

The Board of Mayor and Aldermen of the City of Waveland, Mississippi, met in special session at the Waveland City Hall Boardroom, 301 Coleman Avenue, Waveland, MS. on July 30, 2015 at 6:30 p.m. to take action on the following matters of city business.

TAPE AVAILABLE FOR LISTENING UPON WRITTEN RECORDS REQUEST

ROLL CALL

Mayor Smith noted for the record the presence of Aldermen Burke, Richardson, Lafontaine and Piazza, along with City Clerk Lisa Planchard and City Attorney Rachel Yarborough.

NOTICE OF MEETING TO DISCUSS INVOICE/PAY APPLICATION NO. 19 FROM HENSLEY R. LEE CONTRACTING, INC. JEFF DAVIS/GULFSIDE SEWER IMPROVEMENTS PROJECT (EXHIBIT A)

CITY ATTORNEY'S COMMENTS

City Attorney Rachel Yarborough had no comments at this time.

RECONVENE MEETING

Re: Reconvene Recessed Meeting of July 28, 2015

Alderman Lafontaine moved, seconded by Alderman Piazza to reconvene the recessed meeting of July 28, 2015.

A vote was called for with the following results:

Voting Yea: Burke, Richardson, Lafontaine, and Piazza

Voting Nay: None

Absent: None

INVOICES/JEFF DAVIS-GULFSIDE SEWER IMPROVEMENTS PROJECT

Re: Payment of Invoice No. 19 from (HRL) Hensley R. Lee Contracting, Inc.

Alderman Lafontaine moved, seconded by Alderman Burke, to approve and issue payment for Pay Request No. 19 (Final) from Hensley R. Lee, Contracting (HRL) in the amount of \$118,085.94 reserving particular rights and not waiving any warranties or rights under the contract as to performance, time of performance, completion of punch list items, warranties, or any other contracted rights owned by Hensley R. Lee Contracting, Incorporated to the City; nor is this payment a waiver of any right by the City of Waveland to recollect these amounts for any breach by HRL. All above regarding the Jeff Davis/Gulfside Sewer Improvement Project.

City Attorney Yarborough said that Mr. Fletcher with HRL just handed her an affidavit, which lists all of their subcontractors and any balance amounts. This affidavit also states that Exhibit A is a complete and thorough list of all unpaid bills at this date excepting Gulfcoast Underground the amount of \$123,910.00 and L.J. McCool of MS, the striping subcontractor that's not at this time performed the work. She asked Mr. Stein of Digital Engineering, "What part of the final pay app work has not been performed." Mr. Stein said, "It would be the striping". Ms. Yarborough said, "And that's it, because I know that there was some talk last meeting about there being some cleaning of sewer lines." Mr. Stein answered, "That's a punch list item, not a pay app." She asked, "What punch list items have not been completed." Mr. Stein provided her an updated list current as of 1:00 pm today. She asked Mr. Stein, in his opinion, if there were any items listed under this punch list, which would represent a substantial amount, more than \$1,000 or \$5,000? Mr. Stein said it would be the striping. She then asked if he had a guestimate of the value of the punch list items remaining besides the striping, which we've established is \$25,000. He said he does not have an estimate. She asked if he knew how long it would take to complete the work remaining on the punch list. He said that other than the striping, it should not be more than a couple days with the cleaning and then the striping.

