

1 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
2 NARRAGANSETT BAY COMMISSION

3
4 IN RE:

5 MONTHLY BOARD MEETING OF THE COMMISSION

6 ** EXECUTIVE SESSION **

7 ** CONFIDENTIAL **

8 ** SEALED MINUTES **

9
10 DATE: MAY 21, 2008

11 TIME: 11:00 A.M.

12 PLACE: NARRAGANSETT BAY COMMISSION

ONE SERVICE ROAD

PROVIDENCE, RHODE ISLAND 02905

13
14 BEFORE: VINCENT MESOLELLA, CHAIRMAN
RAYMOND MARSHALL, EXECUTIVE DIRECTOR
15 ROBERT P. ANDRADE, TREASURER
JOSEPH DEANGELIS, ESQUIRE
16 DR. RICHARD BURROUGHS
DAVID CRUISE
17 JONATHAN FARNUM
LESLIE GRAY
18 JOSEPH KIMBALL
JOHN MACQUEEN
19 AL MONTANARI

ALAN NATHAN

20 MICHAEL SALVADORE

RICHARD M. BROWN

21 RICHARD WORRELL

MICHAEL DICHIRO, ESQUIRE

22

23

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1 (EXECUTIVE SESSION COMMENCED AT 11:51 A.M.)

2 MR. CHAIRMAN: Ready? So I guess we
3 can begin. How do you intend to proceed with this,
4 Laurie?

5 MS. HORRIDGE: I will proceed with it
6 the same way that I did before. I will introduce the
7 attorneys that are seated with me today.

8 MR. CHAIRMAN: Proceed.

9 MS. HORRIDGE: Okay. This is Attorney
10 John Bulman. He is a partner in Little, Medeiros,
11 Kinder, Bulman & Whitney, P.C. It's a firm, a Rhode
12 Island firm that specializes in construction and
13 commercial law. And John -- and also Thomas Dunn,
14 that works with him. We hired them as special counsel
15 in this particular matter for us, because we did not
16 feel that we had the expertise in construction or to
17 handle this particular matter. So they've been
18 advising us on this, I'd say, since 2004, I think.
19 John has 23 years' experience in commercial and

20 construction trial matters, and he's represented both
21 private and public entities in jury and non-jury
22 trials, arbitrations, mediation proceedings throughout
23 New England, has extensive experience as a neutral
24 arbitrator himself, presiding over, I think you said
25 earlier, 100, 150 cases. So he has great experience

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1 in this area, including claim matters, including
2 change order disputes, indemnity claims, and insurance
3 coverage disputes, which is particularly relevant in
4 this case. He is an active member of the Board for
5 the American Arbitration Association since 2002, and
6 adjunct professor at Roger Williams University in
7 construction law. So, without further ado, I will let
8 John walk you through the construction claim that is
9 at issue here and the proposed settlement. I believe
10 all of you have a copy of the resolution at this
11 point. Is that correct, Karen? A copy of the
12 resolution. It talks about the proposed settlement,
13 and I guess Tom is here to back John up in case there
14 are specific details that he forgot. So, with that --

15 MR. BULMAN: Thank you, Laurie. The
16 settlement amount is \$1,050,000 is the settlement that
17 I'm here to brief you on, and to recommend, and also
18 to answer any questions that any member of the Board
19 has. And I -- it's been about five weeks since we

20 negotiated this settlement, so you know, prior to that
21 we were going full speed ahead with defending this
22 case on behalf of the Bay Commission, and it's sort of
23 been flipped, and now, five weeks later, I'm sort of
24 in the opposite position of actually trying to give
25 you an objective evaluation of settlement as opposed

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1 to an advocate's point of view. But let me give a
2 brief description of the project. This is, involves
3 the Promenade Street drop shaft to the main tunnel of
4 the CSO. The contractor, as I said, was Walsh
5 Construction out of Illinois. The contract, and it's
6 important to understand at least the basics of the
7 contract. The contract required that Walsh
8 essentially create a supportive excavation, within
9 which it was going to drill a drop shaft and a
10 ventilation shaft to connect the Woonasquatucket
11 interceptor with the newly constructed CSO tunnel.
12 Essentially, they would have to drive sheet piling in,
13 excavate within the sheet piling, do their
14 construction, withdraw their -- or fill it back in,
15 take the sheet piling out, and restore the ground.

