

MINUTES
TOWN OF PITTSBORO
BOARD OF COMMISSIONERS
SPECIAL MEETING
TUESDAY, AUGUST 3, 2010
7:00 PM

Mayor Randy Voller called the Special Meeting to discuss a possible Pedestrian Conveyance System Project Budget Amendment to order at 7:00 p.m. and called for a brief moment of silence.

ATTENDANCE

Members present: Mayor Randy Voller, Commissioners Pamela Baldwin, Gene T. Brooks, Clinton E. Bryan, III, Michael Fiocco, and Hugh Harrington.

Staff: Town Manager Bill Terry, Town Clerk Alice F. Lloyd, and Town Attorney Paul S. Messick, Jr.

1. Pedestrian Conveyance System Project Budget Amendment

Town Manager Bill Terry stated that the Town had been notified that design fees paid to Hydrostructures for the Pedestrian Conveyance System project would not be reimbursable under the CMAQ grant because the Town had not used a competitive bidding process to complete the work. He said the Town had already paid Hydrostructures almost \$65,000 and the project budget had been increased to \$205,000, which would put the project budget over the \$243,000 we currently have budgeted.

Mr. Terry said it was his recommendation that the Board adopt the budget ordinance amending the project budget by adding \$65,000 in additional funding from the General Fund balance, which would increase the total project budget from \$243,000 to \$308,000.

Commissioner Fiocco asked would Hydrostructures be doing any construction observation, certifications, or any on-call consultation during the course of construction of the sidewalk. Mr. Terry said in his opinion the answer would be no, although he would communicate to NCDOT that the Town was not inclined to take up further engineering fees so if they needed to consult with Hydrostructures that NCDOT would need to cover that cost. Commissioner Fiocco asked if the plans Hydrostructures designed had been incorporated into the contract and the project. Mr. Terry said that was correct. Commissioner Fiocco said then NCDOT should be taking full responsibility for the design. Mr. Terry responded yes.

Commissioner Fiocco said there was some talk months ago about the sleeves that had been installed and that might be more appropriately assigned to the Downtown Water System Improvements Project. He asked was that something that would be revisited or should that be taken care of now. Mr. Terry said he would need to look at that more closely, but believed it was true that those sleeves related more to the Downtown Water System Improvement Project. He

said he believed part of the \$65,000 was that work and they could adjust that out through a journal entry to make that change. Mr. Terry said that might have already been done, but he would have to check the records to be sure.

Commissioner Harrington asked for clarification about the sleeves. Mr. Terry said it was part of NCDOT's road work, noting that as they were putting the new road in it had been noted that the area they were working in was the same area where water system improvements were planned, and they could prevent digging up that road at a later date by putting pipe in the existing sleeves.

Commissioner Bryan asked how much money that would save. Jay Johnston with Hydrostructures responded they would have to flush that out. Commissioner Bryan said if those sleeves were already installed then they should know the cost. Mr. Johnston responded and said they had done it as a function of the overall effort around sidewalks in the traffic circle, and he would go back and check his records to pull out that cost.

Commissioner Brooks said at a meeting this morning he had heard County Commissioner Sally Kost say that they hoped that NC 87 would be opened soon and they did not want to have to close the circle for more than two days so that the nearby businesses would not be adversely affected any longer than necessary. He said he believed the contractor had said they would need longer to finish the sidewalk and wanted NC 87 closed while they built the sidewalk, and that was problematic with coordinating with the repair on the courthouse.

Commissioner Bryan said he had been told by a NCDOT employee that if they built the sidewalk that NC 87 would still be opened on August 16.

Commissioner Brooks asked had the contractor indicated they needed more than two days, and was it the contractor who did not want to open NC 87 until the sidewalk was completed. Mr. Terry said it was his understanding that the contractual completion date of that project was August 20, 2010 and NCDOT had indicated they believed that the sidewalk would be completed by that date.

Commissioner Brooks said he assumed the contractor wanted the road to remain closed until they finished the sidewalk. Mr. Terry said he understood that because it would save the contractor money by not having to have flagmen. Commissioner Brooks asked was that part of the equation now. Mr. Terry said yes, noting it was his understanding the road would remain closed until August 20, 2010.

Commissioner Brooks said the library was supposed to open on August 20, 2010. Mr. Johnston stated he had been told that the road would be opened by the end of the contract date of August 20, 2010 even if the sidewalk project had not been completed. Commissioner Brooks said then it was a non-issue.

Commissioner Fiocco asked was the sidewalk handled under a change order to the contract. Mr. Terry said it was covered under a supplemental agreement. Commissioner Fiocco said just as they had made an adjustment to the price, they would have then made an adjustment to the time of the contract. Mr. Terry said it was envisioned that the work would be done concurrently so

the contract date did not change. He said that was to avoid having two closures where NCDOT would do its work and open the road, and then it would be closed again shortly thereafter to begin the sidewalk.

