

North Dakota State Water Commission

900 EAST BOULEVARD AVENUE, DEPT 770 • BISMARCK, NORTH DAKOTA 58505-0850
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**Audio Telephone Conference Call Meeting
Governor's Conference Room - Ground Floor
State Capitol
Bismarck, North Dakota**

**January 7, 2015
9:15 A.M., CST**

AGENDA

- A. Roll Call
- B. Consideration of *Agenda* - *Information pertaining to the agenda items is available on the State Water Commission's website at <http://www.swc.nd.gov>*
- C. ***Southwest Pipeline Project:***
 - 1) ***Contract 1-2A, Supplemental Intake - Consideration of Settlement Agreement*** **
- D. Other Business
- E. Adjournment

**** BOLD, ITALICIZED ITEMS REQUIRE SWC ACTION**

To provide telephone accessibility to the State Water Commission meeting for those people who are deaf, hard of hearing, deaf and/or blind, and speech disabled, please contact Relay North Dakota, and reference ... TTY-Relay ND ... 1-800-366-6888, or 711.

MINUTES

North Dakota State Water Commission Audio Telephone Conference Call Meeting Bismarck, North Dakota

January 7, 2015

The North Dakota State Water Commission held an audio telephone conference call meeting in the Governor's conference room at the State Capitol, Bismarck, North Dakota, on January 7, 2015. Governor Jack Dalrymple, Chairman, called the meeting to order at 9:15 a.m., and requested Todd Sando, State Engineer, and Chief Engineer-Secretary to the State Water Commission, to call the roll. Governor Dalrymple announced a quorum was present.

STATE WATER COMMISSION MEMBERS PRESENT:

Governor Jack Dalrymple, Chairman
Tom Bodine, representing Doug Goehring, Commissioner,
North Dakota Department of Agriculture, Bismarck
Arne Berg, Member from Devils Lake
Maurice Foley, Member from Minot
Larry Hanson, Member from Williston
George Nodland, Member from Dickinson
Robert Thompson, Member from Page
Harley Swenson, Member from Bismarck
Douglas Vosper, Member from Neche

OTHERS PRESENT:

Todd Sando, State Engineer, and Chief Engineer-Secretary,
North Dakota State Water Commission, Bismarck
State Water Commission Staff
Andrea Travnicek, North Dakota Office of the Governor, Bismarck
Jennifer Verleger, North Dakota Office of Attorney General, Bismarck
Mary Massad, Southwest Water Authority, Dickinson
Jim Lennington, Bartlett & West/AECOM, Bismarck

The attendance register is on file with the official minutes.

The meeting was recorded to assist in compilation of the minutes.

CONSIDERATION OF AGENDA

The agenda for the January 7, 2015 State Water Commission audio tele-phone conference call meeting was presented; there were no modifications to the agenda.

It was moved by Commissioner Foley, seconded by Commissioner Nodland, and unanimously carried, that the agenda be accepted as presented.

**SOUTHWEST PIPELINE PROJECT -
CONTRACT 1-2A, SUPPLEMENTAL
INTAKE - APPROVAL OF SETTLEMENT
AGREEMENT (\$3,000,000)
(SWC Project No. 1736-99)**

The scope of work under Southwest Pipeline Project Contract 1-2A, Supplemental Intake, consisted of the design and construction of a vertical reinforced concrete caisson with a minimum diameter of 14 feet, approximately 151 feet in depth; installation of approximately 2,800 feet of 30-inch inside diameter horizontally directionally drilled or micro-tunneled intake pipe; and the installation of a terminal and pile supported screen structure and associated diver services.

Contract 1-2A involves specialized construction with an aggressive schedule. The design and construction of the caisson and intake pipe construction were combined into one contract as the construction schedule of the intake pipe is dependent on the completion of the caisson. Because of the schedule of specialized construction, the caisson, the installation of horizontally directionally drilled and micro-tunneled intake pipe, and diver services, contractors and subcontractors were prequalified and only prequalified contractors were allowed to bid. Micro-tunneling was not initially included in the prequalification process as it was considered more costly. Micro-tunneling was included upon a request from James W. Fowler, Dallas, OR, to consider allowing micro-tunneling.