16 The problems, Walsh had a number of problems on
17 the project, and essentially, they made two claims.
18 The first claim is, in essence, they claim that the
19 soil behaved in a manner different than what they had

20 anticipated when they bid the project. A so-called
21 differing site condition claim in the construction
22 industry. More specifically, they claim that the Bay
23 Commission failed to identify and bring to their
24 attention a high pressure Artesian water condition
25 that existed in these soils at the area where the

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1 actual construction was done. And this high pressure
2 Artesian water condition led to several events that
3 took place, which led to Walsh incurring \$1.95 million
4 in extra costs. One was the supportive excavations I
5 just described, which is the sheet piling, began to
6 fail and buckle, and created a situation where they
7 could not actually construct what was required under
8 the contract.

9 The second problem that occurred is there was a
10 settlement of the drilling rig. As I said, they had
11 to drill down 200 some-odd feet, nine-foot diameter
12 drop shaft, to connect into the CSO tunnel, and Walsh
13 claimed that the soil conditions caused that drilling
14 mechanism to tilt and go out of point. The third
15 thing happened much later in the project, but it was
16 based on the same alleged condition, and that is that
17 there was a, essentially, a collapse of soil into this
18 drop shaft, which had to be cleaned out at great
19 expense and redone.

20 The second claim -- that's the geotechnical side
21 of the case, the differing site condition claim. The
22 second claim had to do with an insurance claim.
23 Essentially, Walsh claims that the Narragansett Bay
24 Commission agreed under its contract to provide a
25 certain type of insurance called an all risk,

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1 builder's risk insurance policy as part of an overall
2 CSO project insurance policy, controlled -- it's
3 called an owner-controlled insurance policy. Walsh
4 contended that the policy obtained by the Bay
5 Commission under its contract that it was required to
6 provide Walsh was so full of exclusions that it was a
7 worthless policy. It did not cover any of the
8 expenses that Walsh incurred with all of these
9 geotechnical problems. In particular, Walsh claimed
10 that this particular policy excluded coverage for the
11 \$1.9 million in claims related to the damages incurred
12 because of the soil conditions. And obviously, Walsh
13 claims that had the policy properly been put into
14 place, this would have been covered, and there would
15 be no claim. Now, we engaged a local and -- well, two
16 different geotechnical experts. One, Paul Aldinger,
17 locally, and the other Gary Brierley, who worked for
18 many years and is a tunneling expert with Haley &
19 Aldridge.

20 We defended -- we had a number of defenses on the
21 geotechnical side of the case. I really don't think
22 this is either the time or the place to exhaustively
23 go into those, and the reason why is essentially the
24 case came down to a battle of experts, with our
25 experts saying that the geotechnical baseline report

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1 prepared by the Bay Commission did adequately tell
2 this contractor what to expect when he opened up the
3 ground over on Promenade Street, and their expert
4 obviously says the opposite.

5 But what precipitated more aggressive discussions
6 about settlement, and which -- what led to the
7 discussion we're having today, is a ruling by the
8 arbitrator on the second issue, which is the
9 owner-controlled insurance program issue.

10 Essentially, it turned out to be a much bigger problem
11 for the Bay Commission than the geotechnical issues.

12 On April 10 of this year, 2008, the arbitrator issued
13 a ruling on a motion, a motion that was brought,
14 really, by both parties to resolve the insurance
15 coverage issue, and the arbitrator ruled, in short,
16 that the question of whether this policy that the Bay
17 Commission purchased was sufficient under the contract
18 could not be ruled on as a matter of law, which means
19 he was putting off the ultimate decision until

20 arbitration hearings.

21 But in the process of making that ruling, he made

22 several rulings which caused some problems for us.

23 The first is, he rejected one of our key defenses to

24 Walsh's claim. Our -- one of our key defenses was

25 that, as I explained earlier this morning, that this

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1 particular policy was purchased and put in place by
2 the Bay Commission for over a year before Walsh ever
3 even bid on this contract. So at the time this
4 contract was entered into with Walsh, that -- Walsh
5 had plenty of opportunity to see precisely what the
6 policy was, understand its terms, and see what
7 limitations it had. In fact, the Bay Commission's
8 contract documents recommended to, and suggested
9 strongly to Walsh, that it do just that, and the
10 policy -- the contract with Walsh said that Walsh
11 agreed to be bound by the terms of that policy.