Mr. Johnston said that NCDOT had known that the sidewalk would be part of the roadway work from the beginning of that roadway project, but it had taken an odd amount of coordination and time to get them to accept that concept and do the work concurrently.

Commissioner Fiocco said he would like to make a public statement to NCDOT, in that they did not expect, and would not tolerate or entertain, that the contractor would get into a position where he went beyond his contract time, blame it on the sidewalk construction, and then want to charge the Town for the cost of liquidated damages that NCDOT assigned to them. He said he believed that needed to be made clear to NCDOT and that it was a non-starter for the Town. Commissioner Fiocco said this project had taken on some interesting twists and turns, and having charges for damages levied against the Town was the last thing he wanted to hear. Mr. Terry said he would envision taking that a step further by preparing a letter from the Mayor to NCDOT that said the Town was not happy with the situation but was willing to fund an additional \$65,000 to get the project completed, and that any related damages or any unanticipated costs that might be forthcoming would not be acceptable to the Town.

Commissioner Bryan said they had a contract with NCDOT based on an estimate, and asked why those extra expenses were the Town's fault.

Commissioner Fiocco stated they were not actually dealing with the contractor's costs.

Commissioner Bryan said but that contributed to the total scope of the problem.

Commissioner Baldwin said that initially the project costs were not that high and the design costs were not the only thing that had driven the cost up. She said because of those additional fees she was having a problem with the project now. Commissioner Baldwin said she believed they should consider aborting the project because it seemed that the costs were continuing to rise and they had to use Fund Balance to cover those costs. She said her opinion was that they needed to stop using Fund Balance because they were depleting it, and if they were not careful there would be none left.

Commissioner Bryan asked if they were sitting here tonight with zero Fund Balance, what would they be discussing now.

Commissioner Harrington said he believed they would either be begging a bank for a loan or they would abort the project.

Mayor Voller said they already knew they could not pay for the design fees accrued to date with CMAQ funds, so how were they allocated from last fiscal year to this fiscal year. He asked had the design fees already been paid, or were they due to be paid. Mr. Terry said that payments were made to Hydrostructures each month when an invoice was submitted. Mayor Voller said

then the money had already been spent, so the issue was not that a bill was due but that the Town could not get that money reimbursed from the CMAQ funds.

Commissioner Baldwin said they all knew that, but the bid had come in at \$205,000. She said at this point she was ready to get a new contractor, noting that the cost had now risen to a ridiculous level.

Mayor Voller said he agreed, but pointed out that they already had sunk money into the project. He said they had a grant for \$233,000, and believed the project contractor knew how much that grant was for. Mayor Voller said if you carefully looked at what had been done the grading had all of a sudden gone to \$93,000, and they were charging a mobilization fee when they were already mobilized because they were already at the site.

Commissioner Bryan said it was obvious they were taking advantage of the situation.

Mayor Voller said his question to Mr. Terry earlier this week was what the Town could do in regards to the CMAQ funds as far as going back to them on the issue of how they had “barrel rolled” the Town with the Town’s consultant.

Mr. Terry said that in order to respond to the questions already asked, Commissioner Baldwin had suggested walking away from the project and his response was that they could do that. He said he believed they could write a letter to NCDOT and to the contractor and they could return the grant. Mr. Terry said the impact of that was the \$65,000 the Town had already expended.

Mr. Terry said the other issue was whether or not the engineering expenses should be reimbursed from CMAQ funds, and he believed the Town could appeal that and push that somewhat. He said in the General Statutes there was a provision that said that municipalities had to use the bidding process for that work but there was a \$30,000 threshold where you could exempt yourself from that. Mr. Terry said he believed they could go back to NCDOT and make the argument that when the contract had been made with Hydrostructures the design fees were about \$20,500 and he did not believe anyone would have thought to put that out for bids. He said he believed they could push that argument and go a little higher up the NCDOT chain of command.

Mr. Terry said he had talked with Tim Johnson at NCDOT a few days ago who had suggested that the Town could contact Speaker Hackney and perhaps obtain some funds from his contingency fund. He said he had not known that Speaker Hackney had a contingency fund or that it was available for use for these types of things, but he believed that might be something the Mayor would want to explore.

Commissioner Fiocco said that the grant was not tied to the Town working with NCDOT, and asked when the grant expired. Mr. Terry said he believed it had a two year life. Commissioner Fiocco said then they could take the grant money and hire someone else. He said the \$65,000 already expended had given them a ready-to-build project that could be handed to any contractor, but they would have to hire Hydrostructures or someone to administer the bid and to do the construction administration, observation, and certification at the end of the project that NCDOT would do now.

