

11/17/06

**Hillsborough County Executive Committee
Hillsborough County Complex, Bouchard Building
Goffstown NH
November 17, 2006 9:00 AM**

Present: Representatives N. Allan, G. Barry, P. Brassard, P. Cote, D. Essex, B. Golding, S. Jasper, C. Jean, N. Kurk, R. Mead, M. Mooney, L. Movsesian, M. Pilotte, R. Rowe, B. Shaw, S. Stepanek, R. Wheeler. Also present: Comm. Charbonneau, Holden, J. MacDonald, Registrar of Deeds, Sheriff Hardy, J. Harmon, C. Kirby, R. Mercer, D. Reidy, E. Robinson, G. Wenger.

Following a consultation with Legal Counsel, Chairman Allan convened the meeting at 9:40 and requested Mr. Wenger lead the pledge to the flag.

Minutes:

Motion by Rep. Wheeler, second by Rep. Stepanek to approve the minutes from October 27, 2006, Executive Committee Meeting. On a voice vote motion adopted unanimously.

Appropriation Control Report

There are several copies of the Appropriation Control Report that have been distributed. If you did not receive one and are interested in seeing one please see Marcia. The purpose of this report is to show on a monthly basis where the various departments are within their budgets. If you have any questions or would like additional information regarding the report please see Marcia.

Human Services

Chairman Allan requested Ms. Robinson to give her report. Ms. Robinson stated that in your mailing last week you received a news article regarding the litigation between the State of NH and the Counties. There was a declaratory judgment that was filed by the Counties about 18 months ago and she stated that this case was heard in Merrimack County and the Counties prevailed on both of the issues. One of the issues was regarding the CAP and the other issue was regarding skilled care. She did note that it is approximately a \$7,000,000 dispute and a fair amount of that money is from Hillsborough County. She also noted that the State will probably appeal to the Supreme Court and they have until November 27, 2006 to appeal the issue. In response to a question Ms. Robinson stated that since 2003 Hillsborough County has encumbered \$4,000,000 to \$5,000,000 and she stated that if the case is won that money will lapse to the general fund.

Old/New Business

Chairman Allan stated that correspondence from Mr. Wenger, County Administrator, has been received. Chairman Allan explained that Mr. Wenger was invited to give a full presentation on the second floor of the Bouchard Building to the Executive Committee however he has declined the invitation at this time. He did state that he would answer any questions that anyone might have.

Building Subcommittee update

Rep. Jasper stated that there were three individuals from the Building Subcommittee that met on Tuesday November 14, 2006. He noted that the recommendation from the subcommittee was pending correspondence from Legal Counsel. Rep. Jasper stated that the recommendation was to approve the transfer subject to the opinion from Legal Counsel on the questions raised at the prior Executive Committee meeting.

Motion by Rep. Jasper, second by Rep. Wheeler to remove Budget Transfer #2007-2 from the table. On a voice vote motion adopted unanimously.

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Motion by Rep. Jasper, second by Rep. Cote to not approve Budget Transfer #2007-2. On a voice vote motion adopted unanimously.

Motion by Rep. Jasper, second by Rep. Wheeler to make public the confidential memo dated November 7, 2006 from Legal Counsel to the Executive Committee and to read it into the record. On a voice vote motion adopted unanimously.

Motion by Rep. Stepanek, second by Rep. Cote that the Executive Committee strongly supports the renovation of second floor of the Bouchard Building and that the Executive Committee rejected the request for appropriations based on Legal Counsel's opinion issued in response to questions posed at the October meeting. Rep. Stepanek stated that it would then be up to the Board of Commissioners which way to proceed with the project. On a voice vote motion adopted unanimously.

Legal Opinion from Legal Counsel

November 7, 2006

Confidential

Hillsborough County Executive Committee
329 Mast Road
Goffstown, NH 03045

Re: Bouchard Building Renovation -2nd Floor

Dear Executive Committee Members:

This letter is in response to questions raised at the October 26, 2006 meeting relative to the proposed renovation of the second floor of the Bouchard Building. Specifically, a representative asked whether the County could use another contractor to complete Phase II of the project without liability. The answer to that question is no.

The RFP is drafted in a manner that necessarily ties the successful bidder to Phase I and Phase II of the project. The RFP contains mandatory language requiring the successful bidder to complete design specifications and a construction cost analysis of Phase I and, upon approval of the design, financing and proposed use, to complete the construction renovation. The document further mandates that the County will execute a contract with the successful bidder and incorporate the RFP into the contract. It does not provide for flexibility to utilize another contractor through a separate bid process for Phase II without the possibility of liability from a claim by the Phase I contractor. The successful bidder has offered to perform Phase I and Phase II. The county's acceptance of that offer necessarily involves full acceptance of the two part offer should it proceed with construction, to wit; Phase I and Phase II. Attempts to accept only Phase I and re-bid Phase II would probably result in litigation on the basis of a breach of contract and breach of the implied covenant of good faith and fair dealing and/or a violation of RSA 28:8-e. These are separate causes of action and although the county may be successful in defending against one claim, it would not foreclose the possibility of losing on another.

