

RICHLAND COUNTY WATER RESOURCE DISTRICT  
Richland County Courthouse, Wahpeton, ND  
September 18, 2018

The Richland County Water Resource Board (RCWRB) met September 18, 2018 at 8:30 AM at the Richland County Courthouse, Wahpeton, North Dakota.

THOSE PRESENT: Managers Arv Burvee, James Haugen, Don Moffet, Robert Rostad, Engineering Technician Justin Johnson, and Secretary-Treasurer Monica Zentgraf.

THOSE ABSENT: Gary Friskop

### **Minutes**

The September 11, 2018 minutes were presented. A motion was made by Mgr. Rostad and seconded by Mgr. Haugen to approve the September 11, 2018 minutes as corrected. The motion carried unanimously.

### **Proj #7 Reconstruction**

Zach Herrmann, of Houston Engineering, met with the Board to discuss the Proj #7 reconstruction. The Office has been notified by North Dakota State Water Commission (ND SWC) staff that the District's request for cost share assistance will be presented to the Flood Control and General Water Subcommittee on September 20, 2018 for consideration of presenting the project to the ND SWC at the December 2018 meeting. Because of the possibility for cost share assistance, the Board was asked to reconsider the additional cross sectioning for the entire four miles of the drain (rather than two miles as approved September 11, 2018) and the need for a sediment analysis. Considerable discussion followed regarding this matter. Mr. Herrmann also provided the Managers with a preliminary schedule for the reconstruction project and discussion was held regarding right-of-way acquisition. A motion was made by Mgr. Haugen and seconded by Mgr. Moffet to rescind the September 11, 2018 motion "to reduce the current reconstruction project to Sections 23 and 22, Garborg Township, and authorize Houston Engineering to re-cross section Sections 23 and 22." The motion carried unanimously. A motion was made by Mgr. Haugen and seconded by Mgr. Moffet (that due to additional information received about possible ND SWC cost share assistance) to authorize Houston Engineering to re-cross section and complete a sediment analysis on Proj #7 in the S1/2 Sections 23, 22, 21, and 20, Garborg Township. The motion carried unanimously. Vice Chr. Burvee directed the Secretary to notify Ohnstad Twichell Law Firm to proceed with drafting right-of-way documents for Sections 21 and 20. (RCWRD #17-016)

### **Proj #31 Reconstruction**

A brief discussion was held about Houston Engineering surveying the E1/2 Section 28 and SE1/4 Section 21, Devillo Township, after corn harvest. Barring an early onset of winter weather, the survey will be completed this year. (RCWRD #18-022)

Mr. Herrmann left the meeting.

### **Request for Engineering Services (RFQ)**

## **RICHLAND COUNTY WATER RESOURCE DISTRICT AGENCY SELECTION COMMITTEE - INITIAL REPORT September 18, 2018**

In accordance with the NORTH DAKOTA STATE WATER COMMISSION'S COST-SHARE POLICY, PROCEDURE, AND GENERAL REQUIREMENTS (the "SWC Policy"), and in accordance with Chapter 54-44.7 of the North Dakota Century Code, the Richland County Water Resource District (the "District") previously conducted an engineering selection process for purposes of procuring an engineering firm, and

ultimately selected Interstate Engineering, Inc. The District notified the North Dakota State Engineer and Interstate Engineering of its selection. However, the District later concluded a single firm was not likely equipped to handle all of the District's projects and other tasks. Further, the District concluded engaging more than one firm would be more economically advantageous for the District and for the residents of Richland County. With that in mind, the District has elected to proceed with the engineering selection process again with the objective of selecting more than one qualified firm to act as consultant engineers for the District.

For the second selection process, the District once again appointed all five of its Water Managers as the "Agency Selection Committee" for purposes of conducting the requisite engineering selection process (as specifically required under Section I(C) of the SWC Policy and under N.D. Cent. Code § 54-44.7-03(1)). The District reasoned that all five of its members must ultimately approve a final contract with any firms selected; the District's members are best-equipped to measure and judge the qualifications of engineering firms regarding the District's business; and the District's members can mobilize relatively quickly and easily as necessary for purposes of conducting interviews, meeting to evaluate engineering firms, and otherwise performing the requisite tasks required to meet the requirements of the SWC Policy and Chapter 54-44.7.