Ms. Yarborough asked if we established at the last meeting that the striping was \$25,000 or \$20,000. An HRL representative said the striping cost would be \$25,890.00. Ms. Yarborough asked, "And in the Pay App #19 that's been submitted by HRL, approved by Digital, does that include the price for the striping, included in the total to be paid". Mr. Stein said that yes, it's part, this is just the retainage. Ms. Yarborough said, "Yes, but if you're releasing the retainage, it contemplates that the work's been totally complete." Mr. Stein said that it would be part of the pay app. She said, "So that \$118 does contemplate that the \$25,890 worth of striping has been completed." He said, "Right". She then told the Board her position on this, "Although there are a few things on the punch list besides the striping that are incomplete, that doesn't much give me lots of heartburn to represent to the Corp. (of Engineers) that the contract's been completed even though these punch list items haven't necessarily been done because those are really small items. But this large striping that's yet to be accomplished; to me, I have a problem representing to the Corp. of Engineers that that's been done and paid for by approving final app. if it's not been. That, to me, is a large ticket item and by approving the final pay application, that's representing all the work under the contract documents have been accomplished and you're making the same representation to the Corp, so my recommendation would be that we need to reduce the contract amount at least by that amount because that work has not been accomplished." She said she had proposed to HRL that she would make the recommendation to the Board that we forgive some of the \$51,000 in liquidated damages if they would agree in a dispute resolution agreement to finish the work and the striping if we paid them the outstanding amount minus what the outstanding; what those items remained left to be done, which at this point would be the striping. She said her approach would be that the City would deduct from the contract price, from the Pay App #19, the \$25,890 from the \$118,000+, take into consideration their liquidated damages, and then enter an agreement with HRL that they would complete the punch list items and the striping if we were to pay them the reduced amount. She added that that apparently has been declined by HRL. HRL's attorney, Nick Thompson came forward with a counter offer. He said that HRL's counter proposal is a very simple one, it is simply that you release the \$118,000 total price to them tonight or tomorrow and the work is completed, the job gets done, all the subs get paid who are owed to be paid; the issue with GulfCoast Underground, which is in dispute, but I want assure the Board that any issues with any subcontractors of HRL for payment allegedly outstanding is between HRL and the subcontractors and that is because HRL's bond payment and performance bond is good for a year after contract completion. So, if the Board were to pay out HRL tonight, if there's any subs out there that have issues with not being paid by HRL, that's between them and HRL and the bonding company. He said he doesn't want the Board to think there's an issue that would prohibit them from doing that tonight, from paying HRL. Ms. Yarborough said she does not necessarily disagree with that, Gulfcoast Underground has not submitted a notice of claim. What they've done is submitted a copy of the invoice to the City, but if they do and we know that it's going to be disputed, however Gulfcoast Underground is well aware of the procedures to make a claim with the Surety. Ms. Yarborough said she would not recommend paying the \$25,890; she does not think there's any way around not including that \$25,000+. Ms. Yarborough said, "And really, here's my position and I really don't understand HRL's, because if you're intending to do the work there's no other reason to really deny the City's offer because you could either, if the City, and it's going to be my recommendation that no matter what, we revise the final pay app. to reflect the work that's been done, which will be \$93,000+/- and then the Board has the authority to assess liquidated damages in the amount of \$51,000. So if your contract price goes to \$93,000 because you take away the \$25 and then you assess liquidated damages, I mean their walking away with \$42,000." Mr. Thompson said he has reviewed the contract and he thinks there's a good questioning whether or not that liquidated damages provision would be enforceable in this case for multiple reasons. He added that the fact that the sewerage system has been in use for multiple months now would pretty much almost kill the liquidated damage provision and secondly, the fact that it's not a, even though you put it in the language of the liquidated damages provision that says we recognize the difficulty of actually determining what are the actual damages because of delay so were just going to put a dollar amount on it. He said in his opinion that sort of provision under MS. Law is not enforceable. He added that that's where HRL's position comes from; they don't believe that the liquidated damages provision is enforceable and they want to get the full payment tonight and then finish the job. Ms. Yarborough said she appreciates that, but please take into consideration that this is the

City's 4th special meeting just on this final pay app. and that every time HRL submits a bill, we get 4 bills from Digital Engineering.

EXECUTIVE SESSION

Re: Potential Litigation Jeff Davis/Gulfside Sewer Improvements Project

Alderman Lafontaine moved, seconded by Alderman Burke to consider Executive Session to prompt a closed discussion regarding potential litigation, Jeff Davis/Gulfside Sewer Improvements Project.

A vote was called for with the following results:

Voting Yea: Burke, Richardson, Lafontaine, and Piazza

Voting Nay: None

Absent: None

Alderman Richardson moved seconded by Alderman Burke to enter Executive Session regarding potential litigation, Jeff Davis/Gulfside Sewer Improvements Project.

A vote was called for with the following results:

Voting Yea: Burke, Richardson, Lafontaine, and Piazza

Voting Nay: None

Absent: None

Alderman Lafontaine moved, seconded by Alderman Richardson to exit Executive Session with no action taken.

A vote was called for with the following results:

Voting Yea: Burke, Richardson, Lafontaine, and Piazza

Voting Nay: None

Absent: None

**INVOICES/JEFF DAVIS – GULFSIDE SEWER PROJECT SEWER PROJECT/
HENSLEY R. LEE, CONTRACTING/UTILITY DEPARTMENT**

Re: Issue Payment for Pay Request 19 (Not the Final Pay application)

Alderman Lafontaine moved, seconded by Alderman Burke to withdraw their motion and second.

Alderman Burke then moved, seconded by Alderman Piazza to approve and issue Pay Request #19 from Hensley R. Lee Contracting, Inc. (HRL) in the amount of \$92,195.94 accounting for the retainage and reserving particular rights and not waiving any warranties or rights under the contract as to performance, time of performance, completion of punch list items, warranties, or any other contracted rights owned by Hensley R. Lee Contracting, Incorporated to the City; nor is this payment a waiver of any right by the City of Waveland to recollect these amounts for any breach by HRL, all above regarding the Jeff Davis/Gulfside Sewer Improvements Project.

A vote was called for with the following results:

Voting Yea: Burke, Richardson, Lafontaine, and Piazza

Voting Nay: None

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Special Meeting of July 30 2015
6:00 P.M.

Absent: None

City Attorney Rachel Yarborough said, "That will not be considered final payment, there will have to be, when the striping is complete, another pay app." She said that HRL is still under the contract, this is not a final payment, we've just reduced the amount requested by the outstanding work to be completed. She added that we've reserved all of our rights as to liquidated damages and contract issues, so this is basically just not a final payment.

ADJOURN

Re: Adjourn at 7:24 p.m.

Alderman Burke moved, seconded by Alderman Piazza to adjourn the meeting at 7:24 p.m.

A vote was called for with the following results:

Voting Yea: Burke, Richardson, Lafontaine, and Piazza

Voting Nay: None

Absent: None

The foregoing minutes were presented to Mayor Smith on August 21, 2015.

Lisa B. Planchard
City Clerk

The Minutes of July 30, 2015 have been read and approved by me on this, the 21st day of August 2015.

Mike Smith
Mayor

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