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STATE CONTRACTORS' BOARD

MINUTES OF THE MEETING JANUARY 10, 2000

MEMBERS
KIM W. GREGORY
Chairman
DOUG CARSON
DENNIS K. JOHNSON
JOHN LINDELL
DENNIS F. NELSON
DEBORAH WINNINGHAM SHELTRA
MICHAEL ZECH

The meeting of the State Contractors' Board was called to order by Chairman Kim Gregory at 12:48 a.m., Monday, January 10, 2000, State Contractors' Board, Las Vegas, Nevada. Exhibit A is the Meeting Agenda and Exhibit B is the Sign In Log.

BOARD MEMBERS PRESENT:

Mr. Kim Gregory – Chairman
Mr. Doug Carson
Mr. Dennis Johnson
Mr. John Lindell
Mr. Dennis Nelson
Ms. Deborah Sheltra
Mr. Michael Zech

BOARD MEMBERS ABSENT:

None

STAFF MEMBERS PRESENT:

Ms. Margi Grein, Executive Officer
Mr. Dennis Haney, Legal Counsel, (Haney, Woloson & Mullins)
Mr. Bruce Robb, Legal Counsel (Robison, B.R & S)
Mr. Hal Taylor, Legal Counsel
Ms. Nancy Mathias, Licensing Administrator
Mr. George Lyford, Director of Special Investigations Unit
Mr. Rick Bertuzzi, Director of Investigations
Mr. Frank Torres, Deputy Director of Investigations
Mr. Ron Ramsey, Investigator
Ms. Betty Wills, Recording Secretary

OTHERS PRESENT:

Cari Inkenbrandt, Court Reporter, CSR Associates of Nevada; Mark Melson, Executive Vice President, Lehrer McGovern Bovis Inc; David Delaney, Project Manager, Lehrer McGovern Bovis Inc; Jim Murphy, Associate, Lehrer McGovern Bovis Inc; Robert Borton, Associate, Lehrer McGovern Bovis Inc; John Gretch, Associate, R D C; Evan Rubin, Associate, R D C; Jeff Whittle, President, R D C Custom Rock; Karlene Canepa, Office Manager, Maui One Excavating Inc.; Stuart Mason, Vice President of Development, Venetian; Leon Mead, Civil Counsel for Maui One; Steven Arbittier, Legal Counsel, VCR; Sterling Kerr, Legal Counsel for RDC; and Michael C. Mathis, Legal Counsel, VCR.

Ms. Grein stated that Greg Welch and Chet Yekin had posted the agenda in compliance with the open meeting law on January 4, 2000, at the Sawyer State Building, Clark County Library, and Las Vegas City Hall. Additionally, the agenda had been posted in each office of the Board, Las Vegas and Reno, and on the Board's Internet web site.

There were no items on the amended agenda.

EXECUTIVE SESSION

Continued to January 11, 2000.

CONSIDERATION OF ADOPTION OF PROPOSED REGULATIONS – BIDDERS PREFERENCE; FINGERPRINT CARDS; INACTIVE STATUS; AND ASSOCIATED FEES

As the Board was awaiting clarification on the matter and none had been received, the matter was continued.

DISCIPLINARY HEARING

LEHRER MCGOVERN BOVIS INC. #35850 – DISCIPLINARY HEARING

Mark Melson, Executive Vice President, Lehrer McGovern Bovis Inc; David Delaney, Project Manager, Lehrer McGovern Bovis Inc; Jim Murphy, Associate, Lehrer McGovern Bovis Inc; Robert Borton, Associate, Lehrer McGovern Bovis Inc; Ron Ramsey, NSCB Investigator; John Gretch, Associate, R D C; Evan Rubin, Associate, R D C; Jeff Whittle, President, R D C Custom Rock; Karlene Canepa, Office Manager, Maui One Excavating Inc.; Stuart Mason, Vice President of Development, Venetian, were sworn in.

The notice of hearing and complaint, dated November 15, 1999 and consisting of pages 1-17, had been sent certified mail. The return receipt was dated November 18, 1999.

The notice of continued hearing and an amended complaint, dated December 2, 1999 and consisting of pages 1-36, had been sent certified mail. The return receipt was dated December 6, 1999.