The Committee developed the following "description for the proposed project" for firms' consideration, as required under Section 54-44.7-03(2)(a):

The Richland County Water Resource District (the "District") is seeking general engineering services and consulting to assist, advise, and act on behalf of the District regarding all proceedings and projects of the District, including regular attendance at meetings of the District; surveys; inspection and maintenance of existing projects, including assessment projects, drains, and retention projects; development, study, survey, design, bidding, contract administration, and right of way acquisition regarding new projects, improvements to the District's existing projects, and snagging and clearing projects; administration and negotiation of land and right of way acquisition on behalf of the District; assistance regarding permit administration, including surface drainage, subsurface drainage, dam, and dike permitting; investigation and assistance regarding administration of dike, dam, drainage, and obstruction complaints; assessment district development; negotiation with road authorities, railroads, and other entities on the District's behalf; regular cooperation and interaction with the District's staff, legal counsel, and other consultants; and otherwise performing all other tasks as necessary to act on the District's behalf.

The Committee developed "a formal invitation to firms for submission of information" as required under Section 54-44.7-03(2)(c); see the RFQ attached as **Exhibit A**.

As required under Section 54-44.7-03(2)(c), the Committee made the following conclusions:

1. The manner in which this [invitation/RFQ] must be published:
  - a. The Committee concluded a single publication in *The Daily News* would appropriately, adequately, and sufficiently invite qualification statements.
2. The content of the publication:
  - a. The Committee approved the attached RFQ.
3. The frequency of the publication:

- a. The Committee concluded a single publication in *The Daily News* would appropriately and sufficiently invite qualification statements, along with email invitations to all of the firms that submitted qualification statements in response to the initial RFQ.

## **EXHIBIT A**

### **RICHLAND COUNTY WATER RESOURCE DISTRICT REQUEST FOR QUALIFICATIONS REGARDING ENGINEERING SERVICES**

The Richland County Water Resource District (the “District”) is a political subdivision in Richland County, North Dakota. The District owns, operates, maintains, develops, and constructs drainage, flood protection, and other water infrastructure projects in accordance with its statutory authorities. The District occasionally requests cost-share participation from the North Dakota State Water Commission (the “SWC”) regarding various project development, design, and construction activities. In accordance with the SWC’s cost-share policies, the District must conduct an engineering services selection process at least every three years to qualify for cost-share regarding project engineering and development. The District previously conducted an engineering selection process for purposes of procuring an engineering firm, and ultimately selected a single firm, in accordance with the SWC’s cost-share rules and North Dakota law. However, the District later concluded a single engineering firm was not likely equipped to efficiently and timely handle all of the District’s projects and other tasks. Further, the District concluded engaging more than one firm would be more economically advantageous for the District and for the residents of Richland County. With that in mind, the District has elected to proceed with the engineering selection process again with the objective of selecting more than one qualified firm to act as consultant engineers for the District. This RFQ process will satisfy the SWC cost-share requirements.

#### **Scope of Services**

The District is seeking general engineering services and consulting to assist, advise, and act on behalf of the District regarding all proceedings and projects of the District, including regular attendance at meetings of the District; surveys; inspection and maintenance of existing projects, including assessment projects, drains, and retention projects; development, study, survey, design, bidding, contract administration, and right of way acquisition regarding new projects, improvements to the District’s existing projects, and snagging and clearing projects; administration and negotiation of land and right of way acquisition on behalf of the District; assistance regarding permit administration, including surface drainage, subsurface drainage, dam, and dike permitting; investigation and assistance regarding administration of dike, dam, drainage, and obstruction complaints; assessment district development; negotiation with road authorities, railroads, and other entities on the District’s behalf; regular cooperation and interaction with the District’s staff, legal counsel, and other consultants; and otherwise performing all other tasks as necessary to act on the District’s behalf.

#### **Submission Requirements**

The Qualification Statements must include:

1. Name of Respondent and general information regarding Respondent’s entity structure;
2. Name, title, address, telephone number, and email address of contact person authorized to contractually obligate Respondent;
3. General introduction and brief history of Respondent’s firm;
4. Description of Respondent’s specialized or relevant experience or knowledge;
5. Confirmation that Respondent meets the appropriate North Dakota licensing requirements;

6. Description of noteworthy water infrastructure projects the firm has developed, designed, administered, and managed in the area, specifically including legal assessment drains and retention projects;
7. Description of any other characteristics that would be uniquely relevant in evaluating Respondent's experience of Respondent;
8. Identification of key management, field, and staff members Respondent would assign to provide District's services;
9. Information regarding Respondent's management, field, and staff members designated above, including name, position, telephone number, email address, education, and experience, including information regarding relevant project experience; and
10. General description of Respondent's ability to meet Respondent's time and budget requirements.

Respondents must submit one Qualification Statement to the District by 5:00 p.m. on Monday, October 15, 2018, by mail or email, to:

Richland County Water Resource District  
 c/o Monica Zentgraf  
 418 - 2nd Avenue North  
 Wahpeton, ND 58075  
 mzentgraf@co.richland.nd.us  
 701-642-7773

### **Selection Criteria**

The District will evaluate each Respondent on the basis of the following criteria:

1. Professional qualifications necessary for satisfactory performance of requested services, including past performance on behalf of the District and on similar projects;
2. Qualifications of personnel;
3. Ability and willingness to meet time and budget requirements;
4. Location, with higher priority given to firms headquartered in North Dakota;
5. Recent, current, and projected workloads;
6. Related experience on similar projects; and
7. Recent and current work for the District.

