitation for bids, which should be published in a newspaper of general circulation at least 14 days prior to the bid opening. The invitation should expressly state that the district has sole discretion in selection of the bid. Bids should not be withdrawn subsequent to opening unless a clerical or mathematical error exists, and the district has not detrimentally relied on the erroneous bid.
- B. The invitation for bids package should include:
 - i. The closing date for bid submissions,
 - ii. All evaluation factors,
 - iii. Delivery and performance schedules,
 - iv. Inspection and acceptance requirements
 - v. All contract terms, conditions and specifications
 - vi. Project description, and
 - vii. Form of bonds required and other documents as necessary.
- C. Prospective contractors may be pre-qualified, and the method of compiling a list of and soliciting from such potential contractors can be determined by the district.
- D. Bids are typically opened publicly and with reasonable promptness awarded to the lowest responsive, responsible bidder as determined by the district (the qualified bidder who has bid in compliance with the invitation for bids and has furnished required bonds). All bids and documents are to be retained by the district and are open to public inspection thereafter under the open records statutes.
- E. The district's board approves the contract and authorizes its execution and the Notice of Award in a public board meeting. A formal "Notice to Proceed" may be issued when required documentation is received (i.e., certificates of insurance and bonds).

Title 24, Public Works Required Construction Contract Terms:

Title 24's provisions governing construction contracts with public entities apply to special districts.

- A. **10% Retainage.** Construction contracts over \$150,000 for the construction, alteration or repair of any public building, public work or public improvement must contain certain retainage provisions. The contract shall authorize the district to make partial payments of the amount due under the contract at the end of each calendar month or as soon thereafter as practicable if contractor is satisfactorily performing, but require a 10% retainage until one-half of the contract is complete. In other words, 90% of the value of any work completed must be paid until 50% of the work required by the contract has been performed. Thereafter, in making payments, the board need not continue to retain the 10% if it believes satisfactory progress is being made in the work, but it has the ability to do so, and the contract should provide for it. However, all withheld amounts shall be retained until the contract is completed satisfactorily and finally accepted by the board and must be held until final payment procedures are followed.

Contracts for less than \$150,000 are not required to have a retainage provision, but it may be a level of protection the district should consider adding to every construction contract.

- B. **District Appropriation of Funds.** Before entering into a contract for a public works project, the district's board must appropriate sufficient funds in an amount not less than the contract amount (Section 24-91-103.6, C.R.S.). **All construction contracts must contain appropriation clauses** which state that money has been appropriated by the district and that any change order increase will be accompanied by further written assurance that appropriations are sufficient.

Title 38, Bonds which may be required of contractors:

- A. **Performance & Payment Bond (penal bond)** is required of the contractor prior to commencing work for a contract of more than \$50,000 for the construction, erection, repair, maintenance or improvement of any public building or other public works. The penal bond shall be duly executed, delivered to and filed with the district in a penal sum not less than one half of the total amount payable under the contract (Section 38-26-105 and 106, C.R.S.), and shall be current for the duration of the contract. The bond shall also provide that if the contractor fails to pay any subcontractor, the surety will pay the same in an amount not exceeding the sum specified in the bond together with interest at the rate of 8% per year. The intent of such bond is that the contractor shall at all times promptly make payments of all amounts lawfully due to all persons supplying or furnishing such person or person's subcontractors with labor, laborers, materials, rental machinery, tools or equipment used (collectively "subcontractors") and that such contractor will indemnify and hold the District harmless. Subcontractors, materialmen, mechanics, suppliers and others may have a right of action for amounts lawfully due them from the contractor directly against the principal and surety of the bond (known as a Section 105/106 subcontractor's claim against the contractor and

surety).

It is also recommended, but not required, that a maintenance bond guaranteeing the warranty provision of the contract for a year be added into the Performance and Payment Bond.

- B. **Bid bonds** equal to 5% of the amount of the bid which guarantees that the bid will be maintained in effect for 30 days after the bid opening or as specified in the invitation for bids. Bid bonds are not required by law, but if required it can act to avoid withdrawal of low bids.

Title 38, Final Payment Procedure on Contracts:

- A. Upon completion of a project (final settlement for the work contracted) the District shall cause a notice of final payment to the contractor must be **advertised twice** in a newspaper of general circulation if the contract awarded exceeds \$50,000. The notice announces that the district is about to make final payment to the contractor on a specific settlement date, which is at least ten days after the second publication. If no claims (usually from subcontracts which have not been paid by the contractor) are made, final payment in full to the contractor may be made on the properly noticed settlement date.