The hearing was for possible violation of NRS 624.3012 (2), willful or deliberate failure by any licensee or agent or officer thereof to pay any moneys when due for any materials or services rendered, when he has the capacity to pay or when he has received sufficient funds therefor as payment for the particular construction work, or the false denial of any such amount due or the validity of the claim thereof with intent to secure a discount upon such indebtedness or with intent to injure, delay or defraud the person to whom such indebtedness is due; and NRS 624.307 (3), all advertising by a licensed contractor must include the number of his license.

Mr. Robb stated the hearing was to hear allegations involving Lehrer McGovern Bovis Inc. (LMB), and pertaining to the Venetian Resort Hotel Casino project. Ms. Jennifer Fletcher, Legal Counsel, and Mr. Melson were representing LMB. The original charges had involved Century Steel, Steel Engineers Inc., Winaire, Inc., Recreational Development Company (RDC), Maui One Excavating Inc., and a charge that the Licensee had not included his contractor's license number on his business cards and stationary. In the week preceding the hearing, three of the complaints had been resolved: Century Steel, Steel Engineers Inc., and Winaire, Inc. Additionally, Mr. Robb said it was his understanding that in an affidavit that was going to be presented, Ms. Fletcher was going to acknowledge that the business cards and stationary did not contain the license number. It also contained an explanation that other entities had similarly not included their license numbers on their advertising, and that had the company been aware that it was needed, it would have been provided.

The hearing file was entered into the record as EXHIBIT 1. Mr. Robb acknowledged he had prepared a book, which was a part of the hearing file. It contained 16 exhibits. He said

he intended to refer to exhibits 1-16 throughout the hearing. The exhibits were, essentially, contracts between LMB and the Venetian, Maui One, and RDC, as well as other documents.

Ms. Fletcher stated that she, too, had several books she desired to enter into evidence. The following items were then entered into the record as exhibits: EXHIBIT A, a blue book containing documentation relating to the history of payment and discussions between LMB and Venetian; EXHIBIT B, a black book containing documentation relating to Maui One and RDC; EXHIBIT C, a brief filed with the board this day containing exhibits pertinent to the issues that was part of the record by stipulation; EXHIBIT D was Mr. Murphy's affidavit; and EXHIBIT E, a document containing the calculation of amounts paid to LMB by Venetian on the project. Mr. Robb did not object to entering the exhibits into evidence.

The stipulation was not signed.

Mr. Nelson and Mr. Zech abstained due to prior involvement on the project. Mr. Gregory disclosed he had performed work on the project for which he had been paid, and he was a part owner in another contract where money was still outstanding. Mr. Gregory stated he did not believe his judgment on the matter would be affected.

Ms. Fletcher had no objection to Mr. Gregory's participation in hearing the matter.

Mr. Robb then addressed the allegations in the amended complaint as they related to RDC and to Maui One. Mr. Robb said it was his understanding that the Licensee was not asserting that he did not have financial ability to pay, conceding that he did. The Licensee's position was that contractually, he had no current obligation to pay as the statute stated he was required to pay when due, and the moneys were not yet due. Secondly, back charges and other changes obviated the necessity to pay.

Ms. Fletcher presented her opening statement wherein she stated that the claimants were asking the Board to throw out the contracts that they had entered into with LMB. She pointed out that moneys were not due because the written contracts between the parties contained a specific provision that provided payment would not be due until payment was made by the owner. Ms. Fletcher said she expected the evidence to show six undisputed facts that governed the nature of the dispute: one, the owner had paid the trades directly; two, there was no evidence that LMB had received any checks for RDC or Maui One that had not been turned over, nor was there any evidence that the owner had paid LMB moneys that were designated for the two parties; three, the contract contained a clear and unambiguous pay if paid provision as contained in the briefs provided to the Board; four, the right of freedom to contract; five, there was nothing in the statutes to invalidate this type of contract provision; and six, the matters were pending in court. Regarding Maui One, Ms. Fletcher stipulated to the eighth and ninth cause of actions stated in the hearing notice, with explanation, and noting specific differences.