On August 9, 2013, bid packages were opened for Southwest Pipeline Project Contract 1-2A, Supplementary Raw Water Intake Caisson, Intake Pipe and Screen. Three bids packages were received for Contract 1-2A, all bids appeared in order, and all bid packages were opened. The apparent low bid of \$12,978,000 was from James W. Fowler Company, Dallas, OR, a micro-tunneling contractor, for the 30-inch steel intake pipe under the base bid. The low bid of \$12,994,000 for the larger intake pipe was also from James W. Fowler Company for the 36-inch steel pipe under the base bid with Alternate 2, which was \$16,000 more than the low base bid.

On August 20, 2013, the State Water Commission adopted a motion to approve an allocation not to exceed \$12,994,000 from the funds appropriated to the State Water Commission in the 2013-2015 biennium (H.B. 1020) for the Southwest Pipeline Project; and approved the award of Southwest Pipe-

line Project Contract 1-2A, Supplementary Raw Water Intake Caisson, Intake Pipe and Screen, to James W. Fowler Company, Dallas, OR, based on the base bid with Bid Alternate 2, in the amount of \$12,994,000. The Commission's action was contingent upon the satisfactory completion and submission of the contract documents by James W. Fowler Company, technical review, and review/approval by the Commission's legal counsel.

In October, 2013, James W. Fowler (JWF) initially indicated the micro-tunneled pipeline would be 58.5 inches in diameter and requested consideration of a large caisson which would consist of a 7-meter (22.96 feet) inside diameter caisson. JWF also requested consideration of a shaft constructed with precast segmental panels that bolted together and are assembled on-site rather than constructing the caisson by placing concrete on site.

On October 22, 2013, a letter was received from JWF requesting the use of reinforced concrete pipe for the intake that would have an outside diameter of 101" and an inside diameter between 78" to 84". The larger pipe would allow the use of a larger micro-tunneling machine which would be advantageous in dealing with large boulders if encountered during the micro-tunneling operation. Since the reinforced concrete pipe is more conducive for corrosion resistance and is significantly larger than specified, the request was accepted. The final approved submittal for the intake pipe has an outside diameter of 73.5", and internal diameter varying between 54" to 60" in order that the pipe would be neutrally buoyant during tunneling, and the caisson is 7.5-meter (24.6 feet).

The bid documents for Contract 1-2A included, by reference, the geotechnical report completed by the State Water Commission's engineer, Bartlett & West/AECOM's (BW/AECOM) sub-consultant, Braun Intertec, for the Southwest Pipeline Project's supplemental intake project, and the geotechnical report completed by Shannon & Wilson, Inc. for the existing Basin Electric Power Cooperative intake. The existing Cooperative's intake site is located approximately 550 feet east of the supplemental intake site.

The project engineer received written notices, dated March 31, 2014 and April 30, 2014, from JWF with claims of differing subsurface conditions based on "technical data" included, by reference, with the contract documents. Refer to **APPENDIX "A"**, State Water Commission staff memorandum, dated December 29, 2014, for detailed information relating to the claims of differing subsurface conditions.

JWF submitted notification and supporting documentation on July 7, 2014, indicating that the cost and schedule impact due to the differing subsurface conditions was \$4,200,000, and the delay in the completion of the contract would be from November 30, 2014 to October 28, 2015. JWF's claim was rejected by BW/AECOM through their letter dated August 15, 2014.

During excavation of the caisson, at a depth of approximately 50 feet, a boulder was encountered in October, 2014. JWF submitted a request of differing subsurface claim for the boulder. Braun Intertec determined the claim was not justified, and because of the claim dispute, JWF further requested mediation.

