

Municipal Facilities Committee

Minutes of 01/03/2019 Meeting

Submitted by Steve Hinton

Attendees: Jerry Lerman, Kate Reid, Josh Kablotsky, John Lavery, and Steve Hinton

Also present: Tim Goddard (Town Administrator), Rob Fortado (School Facility Manager)

The meeting was called to order at approximately 5:02 PM.

The group discussed the need for regular Town Administrator's status reports in tabular XLS format. Josh and Kate proposed that the reports include more detail including: project name, expected start/completion dates, budget\$, actual\$, and obstacles impeding completing, etc. Jerry further requested that the Town Accountant provide monthly department budget statements similar to those routinely provided to other departments. Tim indicated he would address these two requests.

Tim presented a \$1000 engineering invoice for approval as part of the FD oil tank removal. Kate and Jerry signed the invoice. John noted that the tank removal was completed on time but the final report had not yet been received.

With respect to further departmental expenses, Josh inquired as how the department budget could be reallocated. Tim indicated the budget was presently allocated ~48K to salary and \$3.6K for incidentals. After some discussion the group concluded that half of salary budget could and should be reallocated to the incidentals budget so that it could be used for departmental project management expenses like the engineering invoice. Tim indicated that the Town Accountant would need a memo from him requesting the reallocation and that he would see to that.

Subsequently, there was a lengthy discussion with Tim regarding the MFC's view of on-going funding for the MF department, how expenses would be approved, and what would constitute a steady-state condition. There was an agreement in principal that the facility manager's salary would be approved by Tim G every two weeks so as to eliminate delays in payroll and that all other bills, invoices, expenses, etc. would be approved by vote and sign-off of the MFC members.

Between 6:03 PM and 6:29 PM, the committee met with Facility Manager candidate Frank Golis to assess his qualifications for the facility manager position.

Between 6:29 PM and 7:10 PM, the committee met with Facility Manager candidate Stephen Bastek to assess his qualifications for the facility manager position.

On motion by Josh/Kate, the group unanimously voted to direct Tim Goddard to appoint Stephen Bastek as the Town's Facility Manager effective immediately through June 30, 2019 subject to a 90 day probationary period.

Between 7:25 and 9:05, the group met with TBA Architects (Russel Feldman, and Robert Jefferies) for the purpose of establishing a budget for the Police Station renovation project. TBA reported that architectural fees for renovation range between 12 and 14 percent of hard construction costs and that they guessed hard construction costs would be something on the order of \$500K. These values do not account/cover the Feasibility Phase which precedes the typical five-part sequence of: Schematic (20%)-

Design Development (10%) -Construction Documentation (40%) – Bidding (5%) - Construction Administration (25%) OR any `site/civil` related engineering such as wetland delineation, site grading, etc. Since the feasibility phase has not been completed, TBA was unable to establish budget requirement for customary 5-part sequence. If the Town could provide the wetland delineation, TBA estimated the Feasibility task could be completed for \$15.5K.

After considerable discussion, and with the understanding that absence the Feasibility task results there is no certainty whatsoever, the following estimates could be considered lower-bounds to project expenses:

Before Town Meeting	\$35K – \$40K
Balance of Architecture	\$40K – \$48K
Construction	\$500K – \$600K (depending on site work requirements)
Project Management	\$35K – \$40K
Contingency	\$40K – \$60K
Civil	\$?????
Construction Testing	\$?????

TBA identified five areas of the proposed contract that needed reconsideration. The group indicated that such considerations were the domain of Town Purchasing Official (Tim G) and Town Council. Tim agreed to carry TBA's questions/concerns to Town Council for their input. In summary, the five areas of concern were: 1) No Project Representative during Feasibility; 2) Design meetings every-other week were too frequent; 3) Rebidding shouldn't be an open end process; 4) Defend should not be a part of indemnity, and (5) Insurance limits should allow for umbrella policies. TBA provided a ACEC/MA white paper on the issues surrounding recent changes to the general liability provisions of the standard MA design contract; see **attached**.

On motion by Kate/Josh which passed unanimously, Tim G should engage TBA to conduct the Feasibility Study of the Police Station renovation for \$15,500 provided negotiations over contract language with Town Council are successful.

On motion by Steve/Josh which passed unanimously, Steve should engage a contractor to delineate and map the wetlands along the rear boundary of the Police Station for an amount not to exceed \$2,000.

Next regular business meeting will be at 1/8/2019 at 8:00 AM. [FYI, this meeting could not be posted in time and was postponed.]

On motion by Steve and seconded by Josh (unanimous), the meeting closed at 9:10 PM.