Mayor Voller said NCDOT would be charging the Town to do that work.

Commissioner Bryan asked just how much it cost to build a sidewalk. Mr. Johnston said when they had written the Scope of Services in June of 2009 they had six line items that he had attributed time to, but only the first two had a dollar amount attached to it which totaled \$15,500. He said for the last four items, they had no idea what would be required so Hydrostructures' services were billed hourly for those items. Mr. Johnston said at the time the agreement was written it had been left open ended as far as what work would be required, and noted that the scope of work was for the sidewalk section between West Street and Salisbury Street.

Mr. Johnston described the last four line items that were to be billed hourly, with the first being to collect and incorporate data into the design drawings and contract documents, and inspection and construction administration. He said the second was calculations and design for curb and gutter and other stormwater conveyances, noting that at the time they expected that the grant did not consider that sidewalks were not simply sidewalks but also came with curb and gutter and significantly affected stormwater control runoff management. Mr. Johnston said the third item was documentation for categorical exclusions, which was noted as perhaps requiring some outside consulting. He said they had had to do some environmental work on certain aspects of the project, but at the time they had not known the scope or the cost. Mr. Johnston said the last item was grant administration and assistance. He said those four line items were unknown but eventually to be added costs.

Mr. Johnston said under Services Not Included, the first item was property surveys, easements, maps and drawings, all of which Hydrostructures had done. He said another was appearances before the Commissioners and boards, noting he had attended at least six meetings with two dozen NCDOT representatives so far. Mr. Johnston said the project then involved at least twice and possibly three times as much linear feet of sidewalk as in the contract.

Commissioner Brooks asked how far it was from West Street to Salisbury Street. Becky Smith, with Hydrostructures responded 750 feet.

Mayor Voller asked how long the sidewalk was planned for now. Mr. Johnston responded 2,100 feet and it would go all the way to the new library.

Mr. Johnston said that the scope of the project was now easily three times what had been originally envisioned, and did not want the Board to believe that Hydrostructures had lost control or had billed the Town because they thought they could. He said the project exploded and involved many agencies that had to be coordinated. Mr. Johnston said that NCDOT had invited the Town to piggyback its project onto theirs and save the Town the construction administration costs. He said for the benefit of the Town he had agreed that was fine to do in that he did not have to capture those dollars for Hydrostructures. But, he said, coordinating in that direction had been very difficult.

Mayor Voller said the only real issue in that regard was that the Town was not getting reimbursed for their investment. He said if NCDOT was doing what it was supposed to do, then

technically the Town had no control over that money. Mr. Johnston said they had \$233,000 in grant money and they had to pay the contractor \$205,000 for the work, so that left \$28,000. He said if they could get up to \$30,000 reimbursed for engineering, which he believed CMAQ would allow, then they could capture the full \$233,000.

Mr. Johnston stated that some NCDOT employees had said publicly that it was Hydrostructures that was preventing the road from being opened, and he believed that was contributing to some of the tension he felt from the public and from the Town Board.

Mayor Voller said he understood that Hydrostructures had nothing to do with why the road was not now opened.

Commissioner Baldwin said she knew that NCDOT was very difficult to deal with, but her concern was not with Hydrostructures' fees but with the bid itself. She said it was not okay for the costs to continue to rise.

Mayor Voller agreed, but said they needed to determine the best strategy for the Town and the County as they went forward. He said he also agreed that NCDOT was trying to take advantage of the fact that the grant was \$233,000. Mr. Johnston said he believed that NCDOT knew what the estimated cost was because NCDOT for the last month had been expressing concern and wanted to give the project back. He said he believed but could not prove that the contractor knew not only what the grant amount was but also what the budgeted amount was for the project, and expected that if they came in way over the budget that the Town would say they did not want to do the project and the contractor would then be "off the hook."

Mr. Terry said one question was could the Town walk away from this project, rebid it, and then go forward. But, he said, they had to consider what the affect of that would be. Mr. Terry said right now they were about \$70,000 over what they thought the bid should have been, so they would be taking a chance that they could get a new bid that was \$70,000 less. He said that would cost them about a month's delay, the Town would divorce itself from the street project, NCDOT would go ahead and reopen the street, and then there would be a second traffic disruption in that area so the Town could conduct its own project. Mr. Terry said there was no guarantee that they could get a bid that was \$70,000 less than what they had now, and they still had not sorted out with the CMAQ administrators that if the Town was to do that and was incurring additional costs for site work and inspections whether or not those expenses would be reimbursable through CMAQ funds. So, he said, there were some downsides to doing that.