On December 10, 2014, JWF and the State Water Commission staff mediated the claim with the assistance of Joel Heusinger acting as the mediator. JWF indicated initially that the cost impact of the differing subsurface conditions and boulder is \$5,600,000. The Commission staff and JWF agreed to recommend the settlement of the dispute for \$3,500,000, of which BW/AECOM will pay \$500,000 to the Commission. A draft settlement agreement was presented for the State Water Commission's consideration.

The Commission staff explained that the supplemental intake project is crucial to the Southwest Pipeline Project and is necessary to increase the system capacity to address growth in the Dickinson area and other areas served by the project. Because of the additional capacity that would be realized due to the increased intake and caisson size, it was the recommendation of Secretary Sando that the State Water Commission authorize the Secretary to the Commission to execute the settlement agreement between James W. Fowler Company and the North Dakota State Water Commission relating to the differing subsurface claim on the supplemental intake contract, pending the review/approval of the final settlement agreement by the Commission's legal counsel. It was also the recommendation of Secretary Sando that the State Water Commission approve an additional allocation not to exceed \$3,000,000 from the funds appropriated to the State Water Commission in the 2013-2015 biennium (H.B. 1020) to the Southwest Pipeline Project for Contract 1-2A, supplemental intake.

It was moved by Commissioner Thompson and seconded by Commissioner Swenson that the State Water Commission:

1) authorize the Secretary to the Commission to execute the settlement agreement between James W. Fowler Company and the North Dakota State Water Commission relating to the differing subsurface claim on the supplemental intake contract. This action is contingent upon the review/approval of the final settlement agreement by the Commission's legal counsel; and

2) approve an additional allocation not to exceed \$3,000,000 from the funds appropriated to the State Water Commission in the 2013-2015 biennium (H.B. 1020), to the Southwest Pipeline Project for Contract 1-2A, supplemental intake. This action is contingent upon the availability of funds. SEE APPENDIX "B"

Commissioners Berg, Foley, Tom Bodine representing Commissioner Goehring, Hanson, Nodland, Swenson, Thompson, Vosper, and Governor Dalrymple voted aye. There were no nay votes. Governor Dalrymple announced the motion unanimously carried.

**NEXT STATE WATER
COMMISSION MEETING**

It was the consensus of the State Water Commission members that a face-to-face meeting of the Commission be scheduled in March, 2015. Governor Dalrymple stated that a new revenue forecast according to Moody's Analytics would be released in February, 2015, and it would be appropriate for a representative from the State Tax Department to provide information at the March meeting relative to the oil extraction tax.

There being no further business to come before the State Water Commission, Governor Dalrymple adjourned the January 7, 2015 audio telephone conference call meeting at 9:45 a.m.

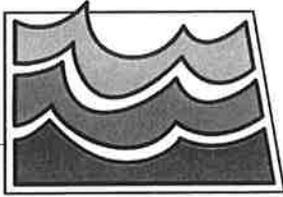




Jack Dalrymple, Governor
Chairman, State Water Commission



Todd Sando, P.E.
North Dakota State Engineer,
and Chief Engineer-Secretary
to the State Water Commission



North Dakota State Water Commission

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MEMORANDUM

TO: Governor Jack Dalrymple
Members of the State Water Commission
FROM: *Todd* Todd S. Sando, P.E., Chief Engineer-Secretary
SUBJECT: SWPP Contract 1-2A Mediation for Differing Subsurface Claim
DATE: December 29, 2014

The scope of work under the Supplemental Intake Contract 1-2A consisted of the design and construction of a vertical reinforced concrete caisson with a minimum diameter of 14 feet, approximately 151 feet in depth; installation of approximately 2,800 feet of 30" inside diameter horizontally directionally drilled (HDD) or micro-tunneled intake pipe; and installation of a terminal and pile supported screen structure and associated diver services.

The Supplementary Intake Contract 1-2A involves specialty construction with a tight construction schedule. The design and construction of the caisson and intake pipe construction were combined into one contract, as the construction schedule of the intake pipe is dependent on the completion of the caisson. Because of the schedule and specialized construction, the caisson, HDD and micro-tunneling, and diver services contractors and sub-contractors were prequalified and only those who were prequalified were allowed to bid or be a sub-contractor. Micro-tunneling was not initially included in the prequalification process, as it was considered more costly. Micro-tunneling was included upon a request from J.W. Fowler (JWF) to consider allowing micro-tunneling.

