

March 25, 2002

**Evanston City Council
Closed Session
Aldermanic Library
March 25, 2002**

PRESENT: Aldermen Moran, Rainey, Feldman, Newman and Bernstein

NOT PRESENT

AT ROLL CALL: Aldermen Engelman, Kent and Wynne

ABSENT: None

STAFF: Judith Aiello, Maureen Barry, Kathleen Brenniman, Roger Crum, Mark Franz, Herb Hill, David Jennings, Bill Stafford

GUEST: Jack Siegel, Corporation Counsel

PRESIDING: Mayor Lorraine H. Morton

START: 6:10 p.m.

Alderman Rainey moved that City Council convene into Closed Session to discuss matters of litigation and minutes pursuant to 5 ILCS 120/2 (c) (11) and (21). Seconded by Alderman Feldman.

Roll Call: Voting aye – Moran, Rainey, Feldman, Newman, Bernstein. Voting nay – none. Motion carried. (5-0)

Minutes

Closed session minutes of March 11, 2002 were accepted without change.

Litigation – Settlement – McNally Tunneling vs. City of Evanston

City Manager Roger Crum reported on the proposed settlement of the McNally litigation stating their claim had reached \$9.9 million and much time was spent with principals involved to work something out.

Mr. Siegel reported meeting a week ago with Mr. Crum and Larry Lenahan of McNally. Reports from experts were extremely discouraging. He reviewed the case, which started with McNally striking an enormous boulder then graduated into an extended series of problems in the ground; reported they had gone through 23 depositions. The issue was whether information the contractor received prior to the job was accurate which was derived from Harza, the city's agent. The city has a Joint Defense Agreement with Harza that provided any settlement/judgement over \$1 million would be split between the city and Harza. In the amended pleadings McNally wanted \$9.5-10 million. The City's tunneling expert (Mr. Hoyer) said there was a change in conditions. If he had testified about the change of condition it would have opened up the entire case. Mr. Manzi (flood expert with City of Chicago) saw scope of a possible jury award of \$4.75 million. Thus a trial would be a battle of experts and if they could reach reasonable settlement they should. A trial date was set for September but Siegel had not finalized expert reports. He advised that continuing litigation would cost another half million and it made no sense to continue. Mr. Siegel appeared before Judge Kennelly. McNally asked Judge Kennelly to recuse himself because the judge's wife is a library employee but he refused. Previously there had been a settlement mediation before a magistrate judge but got nowhere. The city holds retainage of above \$600,000, additional work on change order of \$107,000 plus additional claim for \$92,000. First Assistant Corporation Counsel Herb Hill talked to Harza's insurance company, CNA, and they have agreed to pay \$75,000 over and above their share of \$1.25 million. The City share is \$2.25 million for a total of \$3.5 million.

At this time Aldermen Engelman, Kent and Wynne came into the meeting.

Mr. Siegel hoped the City Council would approve the settlement – McNally/Harza have agreed to settle. The city was releasing retainage and agreed change order. This will be financed by loan from Illinois EPA.

Finance Director Bill Stafford stated under B Section, retainage was 95% reimbursable. On the \$2.25 million construction loan \$1.4 million was eligible for IEPA loan and around \$800-900,000 non-eligible. Legal costs are not eligible.

Mr. Hill said what brought this to a head in the last five weeks were reports from three sets of our experts who had reviewed details which the city has tried to get for over a year. There are 100 boxes of paper. The city got a re-evaluation of total exposure indicating there were differing site conditions including numbers of boulders (17) in the tunnel. In case this went to a jury, it would put the case in a different perspective. Mr. Siegel, Mr. Crum and the McNally people had a three and one half-hour negotiation; anticipated the cost of a trial above \$700,000 so it was in the city's best interest to settle. In response to Alderman Feldman, Mr. Hill said that McNally had completed the project.

Alderman Feldman moved approval of the proposed settlement agreement. Seconded by Alderman Newman.

Alderman Moran said given the Joint Defense Agreement he added (a) and (b) came up with \$3,094,624 payment by the city and \$1.25 million by Harza. It seemed that Harza was not paying half. Mr. Hill stated that was correct by the numbers. At some point they would have to litigate. Mr. Crum explained the \$107,000 was a routine change order. The claim amount was \$3 million. \$92,000 was added to change order request. \$1650 retainage a day added up to \$400,000 for 8 months.