12 The arbitrator essentially rejected our claim
13 that Walsh should be bound by the terms of this
14 insurance policy, and instead, the arbitrator made a
15 ruling that said that he couldn't rule that way, and
16 that the policy had to be judged based on what was in
17 the contract, not the policy itself. The other point
18 that the arbitrator made in this ruling is that the
19 policy contained a number of exclusions of coverage

20 relating to tunneling, soils, dewatering, all of which
21 were not specifically referenced in the Bay
22 Commission's contract, and the implication was, even
23 though the arbitrator did not finally rule on the case
24 but deferred it until the full arbitration hearing,
25 the implication was that he was leaning toward finding

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1 that the Bay Commission's policy did not meet the
2 requirements of the contract, a very disturbing
3 ruling, one that we don't agree with. One that, I
4 think it is fair to say, came as a significant
5 surprise to the Bay Commission, and certainly to me.
6 I still don't agree with it, but that's not my
7 purview. The arbitrator, unfortunately, has more
8 influence than I do.

9 So that led to an evaluation in April of whether
10 or not to settle the case. Now, we had had
11 discussions before about an appropriate settlement
12 amount, but things got a little more -- became more
13 important in light of the arbitrator's ruling on
14 April 10. Walsh's claim, the principal amount of its
15 claim was \$1,954,000. The key components of its claim
16 were labor and material, as you might expect, also
17 some delay-related claims.

18 We did obtain and review through the process of
19 the arbitration their job cost report, which reflects

20 all the costs that Walsh incurred during the course of
21 the project, including what was allocated to these
22 various problems they incurred, and through
23 Gilbane/Jacobs and our own evaluation, we were
24 satisfied that the \$1.9 million was real, that it
25 wasn't just a made-up number. Gilbane/Jacobs felt,

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1 after their analysis, that some of the \$1.9 million
2 might not be an appropriate charge under the
3 Narragansett Bay Commission's contract form. We don't
4 know the detailed calculations, but our sense was, in
5 dealing with Gilbane/Jacobs, that perhaps we could
6 have nibbled away at the \$1.9 million to the tune of
7 three to \$400,000. But the worst case scenario for
8 the Bay Commission, with interest, which arbitrators
9 are obligated to apply, would be \$2.9 million. That's
10 \$1.9 million plus essentially \$960,000 of interest
11 running from September 2004 to the expected date of
12 the award, which would have been September 2008. If
13 we lost the entitlement case, but whittled down the
14 damages to the extent I just mentioned, the exposure
15 to the Bay Commission would still be on the order of
16 \$2.3 to \$2.4 million. If the arbitrator plain and
17 simply split the baby in two, under the circumstances,
18 the loss would still roughly be \$1.5 million.

19 So taking all of this into consideration, plus

20 the fact that the expected expenses for the Bay
21 Commission to go forward with our fees, with the
22 geotechnical experts, arbitrator fees, all of that
23 would be another two to \$300,000 to finish the case,
24 or 150 to \$200,000 to finish the case, plus
25 Gilbane/Jacobs' fees, we reached the recommendation

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1 that settlement at this amount was appropriate.

2 The exposure of \$2.9 million is very substantial.

3 We do have the need to expend possibly several hundred

4 thousand dollars more to reach an award in this

5 matter, and from my point of view, this settlement was

6 justified on the different site condition claim alone,

7 without reference to the insurance claim, because

8 we're looking at a settlement roughly, with interest,

9 33 to 35 percent of the claim. And my own analysis,

10 and with our experts and with Laurie Horridge, our

11 view was that there was -- while we had a good chance

12 on the different site condition claims, a settlement

13 in this range was appropriate based even on that, but

14 certainly, with the insurance ruling by this

15 arbitrator, that created some unacceptable levels of

16 risk to the Bay Commission. That is the basis of the

17 recommendation. Yes?

18 MR. DICHIRO: Aside from the

19 uncertainties of no one knows what the outcome is of

20 the arbitrator, but what was it that got them to
21 accept so much less? They're accepting like a third
22 of what they could eventually get. What was it, what
23 were the strong points in our argument that got them
24 to accept a settlement of \$1.50 million?

25 MR. BULMAN: Frankly, it was the

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1 strength of the analysis by Gary Brierley, our
2 geotechnical expert. He did a fantastic job. That's
3 why we were confident about the DSC, the different
4 site conditions claim.