Bid Results:

Bids for this contract were opened on August 9, 2013. Three bids were received, and all three bids were opened. The low bid of \$12,978,000 was from JWF for the 30-inch steel pipe (Base Bid). The low bid for the 36-inch steel pipe (Base bid with Alternate 2) was also from JWF for \$12,997,000, \$16,000 more than the base bid. Bids from other contractors were approximately 25-40% higher than the bids received from JWF. The State Water Commission (SWC) at its August 20, 2013 meeting authorized the award of the Supplemental Intake Contract to JWF Company based on the Base Bid with Bid Alternate 2.

Caisson and Intake Pipe Changes:

In early October 2013, JWF initially indicated the micro-tunneled pipeline would be 58.5 inches in diameter and requested consideration of a larger caisson. JWF proposed a 7-meter (22.96 feet) inside diameter caisson. They also requested consideration of a shaft constructed with precast segmental panels that bolt together and are assembled on-site rather than constructing the caisson by placing concrete and assembling reinforcing steel on-site. The precast segmental panels had a thin wall, varying between 9 and 11 inches.

At the preconstruction conference for the intake on October 17, 2013, JWF indicated they would like to use Reinforced Concrete Pipe (RCP) for the intake pipe and the pipe would have an outside diameter of 101" and an inside diameter between 78" to 84". A formal letter requesting the change was received on October 22, 2013. The larger pipe was proposed, as it would allow JWF to use a much bigger micro-tunneling machine, which would provide them with a better ability to deal with large boulders if encountered during the micro-tunneling operation. Since the RCP is better than the specified steel pipe for corrosion resistance and since the intake pipe was much larger than specified, JWF's request was accepted.

In early December 2013, JWF indicated that they would provide a 72" outside diameter RCP intake pipe, with an internal diameter of 54", so the pipe is neutrally buoyant during tunneling. The final approved submittal for the intake pipe has an outside diameter of 73.5" and inside diameter varying between 54" to 60". The final approved submittal for the caisson is 7.5m (24.6 feet).

Documents made available to the Contractor:

The bid documents for Contract 1-2A included by reference the geotechnical report completed by SWC's Engineer Bartlett & West/AECOM's (BW/AECOM) sub consultant Braun Intertec for the Southwest Pipeline Project's Supplemental Intake Project and the geotechnical report completed by Shannon & Wilson, Inc. for the existing Basin Electric Power Cooperative (BEPC) intake. Braun Intertec's geotechnical report consisted of information from the four bore logs completed at the Project site. The existing BEPC intake is located approximately 550 feet east of the Supplemental Intake site, and the Shannon & Wilson geotechnical report had detailed geotechnical data and also included a dewatering analysis.

Differing Subsurface Claim:

BW/AECOM received two written notices (dated March 31, 2014, and April 30, 2014) from JWF with a claim of differing subsurface conditions based on "technical data" included by reference with the Contract Documents. The "technical data" referred to in the letter is the geotechnical report by BW/AECOM's sub consultant Braun Intertec. The Shannon & Wilson report describes two aquifers present at the BEPC intake caisson, an upper fine grained sand aquifer with relatively low transmissivity, and a deeper sand and gravel aquifer with much higher transmissivity. The two aquifers are separated by a confining layer of stiff and hard lake deposits about 30-40 feet thick. The bottom of the proposed Supplemental Intake is located within this confining layer. The geotechnical report by Braun Intertec did not include a dewatering analysis. The report said that depending on the construction technique for the caisson, dewatering may be required. The report quoted the dewatering flow rate to dewater the upper aquifer from the Shannon & Wilson report.

