

BIRMINGHAM CITY COMMISSION MINUTES
JUNE 20, 2019
WORKSHOP
MUNICIPAL BUILDING, 151 MARTIN
7:00 P.M.

I. CALL TO ORDER AND PLEDGE OF ALLEGIANCE

Mayor Patty Bordman called the meeting to order at 7:04 PM.

II. ROLL CALL

ROLL CALL:	Present:	Mayor Bordman Commissioner Harris (arrived at 7:09 p.m.) Commissioner Hoff Commissioner Nickita Commissioner Sherman
	Absent:	Mayor Pro Tem Boutros Commissioner DeWeese

Administration: City Manager Valentine, Assistant City Manager Gunter, City Attorney Currier, Police Chief Clemence, City Clerk Mynsberge

Also Present: Joe Fazio, Attorney with Miller Canfield

III. BUSINESS

06-152-19 REVIEW OF PROPOSED NEW PARKING STRUCTURE AND STREET PLAN, PROJECT PRICING AND CONSTRUCTION AGREEMENT.

Mr. Victor Saroki, Saroki Architecture, and member of Woodward Bates Partners, gave a brief overview of the design status and said he will also highlight items included in the Guaranteed Maximum Price (GMP). Mr. Saroki noted many consultants and design professionals are working on this project and introduced those present tonight:

- Ron Bojee, Bojee Group
- Representatives, Waldbridge Aldinger, LLC
- Paul Robertson
- Rich and Associates, Parking Consultant/Engineer
- Michael Dual, Landscape Architect
- Atwell Civil Engineering
- Bob Zieglerman, Luke and Bach Zieglerman Gardener

Included in the GMP:

- Parking Structure Project 1A
- Bates Street extension
- Small surface parking lot directly behind the First Baptist Church
- Streetscape
- Trees
- Benches
- Utility realignment

The Parking Structure is based on Alternate #3 as discussed at the May 6, 2019 City Commission meeting. Detailed drawings have been developed, and Alternate #3 is planned as follows:

- Three (3) levels of parking below ground and seven (7) levels of parking above ground, for a total of 1,142 parking spaces.
- Eight (8) spaces in the small surface lot.
- Nine (9) parallel parking spaces on the Bates Street extension.
- There will be 1,159 spaces overall, which is a net gain of 414 parking spaces.

Mr. Saroki explained:

- The plaza is in Phase 2 along with Building #4 and Building #5.
- Building #2 is the proposal for RH on North Old Woodward.
- In working with the adjacent neighbors, it became obvious that it was important for the Montessori school to have a small surface lot of approximately eight (8) spaces and a circular drive to facilitate drop off and pick-up of students.
- The parking mitigation plan includes a temporary shuttle station with small buses entering and exiting on Bates.
- The three parking levels below ground have mechanical ventilation and fire suppression. Two thirds of the structure is flat, with a portion on the alley sides that slopes.

In response to questions from Commissioner Hoff:

- City Manager Valentine explained current permit holders will be relocated to a number of off-site parking options while the parking structure is demolished and rebuilt. Shuttles will transport the permit holders to and from the shuttle station.
- City Manager Valentine anticipates increased valet operations to aid visitors with parking. Again, permit holders will be relocated to leave transient spaces in the other parking structures.
- Mr. Saroki noted the balconies on the façade of RH are real balconies with operable French doors to allow openness, light, and air into the building.

Mayor Bordman commented:

- The City will own the land on which RH is to be built, but the development team will own the building and will be in charge of managing RH's lease and building maintenance.
- The City will not own, manage, or maintain the building.
- The City will receive lease payments for land use and taxes.
- The items being discussed tonight are the public elements of the plan, which are the parking structure and the Bates Street extension.

Mr. Saroki commented on the private elements of the project, expressing that 100% of the money to build RH or any of the other buildings will come from Woodward Bates Partnership and will not include any City money.

Commissioner Sherman noted that all leases will be at fair market value.

Commissioner Nickita stated the City is not subsidizing any private elements of the project.