Commissioner Bryan said he would rather roll the dice and take the chance.

Commissioner Brooks said he had thought the sidewalk would essentially be on the highway, but he was now hearing that it would go to the new library and the classrooms. He said that Pittsboro had a considerable investment, as did the State, in the walking trail that was located in that area. Commissioner Brooks asked if this project would have any significant impact on that trail.

Commissioner Bryan said the answer was yes, noting that at least a third of that trail had been torn up.

Commissioner Brooks said if that trail was being disrupted then the Town was losing its investment in it.

Mayor Voller said he believed there was some plan for re-establishing that trail, noting that he believed the Recreation Board had discussed that. Ms. Smith said they had been told that the new sidewalk would come along the new entrance drive and that the trail would come up to that so that there was access to the path, and then the other strip would be put back.

Commissioner Fiocco asked if a part of the sidewalk project was a sidewalk from the public right-of-way to the library that was on private property. Ms. Smith said yes, that that was a part of the unknown costs because there had to be a permanent Town easement for that sidewalk. She said they had then discovered that the driveway had not been surveyed properly and that had taken some time to resolve. Commissioner Fiocco said that the CMAQ funding was paying for about 200 feet of sidewalk at the Community College which would be adjacent to the driveway, and that sidewalk would be the responsibility of the Town to maintain. Ms. Smith said that was correct. Commissioner Fiocco asked why the Town would agree to that. Ms. Smith said in order to get the grant.

Commissioner Fiocco asked did that mean that the Town had to accept liability if someone was injured using the sidewalk. Town Attorney Paul Messick said that the Town would not be the only entity liable but they would be in the mix.

Mayor Voller said perhaps the question would be should they go to the County and say the Town wanted to turn the sidewalk over to them because the County owned the property. Mr. Terry said that David Hughes had offered to do that when he had seen that the project was in monetary trouble. He said Mr. Hughes had offered to build the sidewalk from the Community College out to the road, but had then realized that the grant dollars were tied to the construction of the sidewalk. Mr. Terry said when linear feet of sidewalk were removed from the project then the available grant dollars were reduced.

Mayor Voller said the question was could the Town and the County negotiate for the County to take control of that sidewalk. Mr. Terry said that was a debatable point, stating that in his mind anything on the Community College campus should be included in its facilities maintenance and the sidewalk should belong to them. Mayor Voller said they should pursue having the County take it over when they reached that point, asking why the Town would want it.

Commissioner Brooks asked who now owned the trail.

Mayor Voller said that was another good question. Mr. Messick said it belonged to the Community College, adding the Town had never owned it.

Commissioner Brooks said then the trail had been deeded over to them. Mr. Messick responded that the Town had never owned it because it was on the Community College's property, even

though it was purchased through donations. Commissioner Brooks said then he believed that was one of the greatest scams that had ever been perpetrated on this community. Mr. Messick said that it was appropriate for the Town to request that the County take over the sidewalk, but only after it was built. He said that was not the question before them tonight; the question was whether to go forward with the project or not.

Commissioner Harrington said the Manager was talking about items that may not be reimbursable if the Board were to walk away from the existing contract or enter into another one. Mr. Terry said that was any engineering consultant fees, which included the design fees paid to Hydrostructures.

Commissioner Harrington asked why was that excluded. Mr. Messick said because permission had to be granted before the fact and not after, which was a fundamental rule that the Town had not complied with for some reason. He said the money was spent before the State had asked the federal government to approve it, and that was the problem they now faced. Mr. Messick said any new work would have to be pre-approved, so therefore the Town would need to know what it was they needed to have pre-approved, and they would not know that until they advertised the bids, received them, and then went forward.

Commissioner Harrington said one of the things that bothered him was that the Town had paid Hydrostructures for grant administration, and it seemed to him that one of the first things they would do in grant administration was to determine what the provisions of the grant were and what would the grant pay. Mr. Johnston said that was one of the first things they had done, and that was when they had found that they could not get reimbursed. Commissioner Harrington asked how much money they were owed by the time they realized that, noting to him that should have been the very first thing that was identified as the grant administrator before they spent the money. Mr. Johnston replied they had known from nearly day one that they would not be paid for the work from the grant but the work had to be done. Commissioner Harrington said then Mr. Johnston was saying that they knew from the very beginning that their fees would not be paid from that grant. Mr. Johnston replied yes, and that had been brought up to the Town.

Commissioner Harrington said it had been brought up to the Board but not that a significant expense was incurred. Mr. Johnston said that Paul Horne had known about it from the first, and that was who they had taken their direction from. Commissioner Harrington asked was he telling the Board that very early on he had realized that what he would charge the Town could not be charged back to the grant, and he was told to proceed anyway. Mr. Johnston responded basically, yes, noting when he was requested by the Town to perform some work that was what he did.