The District will evaluate all Qualification Statements and will rank firms based on the above criteria. The District will conduct interviews with at least the top three firms. Following interviews, the District will select the top-rated firms and will enter into contract negotiations with at least two firms, and possibly three firms; the District will ultimately enter into contracts with more than one firm. The District will provide written notice of its decision to all Respondents.

The District reserves the right, in its discretion, to waive any deficiencies in any submissions, and to accept or reject any and all Qualification Statements submitted. The District is not responsible for the costs of proposal or interview preparation.

### **Abandoned Homestead Drain**

Joyce Shorma, owner of the NE1/4 Section 34, Homestead Township, met with the Board. She voiced concerns about work done by Tim Jones in the south road ditch on the north side of her land. Mrs. Shorma informed the Managers that Mr. Jones "dug out the bottom of the ditch" and placed the dirt on his property in the SE1/4 Section 28. Mgr. Moffet inspected the site yesterday after receiving a telephone call from Mrs. Shorma. He reported that it appears eight to twelve inches of material was removed from the bottom of the ditch. Mrs. Shorma was asked if she felt the work will adversely affect her property; she indicated she does not like what Mr. Jones did without contacting her.

The District's Secretary reported that after hearing about Mrs. Shorma's concern, she researched the ownership of the ditch, as it was part of the legal assessment "Homestead Drain" which was abandoned many years ago. The Secretary further reported the land is still owned by the RCWRD. Given that information, Mrs. Shorma had no further questions or comments and the meeting concluded.

The Managers continued to discuss the matter. Consensus of the Board was to secure an opinion from Legal Counsel whether the RCWRD or Township Board has jurisdiction over work in this ditch. Additionally, the Managers wanted a recommendation from Legal Counsel regarding the District retaining ownership of all of the abandoned drain right-of-way.

#### **Proj #41 ROW-SE1/4 Section 24, Mooreton Township**

The Secretary reported that she contacted Legal Counsel about the straw bales piled on the backslope of Proj #41, as directed by the Board at the September 11, 2018 meeting.

Mr. Fredricks, like the Managers, was also concerned about the excess weight on the slope and recommended the District direct the landowners to move the bales. He also recommended granting them one month to move the bales. After much discussion, a motion was made by Mgr. Moffet and seconded by Mgr. Rostad to require the straw bales to be moved off the District's right-of-way no later than December 1, 2018 and authorizing Vice Chr. Burvee to sign the letter accordingly. The motion carried unanimously. (RCWRD #18-023)

#### **Arthur Bernard Dam/Dike Complaint Against Richland County Highway Department**

The Board next considered Arthur Bernard's Complaint against the Richland County Highway Department. Mr. Bernard filed a COMPLAINT FOR WATER-RELATED ISSUES, dated July 30, 2018, but not filed with the Richland County Water Resource District until August 28, 2018. In the Complaint, Mr. Bernard alleges the Richland County Highway Department covered a culvert in County Road 1. In the Complaint, Mr. Bernard seeks removal of the covered culvert and replacement with a new culvert "to equalize the water on both sides of County Road 1." Mr. Bernard filed the Complaint as a dam/dike complaint under N.D. Cent. Code §§ 61-16.1-38 and 61-16.1-53. Mr. Bernard essentially alleges County Road 1 acts as a dam or dike that floods his property in the Northeast Quarter of Section 19 of Ibsen Township.

Mr. Fredricks reviewed this matter and indicated the Richland County Water Resource District lacks jurisdiction to order Richland County to install a culvert through its highway in this situation. Under N.D. Cent. Code § 61-16.1-42, the Board has authority to order installation of a culvert through a county highway, or to increase the capacity of existing culverts in a county highway, but only along the course of a legal assessment drain. Further, water resource districts share jurisdiction and decision-making authority regarding culverts that discharge into legal assessment drains, or that permit water to enter into legal assessment drains, under the North Dakota Supreme Court decision in Eichhorn v. Waldo Township Board of Supervisors, 723 N.W.2d 112 (N.D. 2006). However, neither Section 61-16.1-42 nor the Eichhorn decision have any bearing on this matter. There is no legal assessment drain in the vicinity of Mr. Bernard's property in the Northeast Quarter of Section 19 of Ibsen Township, and, therefore, the legal assessment drain capabilities of the Richland County Water Resource District under Section 61-16.1-42 and the Eichhorn decision, as they relate to culverts through county roads, do not apply in this situation.