The supplemental intake contract with JWF specifically includes design of the intake caisson and the means and methods required to construct the caisson, including any dewatering if the Contractor's chosen method required it. The plans and specifications included with the contract were based on cast-in-place sunken construction that does not require dewatering. However,

JWF decided to construct the shaft in the dry with thin precast segments. This is the change in the design approach by JWF. JWF should have looked at all the information available to them before making their means and methods choice.

JWF initially anticipated a single dewatering well to facilitate the shaft construction and to determine the volume of water to be encountered. Water from the dewatering well was planned to be discharged into the SWPP's existing reverse osmosis concentrate discharge line. JWF estimated 150-200 gallons per minute (gpm) of water. When this dewatering estimate was provided by JWF, BW/AECOM provided JWF with a copy of a memo prepared for the SWC on the feasibility of a horizontal collector well at the intake location. This memo pointed out that the geotechnical investigation by Braun Intertec had not penetrated the confining layer between the two aquifers at the site and included two memoranda from hydrogeologists discussing the two aquifers. JWF's first dewatering well was drilled on March 17, 2014, to a depth that penetrated the confining layer into the lower aquifer. The driller determined that they had more water than they initially anticipated, and a second well was drilled on March 25, 2014. JWF had a hydrogeologist out of Washington State (Bender Consulting, LLC) on site on March 27 and March 28, 2014, performing pumps tests. The hydrogeologist estimated 1,800 to 3,000 gpm would be required to lower the water level to the base of the proposed shaft and 8,400 to 9,000 gpm would be required to de-pressurize the lower aquifer to provide a stable excavation bottom for "in the dry" construction. Bender Consulting, LLC also stated that, based on the drill cuttings samples collected during the installation of the dewatering wells, they believed none of the samples have similarity to those described in Braun Intertec's geotechnical report. JWF's March 31, 2014 letter was based on Bender Consulting, LLC's report. The letters were forwarded to Braun Intertec and BW/AECOM responded to JWF's letter on April 14, 2014, indicating that JWF's contention that the materials encountered in drilling the dewatering wells were different from those described in the geotechnical report was incorrect.

JWF indicated that based on the existing conditions, their initial plan of unsupported excavation was not compatible with the soils and groundwater encountered and determined that ground freezing was the most prudent method available to both stabilize the ground conditions and to seal out groundwater. JWF hired Midwest Testing Laboratories to perform a geotechnical exploration at the proposed caisson location. The borehole was installed on April 16, 2014. A letter from JWF was received on April 30, 2014, again claiming differing subsurface conditions and requesting a written order pursuant to General Conditions in the Contract Documents allowing them to continue work. BW/AECOM responded to JWF's letter along with Braun Intertec's response rejecting JWF's claim based on the conclusion that the geotechnical investigation conducted by JWF's subcontractors did not differ materially from that shown or indicated in the Contract Documents. BW/AECOM also pointed out that the Shannon & Wilson geotechnical report, which was downloaded by JWF before bidding, indicated similar dewatering volumes as determined by JWF's dewatering sub consultant (Bender Consulting). The letter indicated that JWF is solely responsible for the means, methods, techniques, sequences, and procedures of construction. Contract 1-2A expressly requires Contractor to be responsible for the design of the intake caisson structure, which would include the means and methods of construction. JWF's choice of ground freezing for the construction of the caisson is their choice of means and methods for the construction of the caisson.

December 29, 2014

JWF sent a letter on May 14, 2014, notifying their intent to make a Claim and requesting clarification on the date by which the supporting data for the Claim amount should be submitted. After discussion with SWC staff, BW/AECOM indicated that supporting data for the claim amount was a moot point, as the Claim of Differing Subsurface Conditions was previously rejected. However, it was clarified to JWF the deadline for submitting the supporting data would be July 7, 2014. JWF requested a 14-day extension to July 21, 2014. The time extension was granted for submitting the supporting documentation, but JWF was asked to submit the associated cost and schedule impact by the original July 7, 2014 date. The letter from JWF on July 7, 2014, indicated that the cost and schedule impact because of the differing subsurface conditions is \$4.2 Million, and the delay in the completion of the contract would be from November 30, 2014, to October 28, 2015.