===== Attachments follow:

ACEC/MA and the Boston Society of Architects have recently been made aware of a growing trend among public agency agreements, particularly municipalities that are requiring professional liability insurance, commercial general liability insurance and automobile liability insurance aggregate limits that are higher than are generally carried by most design professionals bidding this work. The insurance limits in these agency agreements apply not only to the prime design professional but to all sub-consultants as well. For commercial general liability and automobile liability insurance, the limits more frequently being required are \$1,000,000 each occurrence and \$3,000,000 aggregate. In regards to the automobile liability insurance, since there is no aggregate limit on the policy, firms can meet the auto liability requirements, but not the commercial general liability insurance requirements.

The professional liability limits frequently being required are \$1,000,000 each claim and \$3,000,000 in the aggregate. In addition, many municipality contracts in their indemnification agreements are requiring the design professionals to defend the municipality, even against claims allegedly or purportedly arising out of a designer's professional negligence. Such a defense obligation is not insurable under professional liability insurance policies. The higher limit requirements for commercial general liability and professional liability, as well as the defense obligations in regards to professional liability claims are particularly burdensome on smaller firms, making it difficult for MBEs, WBEs and DBEs to bid on such work.

The commercial general liability insurance (CGL) coverage provides protection against claims for bodily injury and property damage arising out of the insured's premises, operations, products, completed operations and advertising/personal injury. It does not cover design professionals for claims arising from the performance of their professional services. The standard limits offered by CGL insurers, even for very large design firms are either \$1,000,000 each occurrence / \$1,000,000 aggregate or \$1,000,000 each occurrence / \$2,000,000 aggregate. It should be noted that CGL insurers freely endorse these policies so that the aggregate limits applicable to the design professional's operations apply on a per project basis. With this endorsement on the policy, the public agency or municipality is getting the benefit of an aggregate limit that is applicable solely to their project and would be unaffected by loss occurring on any other project of the design professional. CGL insurers also freely endorse these policies such that the public agency or municipality becomes an additional insured under the design professional's CGL policy for third party claims arising from the non-professional activities of the design professional; so long as a written contract requires such status. Given that the aggregate limits for the design professional's CGL insurance apply per project, we think that a \$1,000,000 aggregate limit amount should be sufficient to cover the project risks arising from a designer's non-professional activities.

On the professional liability insurance, generally average size firms with annual billings up to \$5 million, purchase limits of \$1,000,000 each claim and \$1,000,000 aggregate. It is highly unusual for any firm to experience more than one professional liability claim arising out of any project. Further, smaller to mid-sized firms with up to \$5 million annual billings tend to experience very few claims, most years experiencing no claims on any projects at all.

We recommend that public agencies and municipalities consider the \$1,000,000 minimum professional liability insurance limits as stated in Section 51 (e) of Massachusetts General Laws, Chapter C as the standard aggregate limits to require for most public agency and municipality construction projects. Requiring limits greater than this will likely cause the smaller firms who tend to be WBE's, MBE's and DBE's not to bid on these agency projects, thus making it harder to meet State goals in apportioning

work to these businesses on public projects. Also requiring limits greater than \$1,000,000 aggregate increases the overhead costs that get passed through to agencies and municipalities on their projects.

Indemnification clauses in municipality and public agency agreements which require the design professional to defend the municipality or agency for claims allegedly or purportedly caused by the designer's performance of professional services are also very problematic. Professional liability insurance does not cover this up front duty to defend. Unlike CGL insurance, where an insurer will agree to add the municipality or agency as an additional insured, professional liability insurers will not agree to name project owners as additional insureds for liability arising from the designer's performance of professional services. Professional liability insurance is predicated on the negligence based standard of care expected of design professionals in our legal system. Since the liability of a project owner, contractor or other party on a construction project is often greater than a negligence based standard of care, no professional liability insurer will agree to add them as an additional insured. Professional liability insurers thus are only obligated to defend the insured designer and will turn down requests from project owners and other participants for defense.

It should be noted that professional liability insurers will reimburse the project owner its legal costs to defend against a third party claim as part of any damages which are suffered by the project owner due to a claim proven or determined to have been caused by the design professional's negligence. So even though a public agency or municipality may initially need to provide its own defense, such costs are later recoverable if the design professional caused the claim.

Most design professionals will likely not have sufficient financial resources to initially pay the legal expenses to defend the public agency or municipality. A public agency or municipality insisting in an indemnification clause that a design professional defend the agency or municipality against claims purportedly caused by the design professional's negligence will likely find it will need to defend itself as the design professional will be financially unable to do so. Reconsideration should be given to indemnification clauses such that the design professional is obligated only to indemnify, reimburse the legal costs and hold harmless the agency or municipality against third party claims to the extent caused by the design professional's negligence.