Mr. Fredricks noted Mr. Bernard is attempting to utilize the dam/dike complaint process under Section 61-16.1-53 to compel Richland County to install a new culvert. However, the North Dakota Supreme Court has ruled on several occasions that water resource districts lack the authority or jurisdiction to order

road authorities to install culverts, in the absence of any legal assessment drain. In Kadlec v. Greendale Township Board of Township Supervisors, 583 N.W.2d 817, 822 (N.D. 1998), the Supreme Court held road authorities, and not water resource districts, have sole jurisdiction regarding culverts through township roads under N.D. Cent. Code § 24-03-06. The Supreme Court found a landowner seeking a culvert through a road or highway should apply with the applicable road authority since only road authorities have the authority to install culverts through their roads, in the absence of any legal drain. Similarly, in Ness v. Ward County Water Resource District, 585 N.W.2d 793, 795-96 (N.D. 1998), the Supreme Court held that, in the absence of a legal assessment drain, road authorities, and not water resource districts, have sole jurisdiction and decision-making authority regarding culverts through their roads or highways to preserve drainage.

Landowners often suggest that “roads cannot act as dams.” However, that antiquated notion does not control North Dakota drainage law. Rather, Sections 24-03-06 and 24-03-08 require road authorities, including counties, to comply with the North Dakota Stream Crossing Standards when constructing or reconstructing highways or roads. Prior to the implementation of the Stream Crossing Standards, road authorities were required to design road crossings “in accordance with scientific highway construction and engineering” when constructing or reconstructing a road or a crossing. To the extent a road authority fails to meet its obligations under the Stream Crossing Standards, the North Dakota Supreme Court has clearly held water resource districts lack any jurisdiction or authority to compel a road authority to comply with their Stream Crossing Standard obligations, and landowners therefore should seek their remedies from the road authorities. See Skogen v. Hemen Township Board of Township Supervisors, 782 N.W.2d 638 (N.D. 2010). With these issues in mind, the Board lacks any jurisdiction to order Richland County to install a culvert through its county highway.

In addition, the permitting statutes regarding dams and dikes, Section 61-16.1-38, does not contemplate roads or highways as dams or dikes. The North Dakota Administrative Code provides the following definitions of those terms:

3. "Dam" means any barrier, including any appurtenant works, constructed across a watercourse or an area that drains naturally to impound or attenuate the flow of water. All structures necessary to impound a single body of water are considered a single dam.

4. "Dike" means any artificial barrier, including any appurtenant works, constructed along a watercourse or an area that drains naturally to divert the flow of water to protect real or personal property.

County Highway 1 does not meet the definition of a “dam” or a “dike,” nor does it meet the definition of “other device”:

14. "Other device" means a water control structure, other than a dam or dike, including diversions and holding ponds, lagoons, or dugouts.

With all of these issues in mind, the District lacks any jurisdiction under Sections 61-16.1-38 and 61-16.1-53 to order Richland County to remove an existing culvert and replace it with a new culvert. Further, the North Dakota Supreme Court has held on several occasions that road authorities, and not water resource districts, have sole jurisdiction over culverts through their highways. Mr. Fredricks advised the Board they have no choice but to dismiss Mr. Bernard’s Complaint.

Manager Haugen moved to dismiss Mr. Bernard’s COMPLAINT FOR WATER-RELATED ISSUES due to lack of jurisdiction. Manager Rostad seconded the motion. Upon roll call vote, Managers Rostad, Burvee, Moffet, and Haugen, voted in favor of said motion; Mgr. Friskop was absent and not voting. The motion carried unanimously.

The Board directed Mr. Fredricks to prepare the requisite NOTICE OF DECISION and to provide the NOTICE to the parties of record. (Bernard #18-024)

**Proj #5(27)- NE1/4 Section 21, Walcott East**

The Managers were informed that Kathy Olson contacted the Office to inquire about who is responsible for mowing the drain right-of-way in the NE1/4 Section 21, Walcott East. The Managers directed Mrs. Olson be notified the area along the drain will be sprayed in the future.

**Applications**

Appl #18-027, Paul Berndt: E1/2 Sec 36, Mooreton Township A motion was made by Mgr. Haugen and seconded by Mgr. Rostad to approve a culvert to culvert cleanout in 2019 and to assign the project to Ehlert Excavating. Work at Proj #41 expense. The motion carried unanimously.

**Adjournment**

There being no further business to come before the Board, Vice Chr. Burvee adjourned the meeting at 11:30 A.M.

Respectfully submitted,

*Monica Zentgraf*  
Monica Zentgraf  
Secretary

*Arv Burvee*  
Arv Burvee  
Vice Chairman of the Board