5 MR. DICHIRO: Right. And what was the
6 argument? That they knew or should have known the
7 soil conditions?

8 MR. BULMAN: That their design of that
9 supportive excavation was not appropriate, that they
10 knew or should have known about these kind of
11 conditions. Again, it would be a battle of experts,
12 and frankly, I never like to roll the dice on purely
13 experts, and I think if we -- we would not be here
14 recommending this settlement if it were just the DSC
15 claim. Yes?

16 MR. GRAY: What was -- when they were
17 awarded this contract, what was the original size of
18 the contract, and what was the next lowest bidder?

19 MS. HORRIDGE: That would be a

20 question for Rich.

21 MR. BERNIER: It was awarded about
22 \$4.8 million, and the next lowest, probably the \$5
23 million range. I don't have exact figures.

24 MS. HORRIDGE: Thank you. Are there
25 any other questions?

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1 MR. CHAIRMAN: Richard, are you -- did
2 you want to say something?

3 MS. HORRIDGE: No. He responded to
4 Mr. Gray's question. I don't know if there was a
5 follow-up, or are you satisfied?

6 MR. CHAIRMAN: So I guess the question
7 is subject to a vote of this Commission, which would
8 approve the settlement, is this done?

9 MS. HORRIDGE: Yes. The entire --
10 it's all been written up. Everybody has copies of
11 everything, but the last line is it's subject to Board
12 approval, so --

13 MR. CHAIRMAN: So there's nothing --

14 MS. HORRIDGE: Nothing further.

15 MR. CHAIRMAN: If this Board were to
16 act favorably with regard to this resolution, there's
17 no possibility that --

18 MS. HORRIDGE: It's a global
19 settlement of all the issues.

20 MR. BULMAN: Yes. There would be no
21 need to come back before the Board for any action
22 after this, and the Bay Commission is getting a
23 release and indemnification from any possible claims
24 from this project coming up through Walsh.

25 MS. HORRIDGE: Including the

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1 subcontractor, Raito, who was involved with all this.

2 All that is included in the settlement.

3 MR. CHAIRMAN: So basically we have an
4 agreement subject to the Board of Commissioners?

5 MR. BULMAN: That's correct.

6 MR. CHAIRMAN: Make sure we're clear
7 on that. All right. Commissioner Gray, you --

8 MR. GRAY: So moved. I move to
9 approve.

10 MR. CHAIRMAN: Okay. Would you just
11 hold that motion? I think what we need to do, first
12 of all, are there any questions of our attorney on
13 this? If not, I think what's appropriate is to
14 attempt a motion to go back into full session.

15 MS. HORRIDGE: Correct. And then vote
16 on the record.

17 MR. CHAIRMAN: And then go back on the
18 public record, and then we'll take a motion,
19 Commissioner Gray, for, and seconded by Commissioner

20 Farnum on the motion of -- to settle the matter. With
21 regard to the minutes, Counselor?

22 MR. DEANGELIS: Yes. The minutes
23 contain information that is entirely privileged
24 communications between our counsel, and I think we
25 should also move to seal them.

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1 MR. CHAIRMAN: Is that a motion --

2 MR. DICHIRO: I make a motion.

3 MR. CHAIRMAN: -- taken in public

4 session?

5 MR. DEANGELIS: In public session.

6 MS. HORRIDGE: We need to come out of

7 executive session.

8 MR. CHAIRMAN: Is that correct

9 procedurally? In the public session to keep the

10 minutes sealed, and the motion -- okay. Fine. So do

11 we have a motion to go into -- do we have a motion,

12 Commissioner Farnum, to go back into public session?

13 MR. SALVADORE: I'll second the

14 motion.

15 MR. CHAIRMAN: Commissioner Nathan and

16 Commissioner Salvadore seconds that we go back into

17 public session. All of those that are in favor will

18 say aye.

19 (VOICE VOTE TAKEN)

20 MR. CHAIRMAN: Any opposed? There are

21 none opposed. Motion carries.

22 (EXECUTIVE SESSION CLOSED AT 12:09 P.M.)

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1 C E R T I F I C A T E

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3 I, Carole J. Ogden, hereby certify that the
4 foregoing is a true, accurate, and complete transcript of
5 my notes taken at the above-entitled hearing.

6 IN WITNESS WHEREOF I have hereunto set my hand
7 this 6th day of June, 2008.

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CAROLE J. OGDEN, RPR, NOTARY PUBLIC
12 My commission expires 10/4/08.

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