Respecting the violation of NRS 624.307 (3), Ms. Fletcher stipulated that LMB did not have its license number on the cards or stationary, but she stated she did not believe the statute covered stationary. Nonetheless, the Licensee had provided an affidavit indicating the cards and the stationary had been revised. Ms. Fletcher noted that she did not believe the matter was a basis for sanction as many contractors were operating with the same transgression.

MAUI ONE

Mr. Robb questioned Ms. Canepa, who testified that Maui One had performed miscellaneous excavation site work, water, and storm drain installation. The work had commenced in April, 1997, for Fisk Electric. Maui One commenced working for LMB in July, 1997. Originally, there had been no written contract; the work had been performed for time and material, and invoices had been submitted on that basis. Maui One had then entered into a written contract with LMB on October 15, 1997 for \$250,000. Ms. Canepa

then detailed the reason for the contract, and provided information pertaining to the second contract with LMB. All work had been completed under the two contracts as of April 1999. Maui One had not been paid what it was owed under each contract. LMB had not made any complaint to Maui One regarding the timeliness or the quality of the work, but questionable back charges raised by LMB totaled approximately \$500,000 to \$700,000. Meetings to resolve the issues had been held between Maui One and LMB.

Leon Mead, Civil Counsel for Maui One, identified himself and clarified what had occurred in the negotiations with LMB, stating why the numbers appeared to be different.

Mr. Robb clarified that the undisputed amount owed under both contracts was \$334,000. LMB had made an advance to Maui One of \$100,000.00 against moneys to be collected from the Venetian, which was carried as a loan on Maui One's books.

Ms. Fletcher agreed the number was close, and proceeded to question Ms. Canepa.

Mr. Gregory clarified that what the Board needed to now was had LMB been paid or not? When did LMB encumber the project past the guaranteed maximum price (GMP). When did LMB run out of money? And did the owner know LMB had run of money?

A discussion then followed regarding how retention was paid, and the Board questioned if the only thing that was outstanding was pending change orders. Ms. Fletcher replied that the owner had not paid LMB for all of its written contracts and written change orders, nor for pending change orders. The Board then questioned what had been paid. How much had the owner paid LMB, and what evidence was there that the Venetian had paid LMB for the work performed by Maui One or RDC? Mr. Robb replied there was no clear evidence.

Mr. Gregory pointed out there had to be an accounting of the open basis of the contract to determine if the GMP had been exceeded.

Ms. Fletcher said there was, and that Venetian admitted to an amount that was yet unpaid.

Mr. Mason was questioned regarding the two contracts with LMB. The first one had a preliminary guaranteed maximum price limit. A final guaranteed maximum price contract containing a lump sum amount had been agreed to based on specific plans, drawings, specifications, etc., and the contract indicated that LMB would pay all costs in excess of the negotiated amount. Construction was to commence March, 1997 and conclude in April, 1999. Mr. Mason detailed how LMB was to get paid. He said Venetian had no complaint regarding the quality of work performed by Maui One. Mr. Mason then spoke to the questions previously asked by the Board regarding retention and the retention reduction document executed in May, 1999, and scope changes. It was Mr. Mason's contention that the GNP had been fully depleted in April, 1999, although money issues pertaining to scope changes were still being resolved. Mr. Mason was unaware of moneys owed to Maui One.

An extensive discussion followed regarding LMB's contract amount with approved changes versus the moneys owed to Maui One and RDC.

Thereafter, Ms. Fletcher questioned Mr. Mason regarding the final guaranteed maximum price (FGMP), which had been prepared by VCR. Mr. Mason said the amounts were in dispute and might not be final. The total amount paid by VCR to LMB and its subcontractors was \$653,511,000. Ms. Fletcher contended that there was retainage owed by the Venetian to LMB that was sufficient to pay all those who were owed money. Her calculations showed there was an undisputed \$26 million owed to LMB, who had been paid \$642 million. Mr. Mason was not sure that LMB was owed \$8.5 million for phase 2 work, which had been a loan from LMB, although he did agree that LMB had loaned the Lido the money. He did not know if the amount was included in the figures being discussed. Mr. Mason said the Lido had not paid LMB the money because it was not due yet, and the loan had nothing to do with the trade contractors. Ms. Fletcher continued questioning Mr. Mason in regards to billing matters. When asked if Venetian was prepared to pay to Maui One the amount requested in the May pay application, Mr. Mason deferred to his counsel.