Responding to comments and questions from Commissioner Hoff, City Manager Valentine explained the benefits of the partnership to the City:

- Cost/risk reduction with the GMP that the City is receiving from the development team on the construction of the parking structure.
- Cost savings from doing a turnkey project, meaning all construction and related activities are handled by the partners.
- Contribution of \$201,600 from the development team toward the design costs for the design of the parking structure.
- Additional warranty extension beyond industry norms.
- The City will receive 100% of the cost savings under the GMP.

Eliza Fory, mother of children attending Gateway Montessori housed at First Baptist Church, expressed concern that during construction there will not be enough parking spaces to handle the drop off and pick up of these small students. She thinks the school would need 20-30 spots around the building. Ms. Fory also indicated that making a left onto Bates from eastbound Willits is a tricky traffic flow and asked if traffic engineering has looked at that situation.

City Manager Valentine assured Ms. Fory that discussions with the church and school administrators included concerns with drop off and pick up of the students. He noted:

- Creating an area to allow students to be dropped-off at the door with staff to pick them up from their cars is under consideration.
- Accessible parking is included in the plan but the number of spaces has not been determined.

Judith Paskiewicz, 560 Woodland and a member of both of the Parking Advisory Board and the former Ad Hoc Committee that developed the plan, asked about the height of the ceilings in the structure. Mr. Saroki responded that the floor-to-floor construction is 11 feet. The current structure has low ceilings, and due to the popularity of high profile vehicles Rich & Associates recommended 11'. He further explained that if the structure were repurposed in the future, premium office space could be created with 9' finished ceilings. He noted standard office space has 8' ceilings, and residential has 8' - 9' ceilings.

Ms. Paskiewicz also observed pedestrian flow has to go past the main entrance and exit to the tower, and that the location of Building #2 will create a long walk from the structure to Old Woodward Ave.

Mayor Bordman thanked everyone for his or her input and comments.

City Manager Valentine introduced the GMP item, which is based on design scheme Alternate #3. The revised GMP numbers provided by Walbridge Aldinger provides further refinement as to the cost of this structure.

Zara Broglin, Jones Lang LaSalle, presented:

- The last time that the partnership reviewed the GMP, the recommendation was to look into Alternate #3 as it was potentially going to give significant savings.
- The GMP was \$56,781,203, based on the original design of the deck, which was 50% of the schematic design.
- Walbridge pushed the alternate portion of the design to roughly 30% of schematic and they revisited the prices for all of the trades; resulting in an additional savings of \$211,000.

- Upon reviewing the original GMP, the request to the partners was also to provide allowances for items like ATT, WOW, or anything that could add cost to the project resulting in an additional \$600,000.
- The revised GMP, including the allowances and adjustments listed above, is now \$57,255,000.
- GMP is defined as the guaranteed maximum price. This price includes a construction contingency closely monitored with the help of the owner's representative; any savings generated during construction will be returned to the City. Typically, the savings are split between the owner and contractor at 50%. In this instance, 100% of the savings will go to the City and the Partners will pay 100% of costs over the GMP.
- The partners will be carrying the risk of completing this project @ \$57,255,555.

Commissioner Sherman asked for an explanation of the \$600,000 increase to the original GMP. Ms. Broglin reiterated that the original GMP did not include allowances for the potential costs of relocating lines (AT&T, WOW, Comcast, Consumers Energy etc.), and adding new lines of services that will be needed to make the garage operational.

Commissioner Hoff further commented that to her recollection the Commission did not make a decision on what alternate the City was going to use. Now, we are in discussions about Alternate #3 as though it is the confirmed decision.

- City Manager Valentine said that there was a discussion on all of the alternatives and the consensus from the Commission at that time was that Alternative #3 met the objectives by providing the most amount of parking with the least amount of cost and collectively thought it made the most sense.

Commissioner Hoff also pointed out that the amount of the bond was \$57,400,000 and asked if that number has changed.

- City Manager Valentine explained that the bond number is a "not to exceed" amount and the cap for authorization. The City has \$10 million in reserves that reduces the number. If the ballot initiative is approved, the Commission has the ability to use up to the \$57,400,000. However, the ultimate issuance is probably going to be significantly less because of the reserves in the system and the alternate that the commission selected.

City Manager Valentine confirmed for Commissioner Harris that the GMP is part of the construction agreement.

Before moving on to the next item for discussion, City Manager Valentine announced that an RFP has been developed for an owner's representative to serve on the City's behalf during construction to administer the day-to-day activities of the project and insure accuracy.