Commissioner Harrington said he was concerned about what had happened within the Town's organization, in that the first time the Board had heard about the fees that could not be charged back to the grant was only after considerable expense had been incurred. He said what he was hearing Mr. Johnston say was that he had already advised the Town that he was going to have to charge them a considerable amount, but to his recollection the Town had not known that until those fees had been incurred. Mr. Terry said it was his recollection that from the first he had heard about the project he had known that the Town had a 100% grant, but in order to get that

100% you had to submit a design by a particular date which was on a very tight timeframe. He said that was why they had hired Hydrostructures, noting the schedule was so tight it was not apparent whether they would be able to get the work done by the deadline. Mr. Terry said he had been pushing Hydrostructures to get that work done.

Commissioner Harrington asked did they know at that point that the grant would not reimburse those expenses. Mr. Terry provided the Board with a copy of a memo he had sent out dated March 22, 2010 to the grant administrator that challenged that, and he had first learned that the fees were not reimbursable under the grant just prior to sending that memo.

Commissioner Bryan said that Mr. Johnston had said he knew about it on day one. Mr. Johnston replied he was referring to day one of his involvement in the grant administration. He said his first involvement was to guide the engineering to try to make the project be 100% granted. Mr. Johnston said that Hydrostructures had no interest and no idea about grant administration at that time.

Commissioner Brooks said he recalled Mr. Terry telling him that he had thought that it was such a small project that he did not see any need to advertise for bids and that they were also working under a time constraint. Mr. Terry said he had not said that there was no need to advertise for bids, but had said there was no need to put out a request for qualifications for engineering. He said they were only designing a sidewalk and he had not thought it was necessary. Commissioner Brooks said that was how they had gotten into trouble with the grant. Mr. Terry said they had been told they had to have the work done by a date certain so he had made the call to have Hydrostructures do the work. Commissioner Brooks said then after he had made that call he had learned that the fees would not be reimbursable. Mr. Terry said the “catch 22” was that if they had competitively solicited for an engineer then that would have taken the entire amount of time allotted so they would still be paying, because the grant would have been a 80/20 grant instead of a 100% grant.

Mayor Voller said that was a key component that the Board needed to understand. Mr. Terry said if they had put out a request for qualifications, took the time to study those received, then chosen that one engineer, that by the time that was done the Town would have only been able to receive the 80/20 grant so the Town would have had to contribute 20% of the cost. Mayor Voller said then it would be the same difference, in that they would be paying one way or the other. He said it seemed to him that the real issue on the fees was that they had been barrel rolled by NCDOT. Mayor Voller said the other issue at hand was that the contractor knew how to get the work done at a particular cost and it was insulting that the contractor was trying to obtain the maximum amount possible because they knew how much money was available for the project.

Mayor Voller said it was his priority that they receive value for taxpayers and citizens. He said at this point they would have to pay thirty cents on the dollar if they had to pay the entire cost, and his only concern was what they would be delivering to their citizens was value.

Commissioner Fiocco said the investment had been made and what they would get in return for that investment was the concern. He said the contractor was clearly taking advantage of the

situation and he was of the opinion that they should take advantage of the situation and get the sidewalk built in a timely fashion. Commissioner Fiocco said if they put the project on hold and went through the process of bidding it out, then it likely would not happen this year because they were approaching the winter months and it would be more costly if the work was done in the winter.

Commissioner Brooks said he agreed with Mayor Voller and Commissioner Harrington, but he believed that many citizens would want to see the Board stand on principle, and it worried him a great deal that they continued to dip into their reserves. He said he agreed that they needed the sidewalk, but at best the Town was not coming out well and the citizens had not been well represented.

Commissioner Fiocco said if they did not move forward with the sidewalk he believed they would simply be spending more of the Town's money to try to get the sidewalk built later, or they would walk away from the project and have spent \$60,000 on nothing. He said moving forward was the better of the bad decisions.

Commissioner Brooks said that may be true, but the County wanted that sidewalk to the Community College.

Commissioner Bryan said the County may step up and do it.

Mayor Voller said he did not know if the County would do that or not, but that did not change the fact that if the Town walked away they would be losing that \$60,000 investment. He said the money had been spent during the last fiscal year, and asked where that money had come from. Mr. Terry stated that a project budget had been created that anticipated revenues and expenditures with the revenue side being the grant plus \$10,000 from the Town. He said the Board had appropriate \$243,000 to do the work, and they had used that appropriation to pay for the work.

