

**PROCEEDINGS OF THE
FINANCE COMMITTEE OF THE
GRAND FORKS/EAST GRAND FORKS
METROPOLITAN PLANNING ORGANIZATION
Thursday, March 3rd, 2005 – 12:00 Noon
Grand Forks City Hall Planning Conference Room**

CALL TO ORDER

Chairman Doug Christensen called the meeting to order at 12:10 p.m.

CALL OF ROLL

On a Call of Roll the following members were present: Chairman Doug Christensen, Dick Grassel, and Steve Gander.

Staff present were: Earl Haugen, GF/EGF MPO Executive Director and Peggy McNelis, GF/EGF MPO Executive Assistant.

DETERMINATION OF A QUORUM

Chairman Christensen declared a quorum was present.

APPROVAL OF THE AUGUST 16TH, 2004, FINANCE COMMITTEE MINUTES

Moved by Grassel, seconded by Gander, to approve the August 16th, 2004, minutes of the GF/EGF MPO Finance Committee Meeting, as submitted.

Voting Aye: Grassel, Gander and Christensen.

Voting Nay: None.

MATTER OF CONSULTANT SELECTION CRITERIA

Haugen reported that since 2001 the MPO has been using cost as our final selection criteria when hiring consultants. He stated that this is something the Feds have allowed us to do, that the State of Minnesota requires the use of, and that the State of North Dakota was allowing us to use, but have now changed their minds, and are saying we can no longer use. He pointed out that he did indicate, in the information contained in the packets, that we are kind of in a "Catch-22", as the Feds say we can use it, but then they also state that because of other clauses the States can make us do what they want us to do. He added that the State of Minnesota is not our lead administrative agency, North Dakota is, so Minnesota only has the ability to impose this requirement when we use the State monies we receive to help us offset our local match requirements. He commented that we have a separate contract with MNDOT, for about \$12,000 for local match.

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Haugen stated that he thinks that North Dakota is taking a very firm stance on this issue. Christensen asked what it is they want, what the bottom line is. Haugen responded that they don't want us to use cost as a selection criteria. Christensen stated that he understands that, but what do they want us to do instead. Haugen responded that they want us to select consultants, and then negotiate with that consultant picked. He pointed out that this method of selection is what the Brooks Act requires when you work on construction. He added that in North Dakota, when you work on construction, construction management, that is how consultants are selected. He stated that the City, when they select a consultant to do a project concept report, do their designs for any of their street projects, etc., they pick their consultants based on qualifications, saying that this firm is our number one choice, so now lets start the negotiation of the scope of work and costs involved. He said that Minnesota, for everything, including construction, selects people based on qualifications, narrow the field down to perhaps three firms, interview those three, and then use, as the last selection criteria, cost bids, thereby making the final selection based on cost.

Gander asked, in the scenario described for North Dakota, and Grand Forks, will you get legitimate cost containment by that mechanism. He added that, in other words, you have identified one vendor for a service, and now you are going to discuss the scope of work, and fees for that service, do you really, in earnest, get cost containment by doing that. Haugen responded that they have found, looking at their 2000 and prior years costs, that they have a 20% to 30% cost savings. Gander stated that he believes that that environment is dreadfully inflationary, the environment in which cost is not considered when choosing a vendor, at the very best will jack-up their costs to do whatever they want, and when they are busy the second best will be bidding, and will jack their costs up to whatever they want, because this is an inflationary market place, apart from cost. Haugen agreed.

Haugen reported that we are the lone MPO in North Dakota that is willing to go to bat with the State to try to reverse their opinion on this issue. He commented that Bismarck/Mandan is housed right there in Bismarck, and they rely on the DOT to do a lot of their stuff, and that Fargo/Moorhead has not been using cost as a selection criteria at all. He added that it seems that Fargo/Moorhead doesn't want to win the battle, and lose the war with the State.

Christensen asked how much money we get from the State. Haugen responded that the State of North Dakota gives us zero funding, but all of our federal funds pass through them. He added that the State of Minnesota's federal funds are transferred, via Denver to North Dakota, as they are the lead agency for federal funds. Christensen commented that they control how much federal funding we get, that they actually perform the audit function for the Feds, so he would like to know why we want to pick a fight with the guy that is paying us. Haugen responded that he brought this up because, to the MPO, it is an additional \$40,000 to \$60,000 more we will have to cough up for consultants, so it is a cost hit to us.

Christensen stated that the way he figures this is, whoever gets the bid is told that this is how much we are willing to pay, and they can either agree to do the work, or not. Gander asked if a consultant should turn the job down, would it mean we would have to reopen the bid process,

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which would essentially delay things that much more, or does the MPO have the ability to go with the next bidder. Christensen responded that they do have the ability to choose the next bidder. He stated that he thinks the guys from North Dakota, by making you do this, are challenging the integrity of the people giving you bids.

Discussion ensued.