JWF sent the supporting documentation for the differing subsurface claim on July 21, 2014. The documentation included County Groundwater studies and JWF's reliance on the geological unit classification by Braun Intertec, which indicated the Sentinel Butte formation. JWF's letter stated that the county studies indicate that the Sentinel Butte formation does not bear any water and they did not anticipate higher volumes of ground water during caisson construction. JWF's claim was again rejected by BW/AECOM through their letter dated August 15, 2014. JWF then requested mediation.

In early October 2014, JWF encountered a boulder with an approximate volume of 70 cubic feet during the caisson excavation at a depth of approximately 50 feet. JWF sent in a claim of differing subsurface conditions because of the boulder, even though its removal took less than a day. The claim was forwarded to Braun Intertec for response. Braun Intertec notified that the claim was not justified, as the geotechnical report warned that boulders could be encountered in the glacial alluvium down to depths of 55-60 feet. This was transmitted to JWF by BW/AECOM. JWF has requested that the claim of differing subsurface conditions because of the encountered boulder be included in the scheduled mediation.

JWF in the information submitted to the mediation has indicated that the cost impact because of the differing subsurface claim is \$5.6 Million, which includes their claim for the boulder encountered. They also indicated that the substantial completion date of November 15, 2015.

Mediation Summary:

On December 10, 2014 the claim dispute was mediated with the assistance of Joel Heusinger. After long negotiation, JWF and the Commission staff agreed to recommend the settlement of the dispute for \$3.5 million dollars. BW/AECOM has agreed to pay \$500,000 to the SWC. A separate agreement between BW/AECOM and SWC is currently under preparation. The draft negotiated settlement agreement between the SWC and JWF is attached along with this memo.

Settlement Opinion:

The settlement amount of \$3.5 million is high, but the SWC will likely get a better product than what was actually bid. When bidding, the State was anticipating a 30" or 36" inside diameter steel or HDPE pipe with a 14' diameter caisson for a design capacity of 7,000 gallons per

December 29, 2014

minute. If micro-tunneling goes well as planned, the SWC is getting a reinforced concrete pipe with an inside diameter varying between 54" and 60". With equivalent velocity, the 54" and 60" inside diameter intake pipe will have a capacity of approximately 23,000 and 28,000 gallons per minute respectively. That is 3-4 times the capacity that the supplemental intake was designed for and higher than the peak capacity determined for the entire SWPP at 17,305 gallons per minute. The caisson that is currently being built is almost two times the designed diameter of 14 feet. The other two bidders for the Supplemental Intake Contract had an increase in price of 1 million dollars between the 30" and 36" inside diameter intake pipe alternates. The second low bidder on the contract was approximately 3 million dollars higher than the JWF bid for the 36" inside diameter pipe alternate.

The Supplemental Intake project is crucial to the SWPP. The Supplemental Intake project is needed to increase system capacity to address growth in the Dickinson area and other areas served by the SWPP. In the interest of moving the project along, the additional capacity that would be realized due to the increased intake and caisson size and to avoid the increased costs and risk of litigation the SWC staff determined that it would be beneficial to settle this mediation for \$3.5 million dollars.

I recommend the State Water Commission authorize to the Chief Engineer-Secretary to execute the settlement agreement between James W. Fowler Company and the North Dakota State Water Commission in regards to differing subsurface claim on the Supplemental Intake Contract. I further recommend the State Water Commission approve an additional \$3 million dollars for Contract 1-2A to the Southwest Pipeline project from the funds appropriated to the State Water Commission in the 2013-2015 biennium.

TSS:SSP:pdh/1736-99

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (Agreement) is made between James W. Fowler Co. (JWF) and the North Dakota State Water Commission (Commission).