Mr. Hill said a separate analysis was asked for by the city from expert Joseph Manzi. What is a legitimate change order? What was Harza's role in this? What claim does city have against Harza? The expert said the city's exposure was 70% and Harza's 30%, retainage was out. The total was \$4.7 million, \$3.3 million for city, which was divisive for Harza to be aware of. Mr. Hill was surprised by analysis of experts; said the settlement makes sense because its cost is less than a trial. Alderman Rainey asked how CNA determined payment? Mr. Hill noted that on the day settlement was reached Harza never thought their exposure would be that high. Harza had a representative at all meetings.

Mr. Siegel noted the city made an offer of judgement of \$1.2 million. Alderman Moran questioned the 17 boulders in the tunnel. Mr. Hill stated there were differing conditions in tunnel. Was 17 boulders a different site condition? Mr. Hoyer concluded 17 boulders created a different site condition. Alderman Moran noted our guy says \$4.7 million and until last Friday he thought it was \$700,000 and did not understand that. Mr. Hill said it dealt with the way McNally presented the case. Previously the city had hired Wiss/Janey to help analyze the problem. Hill said an ongoing problem was they never received complete reports from McNally. Mr. Crum also noted that the judge allowed the claim to be open for any new item that came along.

Alderman Moran commented on the IEPA reimbursement, cost of trial; noted they have spent lots of money. Mr. Hill said this case has been on for 14 months and the city has spent over \$1 million. The other side contested everything. It was expensive when the other side did not respond to our \$1.2 million offer of settlement. Mr. Siegel stated that McNally spent as much or more than city and had law firms in Cleveland and Chicago on this. Alderman Moran recalled arbitration and was trying to learn from this and what was foreseeable. Mr. Siegel said sometimes they have to spend money to see where they are. Mr. Hill stated on November 11 at the pre-trial before Judge Nolan, the city offered \$1.9 million and McNally's demand was \$5.2 million. Recently they filed a motion for summary judgement. Three efforts were made to settle. Mr. Siegel said under arbitration the terms were closer to \$8 million and if it had gone to arbitration it would have wound up split down the middle.

Alderman Engelman noted they had facts and how did facts differ? Mr. Hill said the report from Mr. Hoyer told them that 17 boulders made a difference. Alderman Engelman asked when was the difference ascertained? Prior to geo technical report. A determination was made that 17 boulders constituted a different site condition.

Alderman Jean-Baptiste came into the meeting at this time.

Mr. Hill said the best information is the most recent, reasonable analysis. Alderman Engelman noted if facts haven't changed, how were damages calculated for project. Mr. Hill stated different circumstance calculated into extra work. They had to do it. Alderman Engelman asked how much is city money and IEPA money? The City is out of pocket \$800,000.

Mr. Stafford stated the total contract was for \$17 million and they were about done at \$15 million; loans and funds are there. The \$800,000 comes out of reserves. Mr. Stafford noted they were building up the contingency fund for the entire sewer project. Alderman Newman asked if there would be a rate increase? No. Mr. Stafford noted they will have to allocate less to the financial software project but most of this was eligible for the IEPA loan. Alderman Engelman asked if they were raiding one pot for another? No. Alderman Bernstein said they borrowed \$17 million and expended \$15 million. Where was the \$2 million? Mr. Stafford explained the City pays out and then is reimbursed.

Alderman Bernstein asked the role of Wiss/Janey? Mr. Hill said they focused on the boulder early on before litigation. 17 months ago they reviewed and gave their best analysis, an original set of cost factors, which changed after the October meeting with Judge Nolan, when McNally revised their claim. By lowering their cost per hour and increasing the hours put the case in a different posture. McNally changed their theory of calculating damages. Mr. Hill stated at the end of the project, there were different claims. Bedrock and boulders were part of claim early on and a claim regarding equipment. McNally went on course of conduct to find/make claims and he hoped that Larry Lenahan would speak to head of company.

Discussion ensued about how to deal this matter among Aldermen Newman, Moran, Engelman, Rainey, Mr. Crum, Mr. Hill and Mr. Siegel.

At 7:05 p.m. Alderman Newman moved to reconvene into open session. Seconded by Alderman Wynne. Motion carried unanimously.

Alderman Feldman moved to authorize the City Manager to enter into a Memorandum of Understanding of Settlement with McNally Tunneling Corporation and Harza Environmental Services, Inc. Seconded by Alderman Bernstein. Roll call. Voting aye – Moran, Engelman, Rainey, Feldman, Newman, Jean-Baptiste, Wynne, Bernstein, Kent. Voting nay – none. Motion carried 9-0. No nays.

At 7:08 p.m. the Council recessed in order to attend standing committee meetings.

Mary P. Morris,
City Clerk