Commissioner Brooks said the Town was going to have to reimburse the grant \$60,000. Town Clerk Alice Lloyd commented that the fees were paid out of the project budget and it should not have been, so they would have to take money from Fund Balance to put that \$60,000 back into the project budget.

Mayor Voller asked where the money had come from to pay for the project, asking had they been getting grant reimbursements already. Mr. Terry stated that any time you create a project budget you were obligating Fund Balance. Mayor Voller said his point was that it had already been paid out of Fund Balance, and this was just semantics. He said they were not reallocating anything that had not already been spent.

Mayor Voller said that they had two bad choices with no good choice, because they were left with someone who was trying to get something for nothing. He said if they did not move forward they would be obligating Hydrostructures to continue to work longer on the project as well as staff when there were much larger and pressing concerns to address, including the sewer plant, the water plant, and other projects. Mayor Voller said this was not the most important

project in Town, but if they left it hanging they would be spending even more time and money on it. He said he would advise the Board to move on and get back whatever money was possible, because if they did not they would be wasting time and not saving any money.

Commissioner Baldwin said she understood all the arguments, but she continued to be concerned about the Fund Balance.

Commissioner Bryan said it never should have been paid that way as a matter of principle.

Commissioner Fiocco asked if they were spending Town energy and money to try to save CMAQ money.

Commissioner Harrington said he agreed that was not the most important project in Town but it was a project that connected the new library with the Town and that was important.

Commissioner Brooks said to be clear, they could not use any of the CMAQ funds to pay Hydrostructures because they had not taken bids. Mayor Voller said that was correct. Commissioner Brooks said therefore, they had to reimburse the grant. Mayor Voller said they had not received any funds from the grant as yet, and the Town had already spent that money out of Fund Balance through the capital project budget.

Mr. Terry said when they filed the grant claim when the project was over he believed they would be awarded the engineering fees at that time.

Commissioner Brooks asked did that mean the Town would get its investment back.

Commissioner Harrington responded no, because the Town had paid the \$60,000 and the contractor wanted the grant money, so the contractor would actually be getting all that grant money and not the Town.

Commissioner Fiocco said the contractor would be getting \$205,000 and there may well be change orders during the course of construction.

Commissioner Harrington said he knew others may disagree with him and he could not blame them, but he was inclined to say they should just do it and get the sidewalk built. He said if they ended up a month from now with a sidewalk connecting the new library to the Town then that was a huge asset to the downtown. Commissioner Harrington asked was there anything else the Town could do, in so far as attaching some verbiage to the contract that the Town would pay only that amount. Mr. Messick responded no and the Board needed to understand that. He said there were circumstances that could occur with any construction contract that would require some change and there was contingency on top of that. Mr. Messick said they had \$233,000 in grant money and a contract price of \$205,000, but you could not just say that there would be no change in the price.

Commissioner Harrington said he believed that he could estimate that the cost overruns would be the amount of the grant, because basically the contractor was going after the grant money. Mr.

Messick said what was being asked for tonight was to clear up the project budget for the Town and not the money, because the money would be there for the work.

Commissioner Harrington said he was only assuming that, because the contractor might come back with even more overruns. He said he understood that they had essentially paid out of pocket the fees to Hydrostructures and the contractor would likely go after the grant money, so his question was what if they now came back with some verbiage to protect the Town. Commissioner Harrington said he was hearing Mr. Messick say that the Town had no legal recourse, in that they could assume that the contingency would be enough for any overruns but the Town could not say that this was the amount of money available and don't come back with anything over that. He said in other words, the Town could not protect itself. Mr. Messick said that the Town could always refuse to approve any change to the scope of the project or something similar, but if there was some contingency, if for instance the contractor hit rock, then that would have to be accepted.

Commissioner Brooks said one question was if the contractor was for some reason late in completing the project could the Town receive damages, and he believed the answer would be no unless the Town could prove somehow that the delay had cost the Town money. Mr. Messick said he believed that was correct, in that it would be hard to show damages if the sidewalk was not constructed on time.

Commissioner Fiocco said that NCDOT would have to be the one to go after the contractor with liquidated damages, and his suggestion was that the contractor would blame the sidewalk for any overrun in schedule and therefore would want a change order for liquidated damages. He said he thought that was highly unlikely, but again this project had taken some odd turns.

Mayor Voller said when he had said this project was not the most important project his thinking was that it was important that they have a complete walkable area around the Community College, but the Town had only so many employees and resources and the question was did they want this project to remain undone while they were dealing with the other issues. He said he was just as frustrated as the other Board members, noting the contractor knew the funding was not the Town's money and they were trying to get it, so it was not a fair situation.