Christensen suggested that Mr. Haugen write the State requesting a better definition of the logic of their request. He stated that this body can't give direction until they have all the information. He asked if the State is saying that they don't want us to do this anymore, or are they referring to a law that says we can't do it anymore. Haugen responded that they referred to the same law that the Feds used to say that we can use cost as a selection criteria. Christensen asked to see the law.

Haugen referred to a copy of that portion of the North Dakota Statutes being discussed, and pointed out that it defines the services we are selecting consultants for. He referred to the first page of the document, the first paragraph, fourth line, and commented that it states: "pertaining to construction, and construction management, as defined...". Christensen stated that this is just a definition. He pointed out that someone circled the word "planning" in that first paragraph as well. Haugen responded that he circled the word "planning", and explained that he did so to illustrate that planning is part of the "other services" that these people can do. He said that the State is saying that because the definition includes the word "planning" all the things we do has to follow the Brooks Act. He added, however, that the Feds have interpreted this to say, again referring to the fourth line of the paragraph, that what we do, as an MPO, we are forbidden, with our planning dollars, to do construction and construction management.

Haugen commented that he also included copies of the Q&A from the Feds, who are pretty clear that because what we do is not construction, or construction management, planning work does not have to follow the Brooks Act, but the State is making an interpretation that what we do leads to construction, and construction management.

Christensen asked where it states that we have to negotiate things. Haugen referred to the second page of the document, Item #5, and pointed out that it states that these are the seven criteria that we must use. Gander commented that it lists budget requirements as a criteria, so we have to budget for the scope of their work, and we can find that out in the bid process, what their ability is to meet our budget. He added that we can say that our budget for a consultant is \$40,000, can they meet that. Haugen said that we can budget a dollar amount, and then we can see if we can get lower bids than that dollar amount, which is something that we have been able to do the last few years. Gander asked if we can tighten up the budgets. Haugen responded that we could, but that, potentially, that could actually put us in the opposite position of trying to find money from other sources to do a project, so, once again we have a "Catch-22".

Gander asked if we could, on all submissions, under that passage, include some way to determine if a consultant can meet our budget or not, which is basically what we are doing now, but does that not provide for exactly what we are doing now. Christensen asked why we wouldn't 'do

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what Mr. Gander suggested, why we wouldn't just tell the consultants what we are willing to pay for a service. Grassel asked if we have an idea of what the services might run before we receive bids. Haugen responded that we typically do have a rough idea of what the services might run, and that is why we estimate our budget slightly on the high side, to help defray any additional costs should the bids come in higher than budgeted.

Haugen commented that the problem with all of this is that we still have to meet the Minnesota requirement of using cost, and then we have North Dakota's requirement of not using cost, so what might end up happening is that those studies in which we use Minnesota funds we will be using cost as a selection criteria, and all other studies we won't.

Gander stated that another way of looking at this, to use Mr. Christensen's analogy, would be to say that we have an MPO wide budget that we need to protect, so if we were to have one consultant go berserk on us in terms of cost, it could potentially hurt the entire budget for any other studies we want to do, so by our asking them to submit prices, we are essentially looking out for the MPO budget.

Haugen reported that we will know what it is that we are going to award a contract on before we say that that is the firm that we want to negotiate with. He added that we will have a quicker timeframe for knowing how that meets the budget requirement, and it will also allow us, because half of our budget involves consulting, and the other half involves staff and everything else, we will be able to know when we start the three studies in the first part of the year, what those costs are early on, and how they fit with our budget. He commented, again, that when we prepare a budget, we do so on the high side in order to cover additional costs, but what we discovered by using cost as one of the criteria, is that they are coming in under budget to be competitive, and that saves us money, which in turn allows us to do more work. Christensen stated that we can do this same thing by telling them that we are only willing to pay a certain amount.

Gander asked, from a legal standpoint, with the paper trail that is created, if you've shown on an annual budget a \$40,000 marker for a piece of consulting work, could you let the bids and the package proposal say \$25,000 even though the budget says \$40,000. Christensen responded that you can because you aren't saying where the \$40,000 is going to go.

Grassel asked if we might end up favoring one consultant over others, over a period of time. Christensen responded that this could certainly happen, but that is something that happens with all kinds of things, such as doctors, attorneys, etc., because people will continue to use the one that charges them the least for the best service.

Christensen suggested that the MPO try following the State of North Dakota's request for a year, and if at the end of that time we find that we are losing money, then we would have an argument we can take to them for using cost as a selection criteria. Haugen commented that for almost ten years prior to 2001 we did it the way the State is requesting we do it now, and, based on that experience, it is going to cost us more.

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Gander asked if there would be any room, in the law, in which we could interpret it to allow us to do what we are currently doing. Haugen responded, again, that that is how the Feds are interpreting the law, that we should be allowed to do what we are doing. Gander asked if there would be a provision in the law that, we, as a group, could go to North Dakota and say, "this is what we are going to do, and the law says this, and this is our rationale, so this is what we are going to do, leave it alone". Haugen responded that this was attempted at a three day meeting in Bismarck recently, but neither the NDDOT, nor the Federal Highway Administration knew of this decision, of the determination from Federal Highway that planning studies are exempt, so they made their decision based on what they do as engineers, and they have now dug their heels in on the issue.