The question of whether the County must bid all contracts over \$5,000 has been intertwined into the concerns with the RFP. The answer is simply yes, contracts or services over \$5000 are subject to competitive bidding. However, the RFP as drafted does not create two separate contracts for bid. It is one contract. As drafted, the document provides for a "not to exceed price" for Phase I but merely an estimate tantamount to an unknown figure for Phase II. Inasmuch as the County cannot separate the two phases under the RFP and therefore cannot have a firm price or a "not to exceed"

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price, it is arguably impossible to truly determine the lowest responsible bidder under RSA 28:8-e. The process also creates opportunities (although there is no suggestion of same) for bidders under these circumstances to intentionally underestimate Phase I and recoup costs in Phase II based on an unknown figure. Competitive bidding is supposed to guard against favoritism, improvidence, extravagance, fraud and corruption and secure the best work at the lowest possible price practicable. Strict compliance with the bidding laws is required.

Based on the foregoing, there is a legitimate question as to whether the RFP, as drafted, complies with RSA 28:8-e and thus may subject the county to liability. Monetary damages and other consequences could result.

A final question raised is whether the County can simply say no to the successful bidder on the basis that the estimate of \$800,000 exceeds the budget appropriation. The answer is yes and there is little chance of liability provided the County says no to both Phase I and Phase II.

I hope this information is helpful to you. If you have any questions or comments, please feel free to contact me at your convenience.

Very truly yours,

Carolyn M. Kirby

Chairman Allan complimented the Board of Commissioners on the fine job they do operating Hillsborough County.

Mr. Wenger stated he would like to respond to some of the items that have been brought up this morning. He thanked the Executive Committee for the opportunity to make a presentation to them however, after speaking with the Board of Commissioners he noted that at this point three months after initially discussing the second floor renovation, and without all the facts, he did not see any merit to presenting to the Executive Committee at this time. He also noted that Legal Counsel would be coming forward to this body to address questions that have been presented to her at the last Executive Committee Meeting. He stated that he did not know what the opinion from Legal Counsel states and without knowing it, noting that he had developed the RFP and presented the RFP to the Board of Commissioners, he believed it was defensible in a court and that what the Board of Commissioners was trying to do was an appropriate avenue. He stated that he would probably disagree with that legal opinion, noting that was his personal opinion. He went on to state that he wanted to speak because right now the commissioners are "0 for 2" coming to this committee trying to get things done with respect to vacant spaces within the County. He stated that he is trying to address issues and put things in a package to present to the Executive Committee and the Delegation so that the checks and balances that are designed into the statutes which form County Government can be in place and so that the Board of Commissioners can do their job. The commissioners are elected to do things and meet their statutory obligations. He stated that he hopes he can sit down with some of the individuals at this table and explain the process that the Board of Commissioners and he have gone through to get this package together. He stated that he has spoken to many individuals associated with

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this project, including builders and he has been told they will not do it this way again. Rep. Jasper stated at this time he does not have any questions, however, he wants the record to show that the Executive Committee is strongly in favor of the second floor renovation project noting that when the budget came forward to the Executive Committee there was originally no money available for the second floor project and the money was put into the budget by the Executive Committee for this specific project by a motion made by himself (Rep Jasper) with the support of the Executive Committee.

Chairman Allan thanked everyone on the Executive Committee for all the support he has received over the last two years and thanked everyone for being patient with him as he noted his background is in engineering.

Rep. Jasper thanked Chairman Allan for the job he has done over the last two years along with Rep. Barry for all her work as Clerk and as a previous Chairman. Rep. Jasper also stated it has been a pleasure to serve with this Executive Committee which has been non-partisan over the last few years and he hopes it can continue this way no matter who is elected to the Executive Committee.

Chairman Allan stated he would like to recognize a few members who are not returning as Representatives in the upcoming session.

Chairman Allan proceeded to present plaques to the outgoing Representatives, they are as follows: Rep. Gail Barry, Rep. Robert Mead, Rep. Paul Brassault, Rep. William Golding and Rep. Robert Wheeler. Chairman Allan noted we also have plaques to send to Rep. John Gibson and Rep. Robert Chabot.

Ms. Rusch announced that the Organizational Meeting is on Wednesday, December 13, 2006, 6:00 PM in Goffstown. She also announced that the next scheduled Executive Committee meeting is on Friday December 22, 2006, in conjunction with the Sheriffs Christmas Party.

Motion by Rep. Moxnesian second by Rep. Cote to adjourn at 10:10 AM. On a voice vote motion adopted.

Rep. Gail Barry, Clerk
Hillsborough County Executive Committee

Date _____