Commissioner Brooks said that Commissioner Harrington's point was somewhat broader, in that he believed Commissioner Harrington was saying that he would like to see the Town operate in a more businesslike way and he did not believe many businesses would operate in this manner.

Mayor Voller said that unfortunately construction was one of the areas that constantly had such changes, which was why development was such a highly speculative field. He said it was not an area where you knew exactly what the cost would be up front, and developers knew that when changes occurred that increased the cost of a project that no one was happy just as in this situation. Mayor Voller said then the argument came up as to who would pay for it. He said the problem here was that the Town was not the one writing the check for the grant, and the Town had already spent money on the project.

Commissioner Fiocco added that design and construction costs at \$270,000 would get them 2,100 linear feet of sidewalk, and that was not a bad investment from the Town's perspective when only \$60,000 came from Town funds. He said if the Town was to build 2,100 linear feet of sidewalk it may be able to get it done for \$270,000, but today they had the opportunity to get that sidewalk for only \$65,000.

Commissioner Fiocco said the sidewalk was estimated at \$205,000 which left \$28,000, and that was just under a 15% contingency. He asked Mr. Johnston if he was estimating a construction project what kind of contingency he would add to the bottom line. Mr. Johnston responded usually 10%. Commissioner Fiocco said he knew of firms that added 15%, so the contingency was just about in line with what he believed would be advised by an engineer as an estimate of the cost overruns to be expected.

Commissioner Bryan said he understood that was the contingency, but the bid was nearly double what it should have been to begin with.

Commissioner Fiocco said they did not have a competitive bid; they had a project price.

Commissioner Harrington said he found it interesting that the Town did not get reimbursed for Mr. Johnston's work because it was not competitively bid, yet the contractor was holding the Town over a barrel when its price was not competitively bid.

Mayor Voller said that was perverse and believed that should be raised with them whether the Town went forward or not. He said he did not believe the Town should be quiet about that fact, but should raise an objection all the way through. Mayor Voller said that Sanford Contractors had pulled the same thing with the business park in Siler City, in that they had the low bid but had produced change orders to the maximum amount.

Commissioner Bryan said if the Town went forward with the project then they would be allowing Sanford Contractors to get away with doing the same thing again.

Mayor Voller said much of the work was bid out and Sanford Contractors had no way of controlling that. He asked Mr. Johnston if he was confident about the quantities that were listed in the project cost estimate, but added that as far as the grading the lump sum that had been put in he would predict was an attempt to get back some of the money Sanford Contractors may have lost on the rest of the project. He said but because it was a lump sum what it had cost Sanford Contractors to do it was irrelevant, because they could not actually get any more. Mayor Voller said there was not a lot of wiggle room but it was a nice fat contract for Sanford Contractors.

Commissioner Brooks said if they decided to move forward, would they ask the County to at least take over the sidewalk so the Town would have no future liability.

Mayor Voller said he believed the Town should be prepared to do that and also be prepared to say when the project was completed and closed out that the Town would ask that the County work with the Town and try to negotiate some reimbursement.

Commissioner Bryan said he would prefer to do that beforehand.

Mayor Voller said they could begin the discussion with David Hughes.

Commissioner Bryan said they also needed to ask about the sleeve money that no one seemed to know about.

Mayor Voller said his advice to the Board was to get very diligent about raising its objections but to approve the budget ordinance so that the sidewalk project could move forward. He said if they let the project languish then the costs could rise.

Commissioner Bryan said he did not believe the project would sit for very long, because when word got around that the sidewalk project was stalled then they would hear about it. Mayor Voller said but the Town would still be out \$65,000 without anything to show for it. Commissioner Bryan said not necessarily. Mayor Voller said then from whom would the Town get its money back. Commissioner Bryan responded possibly CMAQ.

Commissioner Harrington said the best the Town could do was to get someone else to do the work at a lower cost, in which case they would have more of the grant funds left over. Mr. Terry said that was correct, but if they got a better bid then remaining grant funds would have to be turned back in.

Commissioner Bryan said he understood that they were going to go back to CMAQ and ask for the engineering fees. Mr. Terry said yes he intended to do that, but his best advice was that this project was problematic and had been from the first week and he accepted his fair share of the responsibility for that. He said having said that, right now they needed to decide whether they would go forward, and he believed the best solution was to amend the budget and approve the project and then aggressively approach NCDOT to change their position on reimbursing the engineering fees. Mr. Terry said that might mean writing letters and the Mayor contacting Secretary Conti to say how ridiculous that position was and asking him to request that NCDOT take another look at it, because it was a \$20,000 contract and why would anyone compete for a \$20,000 contract. He said the Mayor could also approach Speaker Hackney to find out more about his discretionary fund to see if there were funds available to help the Town. Mr. Terry said they could then get the sidewalk completed in the next 30 days and put the project behind them.

