



To: Mayor and City Council

From: Dylan Mulfinger

Subject: 42 Well Late Fees

Date: 12/14/2020

The City is in a position where negotiations must start to close out the 42 well project.

Start Date: August 2017

Cost: \$1,215,000

Fund: SRF loan repaid by water utility

Contractor: Portzen Construction Inc

Why was this project needed: The 42 well had run its useful life on the former setup. The well was drilled and re-cased.

After some back and forth with Fox, the following information was provided by Vic Kane our Utility Superintendent and Fox Engineering.

Dylan,

I asked FOX the following to help educate new council persons on the process involved with late days. "LDs". Their vast experience in this area will supplement what we have learned in this area.

Why would I "not" want to collect \$330,000 in late fees?

1. To collect the \$330,000 the City would have to file a lawsuit (really arbitration) as the remaining amount exceeds the retainage (\$60,000-\$70,000 at this time). That is what we basically did w/ Summers, kept the retainage, even though the LDs added up to a higher \$.

2. My understanding is that there is very little actual case law on LDs (Iowa or nationally), so any lawsuit is a bit unknown. What little there is has generally indicated that the amount of LDs (e.g. \$/day) needs to be reasonable and justified. Seems what we have is OK. The hard part is when a project is almost done, even at a low \$/day, it adds up when it drags out. Whether a judge/arbitrator would agree that the added up \$330,000 is still reasonable...hard to say. My gut tells me "no".

Why even have late days in the contract if you do not use it?

1. When a project drags on, but almost done, it's not uncommon for LDs to exceed retainage. As up to that point, one has to pay for the work completed if not late yet.

2. If not in the contract, the burden of proof is on the city. The way it's done, the burden of proof is really on the Contractor to be less than the LDs. So that is the "why".

What is an appropriate amount and why?

1. Appropriate amount? Yes, those are the kinds of things, as you mention. They don't have/need to all hard \$ items either. There is definitely value in just having projects done as scheduled. Staff time is the hardest usually to document as it's not like most cities have staff



actually document what they did each day and assign it to specific tasks/projects. Overtime might be easy, but just the day-to-day of a project still going on takes time.

2. There is a "moral hazard" on a City being too harsh on contractors. Future pricing/bids. That isn't to say that a city should never consider holding a contractor responsible for being late and paying something. The City of Ames has a reputation of being a stickler and is likely feeling that on bids, but hard to put a number to that. On the new water plant, they kept \$500,000 (on a \$55 million project). Marshalltown has generally preferred not to enforce unless things get a little out of hand on lateness. So, on several projects that were a few months late, no fuss. Story Construction was quite late wrapping up a project and the City did ding them. Originally took a pretty hard line (new City Admin, different council), but did in the end negotiate something. Story wasn't happy and hasn't bid Marshalltown projects since in the last 5ish years (and over the last 30 years, had been low price on most projects at the wastewater plant). I don't think Marshalltown was wrong, Story really did drag it on way too long.

3. My experience, and from hearing from others at FOX with their projects/clients, is if you start too high, you spend a lot of time (and money), and then end up right back to what we've been discussing.

The amount we request should cover outstanding bills and recover some of the incidental costs the city incurred over this time. We could start at \$50,000

Thank you for your time.

Victor Kane

It is my professional opinion that the City Council should motion to begin negotiations with Portzen Construction Inc. The City should start their request at \$50,000 and allow the City Administrator to negotiate. It is the city's overall goal to ensure that the City reclaim any lost revenue due to the project not finishing on time.