The Board questioned if the change orders had been approved change orders, Mr. Mason said they had been approved by LMB, not necessarily by VCR. Mr. Mason said the only way LMB could change the amount of the contract with VCR, which was \$704 million, was through a scope change. Mr. Mason did not know if all of the approved change orders went through the scope change process, alleging that in many cases LMB gave a change order to a subcontractor and did not request a scope change from VCR.

Mr. Melson added there was a time when LMB had worked directly with the owner to review the change orders and had a signature from a representative of the Venetian before releasing them to the trades. Mr. Murphy said all of the approved change orders had been issued to the trade contractors. Both Mr. Melson provided additional information regarding the change orders.

Steven Arbittier, Legal Counsel, Venetian, was identified.

Mr. Carson questioned what was done with the \$11 million in retention.

Mr. Robb questioned Mr. Melson who explained when the retention, reduction agreement had been executed, and the terms of the contract, including the pay if paid clause. It was Mr. Melson's contention that unless the Venetian paid LMB, the subcontractors did not get paid. When asked if he had ever informed the trades that although directed to perform the work, they might not get paid, he replied no, because at no time during the project did he believe that to be the case. More questioning followed regarding an offer to Maui One to settle, and a request LMB had made to the Venetian to pay an agreed upon amount to them.

RDC

Mr. Robb said RDC had 4 contracts. There were amounts owed under those contracts, as well as approved change orders, that had been approved by both the owner and LMB. There were claims by LMB against RDC for back charges that were substantial. Ms. Fletcher was unable to stipulate to the amounts, providing her reasons why. The amount RDC was asking, overall, for resolution of their claims was so huge, the issues might have to be resolved in court. She conceded that there were disputed issues and that the alleged back charges were reflected in LMB's documentation.

Mr. Gregory said the issue of back charges needed to be resolved in court.

Sterling Kerr, Legal Counsel for RDC, was identified.

Mr. Robb referenced EXHIBIT 1 and said the contract price and owner approved change orders, which had not been paid amounted to approximately \$867,000.

A discussion ensued with Mr. Whittle regarding back charges.

Mr. Melson did not agree that any money was owed to RDC, citing serious scope of work and punch list items. LMB had settled with 100 people, but not with RDC for a reason. Mr. Melson then described the issues. Nonetheless, LMB had met with RDC on a number of occasions and tried to enter into a liquidation agreement with them.

Mr. Robb asked the Board to direct LMB to provide detailed documentation of alleged back charge claims because RDC had alleged it had not seen the back charges.

Mr. Murphy said he was unable to testify as to whether RDC had seen all of the back charges, however, they had seen some as they had responded to them and had denied responsibility for them.

Mr. Gregory asked LMB to forward a full copy of back charges, as well as the paper trail

of when, how, and what the back charges were for. Ms. Fletcher referenced a document in the exhibits found in the black book she had provided as the spreadsheet relating to the back charges.

Mr. Sterling said that he and his client had never seen the document before.

Ms. Fletcher stipulated that the amount requested for RDC in the May application had not been paid by the Venetian. It amounted to \$113,000.

Mr. Mason said there was some punch list work that RDC needed to clean up on the job.

Mr. Robb suggested that the Board direct both entities to supply all documentation, which had not been previously supplied to allow for possible settlement.

Michael C. Mathis, Legal Counsel, Venetian, was identified.

Mr. Sterling asked to lodge exhibits. The exhibits were lodged.

David Delaney testified he had overseen Maui One as a project manager. He described the two contracts with Maui One, as well as Maui One's billing procedures and invoices.

Ms. Canepa contested Mr. Delaney's testimony, stating both parties had made billing mistakes.

Ms. Fletcher asked for an informal meeting for RDC for possible resolution.

Due to the lack of time, the hearing was continued to February 24, 2000.

PUBLIC COMMENT

No one from the general public was present to speak for or against any items on the agenda.

There being no further business to come before the Board, the meeting was adjourned by Chairman Gregory at 4:32 p.m.

Respectfully Submitted,

Betty Wills, Recording Secretary

APPROVED:

Margi Grein, Executive Officer

Kim Gregory, Chairman