Mr. Terry said he fully understood the Board position, noting his first instinct had been to pull out of the project, lose the \$65,000, and give the CMAQ grant back. But, he said, even though he shared the Board's sense of anger that was not what he believed was in the best interest of the Town. Mr. Messick agreed with Mr. Terry.

Commissioner Fiocco said if in fact this was approved, he believed they should be diligent about Town staff being on site and aware of the progress of the project. He said then if there was so much as a hint of a change order then they would be aware of it and could deal with it before things went too far and were covered up, and before the NCDOT came to the Town to say that the contractor had found some problem but they had not told anyone about it because they had wanted to stay on schedule.

Mayor Voller said he agreed with Commissioner Fiocco, and believed they owed it to the public to be seen as riding roughshod over the project and getting it completed.

Commissioner Bryan said he agreed with Mr. Terry as far as going back to those entities to ask for assistance, but asked was there any chance that by the Board meeting next Monday that they could have some responses from those entities. He said he was asking if the Mayor could talk with Speaker Hackney or Secretary Conti by next Monday's meeting.

Mayor Voller said any money given back would always be contingent on the fact that the project was being completed. He said if the Board voted not to go forward now, then others would likely not consider giving the Town any funds.

Commissioner Bryan said he was only suggesting that they wait until they got some answers from those people.

Mayor Voller said they would likely be more open to helping the Town if they knew that the Town would complete the project. But, he said, he was not sure how they would react if the Board had not already voted to move forward. Mr. Terry said one of the reasons he had requested that the Board meet tonight was to save time; noting he had met with an NCDOT representative last week and told him that the next Board meeting was scheduled for August 9, 2010. He said this contractor did not yet know whether or not he would be building the sidewalk, and if he was not going to do it then he had to address the banks, smooth them out, add sod, and the like. Mr. Terry said but if he was going to build the sidewalk, he would not want to have to go and dig all of that up.

Commissioner Bryan said he was only talking about a short delay of a few days. Mr. Terry said that every day of delay was an issue for them, and he would not have asked the Board to meet tonight if he had not thought it was important to move forward now.

Commissioner Brooks said he saw no reason why they could not go ahead and ask Mr. Conti and Speaker Hackney if they could help the Town.

Mayor Voller said they could ask, but ultimately the Town was still faced with making the same decision. So, he said, why not make that decision now, because if they received help then that would be a bonus. Mayor Voller said as well, even if they asked for that help now they would likely not get a decision for several weeks.

Commissioner Brooks said if they kept on in this manner then the Town would be broke.

Mayor Voller said but this money had already been spent.

Commissioner Baldwin said she continued to have great reservations, but believed the sidewalk was needed. She said the contractor had the Town over a barrel, and believed the issue about the competitive bid should be addressed with NCDOT in that they required that the Town have a

competitive bid for engineering services but NCDOT had not required a competitive bid from its contractor for the sidewalk.

Mayor Voller said he believed that was actually a good way for the Town to force the issue for reimbursement.

Motion made by Commissioner Fiocco seconded by Commissioner Harrington to adopt the budget ordinance to amend the Pedestrian Conveyance System Project Budget by adding \$65,000 in additional funding from the General Fund balance, increasing the project budget from \$243,000 to \$308,000.

Commissioner Fiocco said for the record that he found this objectionable, but they were effectively moving \$65,000 that had already been spent on the project and this was the lesser of two evils.

Vote Aye-3 Nay-2 (Commissioners Brooks and Bryan)

**AN ORDINANCE AMENDING THE TOWN OF PITTSBORO FY 2010-2011
OPERATING BUDGET IS RECORDED IN THE BOOK OF ORDINANCES NUMBER
ONE, PAGES 27-28**

Commissioner Harrington said he believed the point should be brought up to NCDOT that the Town was effectively required at the last minute to accept a contract price provided by NCDOT's contractor that the Town was not able to put out for competitive bids. He said that should be compared to how similar that was to what the Town had done for just a \$20,000 sidewalk, in that they were trying to get the grant application in on time to qualify for the 100% grant.

Mayor Voller said he believed that they should contact their new DOT Board member that represented the Town, noting he believed he would be willing to take up the Town's fight on this issue.

Motion made by Commissioner Brooks seconded by Commissioner Bryan to seek reimbursement by all possible means.

Vote Aye-5 Nay-0

ADJOURN

Motion made by Commissioner Harrington seconded by Commissioner Baldwin to adjourn the meeting at 8:30 pm.

Vote Aye-5 Nay-0

Randolph Voller, Mayor

ATTEST:

Alice F. Lloyd, CMC, Town Clerk