Whereas, on August 20, 2013, Commission awarded Project 1736 Southwest Pipeline Contract 1-2A (Contract) to JWF;

Whereas, JWF submitted two claims to the Commission, one on May 14, 2014, and the other on October 3, 2014. Each claim alleged differing site conditions. The first claim is for extra costs and time incurred constructing the caisson. The second claim is for extra costs associated with boulder removal;

Whereas, on December 10, 2014, JWF and Commission mediated the claims with assistance of Joel Heusinger acting as the mediator; and

Whereas, JWF and Commission desire to enter into this Agreement strictly upon the terms and subject to the conditions herein contained, which resolves all disputes related to JWF's two claims, and declare they are executing this Agreement wholly of their own volition, individual judgment, belief, and knowledge and that this Agreement is made without reliance upon any statement or representation of any party or person.

NOW THEREFORE, in consideration of the promises and material covenants herein contained, JWF and Commission agree to settle the disputes relating to JWF's claims as follows:

1. By January 30, 2015, the Commission will issue a Change Order to the Contract that will include the following terms:

- a. Increase the Contract price by \$3,500,000.
- b. Extend the Contract Substantial Completion date to December 15, 2015, and Final Completion date to January 30, 2016.
- c. Clarify that in the Supplementary Conditions Section SC-4.02, the "technical data" upon which the contractor may rely consists of the following:

Braun Project BM-13-00850

Braun Intertec Corporation, Southwest Pipeline Project-Supplemental Raw Water Intake, Mercer County, North Dakota (June 2013)

Shannon & Wilson, Inc.

Geotechnical Report, Proposed Raw Water Intake, North Dakota Coal Gasification Project, Volumes I, II, and III (December 1977)

- d. The “technical data” is defined as the information contained in the boring logs (excluding interpretations of geologic formation), the “time specific” water level information, and other factual information in the geotechnical reports. Information provided based on engineering judgment or opinions is not “technical data.”
- e. Modify the line and grade tolerance for the intake pipe to +/- 24-inches.
- f. Negotiate a non-compensable time extension for reasonable delays in the intake pipe installation caused by obstructions that do not constitute a differing site condition under the Contract.
- g. If an obstruction that cannot be reasonably overcome through the use of micro-tunneling is encountered, the Commission will allow abandonment of the current intake pipe alignment. Any alternative intake pipe alignment cannot reduce the system capacity to less than that provided by a 36” inside diameter intake pipe and may be up to six feet in elevation above the current design. JWF will have the option to retain a Commission pre-qualified Horizontal Directional Drilling (HDD) subcontractor to install the intake pipe if JWF and Commission make a determination that HDD is the best means for completing the work. Any change to the HDD method will be in accordance with Bid Alternate 2. There will be no change in contract price.
- h. The screen elevation will be maintained at the elevation specified in the bid drawings.
- i. JWF releases its pending claims relating to the construction of the caisson and any future claims relating to the caisson and intake pipe construction to the extent the conditions actually encountered should have been reasonably anticipated by a prudent contractor reviewing the documents listed in clause 2c above. Differing site conditions will exclude groundwater, clay, lean clay, sandy lean clay, fat clay, claystone, sand, silt, silty sand, dense sand, sandy silt, sandstone, siltstone, lignite, gravel, cobbles, boulders, glacial outwash, glacial till, organics, roots, gravel, topsoil, bentonite, lacustrine deposits, outwash deposits, lake sediments, and limestone.

2. JWF’s signature on this modification and Commission’s payment of this settlement amount constitutes complete accord and satisfaction with regard to JWF’s

Claims. This negotiated settlement between the JWF and Commission covers all interest, attorney's fees, and costs arising under or related to JWF's Claims.

3. This agreement only alters the Contract to the extent set forth herein.

4. This Agreement shall be construed and enforced in accordance with North Dakota law governing public procurements and Commission obligations. This Agreement has been jointly drafted by JWF and Commission and will be construed according to its terms and not for or against either party.

JAMES W. FOWLER CO.

NORTH DAKOTA STATE WATER
COMMISSION

By: _____
Name: _____
Title: _____

By: _____
Name: Todd Sando
Title: Chief Engineer and Secretary

Dated _____

Dated _____

4814-7057-0016, v. 2