Christensen asked, if the MPO continues to do what they are doing, what are the consequences to the MPO. Haugen responded that NDDOT would not approve our RFP's, they would not approve our contract for services, and we would not have that work done. Christensen asked who would do that work then. Haugen responded that it would have to be done in-house, or we will have to follow their procedures. He explained that the consequences to this group is, if we don't do what the State wants we won't get projects in which we hire consultants approved for federal funding, and that would include our corridor studies, etc.. Christensen asked, then, if we don't get our federal projects approved by the State of North Dakota, how do we fund them. Haugen responded that if we are still going forward with them, they would have to be funded with local monies. Christensen asked where the local monies would come from. Haugen responded that they would come from the Cities of Grand Forks and East Grand Forks, and the State of Minnesota, as North Dakota doesn't not provide any local monies. Christensen asked where the local monies come from. Haugen responded that for our annual budget of \$500,000, \$100,000 is local, \$50,000 would come from the City of Grand Forks, and \$50,000 comes from the City of East Grand Forks and the State of Minnesota. He added that the \$400,000 would be federal monies, and it all flows through the State of North Dakota.

Haugen added, however, that the question we still need answered is, because none of the Minnesota monies go to consultants, so that we aren't using a different selection process on the Minnesota side than the North Dakota side, how should we deal with the \$12,000 from Minnesota, should we use it as match for salaries, or other things not associated with consultants. Consensus was that the \$12,000 should be used for issues other than consultants.

Gander asked how much the MPO spends annually on consultants. Haugen responded that we spend about \$200,000. Gander stated, then, if our costs go up about 30%, it will end up costing us \$60,000 to go back to the old selection method. He stated that if we don't have the extra \$60,000 budgeted for, we will have to scale back our studies to cover it.

Christensen asked if there would be a problem with contacting consultants ahead of time to discuss costs. Haugen responded that it could cause problems if it is discovered that we have been communicating with one consultant to get their costs, while others may not be communicated with.

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Haugen stated that we can follow the State's process, but it seems to him that if they had had some of this information ahead of time perhaps they wouldn't have been quite so set on this, as clearly the Feds say that because of what we do, we don't need to follow the Brooks Act, and we can use cost as a selection criteria; and Minnesota also states that we can use cost as a selection criteria. He said that he thinks they just decided we shouldn't be able to use cost as a selection criteria because they can't use it, and they don't want anyone else to either.

Christensen asked if the MPO had access to the Grand Forks City Attorney's services. Haugen responded they did. He stated, then, that he would entertain a motion that the MPO follows the State of North Dakota's selection criteria, and that they submit a request to the Grand Forks City Attorney to obtain an opinion from the North Dakota Attorney General as to whether or not the Feds rules concerning cost as a selection criteria apply to the MPO. Gander asked if this North Dakota processing group is subject to the findings of the North Dakota Attorney General. Christensen responded that they were.

Haugen stated, then, that what you are basically asking is whether or not the NDDOT's interpretation of what the MPO does falls within the definition of architect/engineer services. Christensen responded that what he is asking is that you take the law discussed, and you take the federal regulation, and outline what the MPO is doing, and why, and ask Mr. Swanson to request an opinion from the North Dakota Attorney General as to what should govern. He explained that what needs to occur is for the NDDOT to write a letter to the MPO explaining why they feel they are right, and why they ignored the federal regulation. Haugen stated that the Feds state that we are not connected to constructions, but the NDDOT is stating that we are, and they are just taking and interpreting that what we do is connected to construction, but the Feds take that same statement and say we are not, and that is why the State is now saying that we cannot use cost.

Moved by Gander, seconded by Grassel, that the GF/EGF MPO follow the State of North Dakota's requirement that cost not be included as a selection criteria for consultants, and that they request the Grand Forks City Attorney obtain an opinion on Chapter 54-44.7, Architect, Engineer, and Land Surveying Services, 54-44.7-01 – Definition, as how/why the Feds and NDDOT differ on the interpretation of MPO Planning Activities regulated by the Brooks Act, and the MPO devise, within the Selection Criteria, ways to help determine how well the proposal conforms to the MPO Budget amounts.

Voting Aye: Grassel, Gander, and Christensen.

Voting Nay: None.

Haugen added that they can require consultants to provide a breakdown of staff hours for each task. He said that this would give us a rough idea of their costs.

OTHER BUSINESS

None.

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ADJOURNMENT

Moved by Grassel, seconded by Gander, to adjourn the March 3rd, 2005, meeting of the MPO Finance Committee Meeting at 12:40 p.m..

Voting Aye: Grassel, Gander, and Christensen.

Voting Nay: None.

Respectfully submitted by,

Peggy McNelis, Executive Assistant