For final payment on contracts that are less than \$50,000, the District should require that the contractor supply a lien waiver/lien release as a condition of final payment verifying that the contractor has paid all subcontractors and suppliers etc.

- B. Any subcontractor whose claim has not been paid by the contractor, at any time up to and including the time of final settlement date, may file with the district a verified statement of the amount due and unpaid on account of such claim ("**verified claim**"). Upon the timely filing of the verified claim, the district shall withhold from all payments to the contractor sufficient funds to insure the payment of the verified claims. The retainage shall last until such time as the claims have been paid (by the contractor) or such claims have been withdrawn (with evidence of payment or withdrawal provided). However, no funds shall be retained longer than 90 days from settlement date unless the subcontractor has commenced an action against the contractor within the 90 days for unpaid claims and a notice of *lis pendens* (notice of a pending lawsuit) is filed with the district. If there are no lawsuit claims or *lis pendens* notices given within the 90 days, then the retainage will be returned to the contractor even if the subcontractor(s) has not been paid by the contractor. If a lawsuit or *lis pendens* is taking place, then the district continues to hold the subject retainage until the final outcome. Failure by the subcontractor to comply with the procedures noted shall relieve the district from any liability for making payments to the contractor. Any time within 90 days following the date of final settlement, any person whose claims have not been paid by the contractor or a subcontractor may commence an action to recover the same against the surety on the Performance and Payment Bond discussed above.

- C. After a verified claim has been filed, the subcontractor who has an interest in the payments being withheld, may file with the court an ex parte motion for approval of a substitute corporate surety bond or any other undertaking that may be acceptable to the court in the amount of 1.5 times the amount of the claim. If granted, the verified claim is discharged and the substitute shall be used in place of the moneys withheld. The district then releases the retainage. The surety substitute shall then pay to the subcontractor that has been adjudged entitled to the claim the amount of the judgment.
- D. If the district knows of a potential subcontractor who is not likely to see the publication of final settlement, then the district may want to contact such subcontractor and indicate that notice has been published or will be published on the known dates in the local newspaper. Although there is no requirement for the district to do so, it should contact such known potential claimants and simply alert them to get a copy of the newspaper on the dates of publication.

Title 8, Illegal Aliens – Public Contracts for Service:

Title 8, Article 17.5 prohibits districts from entering into or renewing a public contract for services with any contractor who knowingly employs or contracts with an illegal alien or who contracts with subcontractors who knowingly employ or contract with an illegal alien. The “services” covered by these contracts include the provision of labor, time or effort that does not involve the delivery of a specific end product that is merely incidental to the required performance.

Public contracts for services must require the contractor/vendor to certify that they do not knowingly contract with or employ illegal aliens to work under the public contract. The contractors must also certify that they have required their subcontractors to certify that they do not do so. Contractors are also required to certify that they have attempted to verify the status and eligibility of their employees and subcontractors as eligible to work in the United States through the Basic Pilot Employment Verification Program. Those employers who are not accepted into the Basic Pilot Program are required to keep applying every three months until they are accepted or the public contract has been completed.

If a contractor obtains actual knowledge that a subcontractor performing work under a public contract is knowingly employing illegal aliens, the contractor has three days to notify the subcontractor and the district that is letting the contract. The contractor must terminate the contract with the subcontractor unless, within three days, the subcontractor fires the illegal alien or certifies that it was unaware that the alien was illegal. If the contractor violates any of these provisions, the district may consider the contract breached, terminate it and hold the contractor liable for damages.

Amendment 54:

Contractors should also acknowledge that its contract with the District may be construed to be a 'sole source contract' within the meaning of Article XXVIII of the Colorado Constitution (if such contract is not bid out), and if so, contractor may have compliance obligations under any currently effective provisions of the Article, including filing a government contract summary.

General Counsel to Review Contracts:

The District should allow its general legal counsel the opportunity to review and revise contracts prior to execution and awarding thereof to ensure compliance with the various laws related to contracting for public works. Often vendors and contracts may have a preferred form of contract, but that form contract may not contain all the necessary terms and conditions required when contracting with a metropolitan district for public works.