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ARBITRATION SERVICE OF PORTLAND

City of Stayton,

Claimant,

vs.

JCNW Family LLC,

Respondent.

ASP No. 141222

**THIRD SUPPLEMENTAL
AWARD**

BACKGROUND

The Final Award requires Respondent to development of a temporary stormwater drainage plan. Respondent initially proposed a temporary drainage system that would involve the building of a ditch across private property to an existing ditch, which would take the stormwater from the Phillips property to Mill Creek. After further discussion, Respondent then proposed a less complicated and more tenable plan, which involved improvements to the retention pond and weir, agreements with downstream property owners, and approval from the SWCD to allow stormwater to drain into the waterway controlled by the SWCD.

The Arbitrator adopted a Supplemental Award on October 26, 2015, outlining a two-phase process for completing a temporary stormwater drainage system. As explained in that award, the original goals set forth in the Final Award¹ could not be achieved

¹ To develop a temporary stormwater drainage plan that would “prevent the escape of stormwater from the Philips property on to private property . . .” (p. 19 of the Final Award).

before the site received significant precipitation.² For that reason a more tenable and expedited plan was adopted. Phase One of this plan required Respondent to “prepare a separate document setting forth the exact construction that is being proposed for improvements to the existing retention pond and weir, including a timeline for completion.” Phase One of this process has been substantially completed. However, Respondent still needs to prepare and submit a comprehensive written plan for completing Phase One. This is addressed below.

Phase Two invited Respondent to “promptly” develop a plan that included the following: “(1) the construction details for the ditch and retention pond on the Roberts property, (2) the proposed lease for use of the Roberts’ property, (3) the anticipated approvals required and (4) all proposed deadlines.” It was anticipated that these requirements would be completed before a significant volume of stormwater was introduced into the existing drainage system.

Respondent has failed to take advantage of the opportunity extended to him in the October 26 Supplemental Award. Phase One was not completed in the time frame anticipated at the time of its entry. The Stayton area has experienced significant rainfall – nearly double the average for this time of year. A significant amount of stormwater has flowed over the new weir onto and across adjacent properties and into the ditch controlled by the SWCD. A hold harmless agreement has not been entered into between Claimant and Respondent; agreements with the three identified downstream property owners have not been entered into; approvals have not been obtained from the SWCD, Marion County and other public entities that might be impacted; no deadlines have been proposed or established.

IMPLEMENTATION OF THE GOALS OF THE FINAL AWARD

To further implement the goals established in the Final Award, this Third

² Final Award, pages 1-2.

Supplemental Award is entered, as follows:

The Hold Harmless Agreement. A hold harmless agreement between the City and JCNW will be executed no later than January 19, 2016. Because the stormwater drainage system required at this stage is temporary and private, respondent is not required to obtain public utility easements from the downstream landowners impacted by the temporary stormwater drainage plan.

Agreement with downstream landowners. Respondent will promptly proceed to complete agreements with all of the downstream landowners relating to the flow of stormwater across their respective properties. There is no reason why said agreements cannot now move forward to completion without delay. It is anticipated that the agreements will expire on October 31, 2016. Said agreements shall be completed on or before January 31, 2016.

SWCD approval. Respondent will continue to negotiate in good faith with the SWCD to develop an agreement to allow stormwater from the Phillips property to flow into waterways controlled by the SWCD. Respondent will report to the City the progress being made to complete this task. This task will be completed on or before January 15, 2016.

Marion County approval. Respondent will continue to diligently work with Marion County representatives to determine if approval of the temporary plan is required by Marion County. Respondent will report to the City and the Arbitrator on the status of this issue on or before January 19, 2016, and thereafter as progress is made on the resolution of this question.

Measurement of water flow over the weir. Beginning on January 19, 2016, and every ten (10) days thereafter, Respondent shall provide a report to the City containing the following information: (1) the level of water in the retention pond, and (2) the volume of water that has been discharged from the pond over the weir. Further, Respondent shall provide to the City the same information gathered since November 16, 2015.

Comprehensive written plan for Phase One. Respondent shall prepare a comprehensive written for completion of Phase One. This plan will include at least the following: (1) a list and description of all downstream property owners and the agreement Respondent has reached, or anticipates reaching, with said property owners, (2) a description and design of the control structure to be used to measure stormwater runoff, together with the plan for using said measurement device and sharing the data gathered therefrom, (3) the specific improvements that have been made or that are proposed for construction regarding the retention pond, weir and drainage onto private properties, (4) a detailed description of how the stormwater is dealt with once it crosses over the weir, and (5) the plan and present status of approval needed from the SWCD, Marion County and other entities having jurisdiction over the activities involved in the plan. This plan shall be completed and submitted to the City on or before January 31, 2016.

Phase Two. Respondent shall develop a detailed written plan document – similar to the written plan described above – for Phase Two of the temporary stormwater drainage plan. This plan shall be completed on or before March 15, 2016. The plan for Phase Two will be developed around the overall goal of this phase being completed by October 31, 2016.

Enforcement. As reiterated in the prior supplemental award, “in paragraph 2i of the Final Award entered in this ASP arbitration action, a provision was included by stipulation of the parties granting to the arbitrator continued ‘jurisdiction over the issues raised in this arbitration action and . . . authority . . . to resolve any and all impasses between the parties that may arise relating to the implementation of the remedial plan’ adopted in the Final Award.”

The parties are at an impasse on most every provision of the present plan for developing the temporary stormwater drainage plan. The authority granted to the arbitrator to “resolve” continued disagreements between the parties is meaningless unless the arbitrator has authority to impose penalties for non-compliance with the provisions

and deadlines set forth in the final and supplemental awards. This “resolution of impasses” clause may be reasonably interpreted to grant authority to the arbitrator to impose appropriate penalties. The parties also have the option of turning to the State court system where the awards may be converted to judgments and enforced with contempt powers. At this stage, unless directed otherwise, the arbitrator will impose reasonable fines and penalties to implement and enforce the goals and directives of the awards entered in this arbitration proceeding.

Dated this 14th day of January, 2016

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Daniel L. Harris
Arbitrator