City Manager Valentine, in response to questions from Commission Nickita, explained the City proposes to engage a firm as an owner's representative to work with the developer on behalf of the City. Through weekly construction and work planning meetings, the appropriate City staff will be identified to work with the owner's representative.

Answering a question from Commissioner Hoff, City Manager Valentine explained the fees for the owner's representative will be paid from the Automobile Parking System, which qualifies as an eligible expense for reimbursement through the bond.

City Manager Valentine further noted that an owner's representative has the expertise necessary to insure that this project will be handled appropriately, and that there is no one on staff with the needed skill set.

Construction Agreement Discussion

Mr. Fazio, project counsel, walked through preliminary drafts of construction documents that will govern, operate, and apply toward the construction of the public improvements for this project as negotiated. To reiterate the scope, the public improvements are:

- Project 1A - Parking Deck
- Project 3 - Retail Liner
- Project 1B - Extension of Bates Street

The construction documents contemplated by the development agreement were approved by the City Commission and signed in April 2019. They constitute one of the many different contingencies that need to be resolved before this project moves forward and before the City is obligated to proceed. The development agreement of April 2019 contemplates many other contingencies that need to be satisfied by a date certain including:

- Vote of the Public, scheduled for August
- Sale and Issuance of the Bonds

Until the above listed contingencies and all of the other contingencies set forth in the development agreement are satisfied, this is not a binding contract. Given the scale and complexity of this project, the papers are before you today and again on Monday for your final approval. A set of ground leases will be brought to your attention through a work session and then again for approval and a series of other contracts and approvals will follow the same process to complete the due diligence required for the Commission to make an informed decision.

Agreement between Owner and Developer

- Turnkey contract by which the developer team commits to build these projects.
- It will contain a GMP provision.
- As contemplated by the development agreement, the developer will then in turn engage a design build contracting firm pursuant to the **American Institute of Architects (AIA)** form of owner agreement with design builder so that the design and actual construction activities will be supervised. The two will work as a team to complete the project on behalf of the City.
- A good portion of the critical terms that exist for the City in this project are going to be contained in the agreement between the Owner and Developer.
- The AIA form between the developer and Waldbridge Aldinger as the builder contains a lot of similar terms and deals with means of production, construction, and staging.
- AIA is a generally acknowledged form of construction agreement that the industry uses. The documents are modified to accommodate the unique aspects of each transaction. Both contractors, owners, and architects use a template on a regular basis.

Generally the way the relationships between these two documents work are as follows:

- The agreement between the owner and the developer is executed.
- The developer then enters into an agreement with the design build operator.
- The City gets the benefit of all of the terms and conditions of that design build contract.
- The developer is obligated to enforce the contract.
- The developer will not be able to amend the AIA contract without the City's approval.

The City is doing a turnkey contract with **Woodward Bates Partnership (WBP)**. WBP then engages Walbridge to assist them in that process, and the City receives the benefit.

Commissioner Hoff would like to understand why Walbridge Aldinger, a partner in WBP, is contracting with WBP for design build services.

Mr. Fazio explained that the City is contracting with Party X, the development team here to do this work. That development team does not have in its own legal entity the bandwidth to do the construction. Walbridge Aldinger, in their professional circumstance as an operating contracting company, does. While it is clear that the representatives of Walbridge Aldinger are investors and partners within the WBP venture, their standalone construction company is entering into this contract with their partner to implement the construction process.

The agreement between the City and the developer contain the critical terms of the relationship to be created by the two parties:

- Guaranteed Maximum Price Terms (GMP)
- Protocol for establishment of change orders
- Clear description of the services that WBP is obligated to provide
- Strong indemnity language for the benefit of the City
- Articulates the remedies that the City has in the event of a default under that contract.
- Articulates the retention requirements as payment draws are paid out towards the completion of the project
- Articulates the mechanisms and requirements for final payment upon project completion
- Makes it clear that the City is entitled to the net savings resulting from the development of the project
- Insurance provisions

Details of the agreement:

- Begins with a series of recitals that tell the story of how we got to this point
- Reaffirms the contingencies that exist to the City's obligation to proceed
- Indicates that the developer has committed to the cost of the design
- Makes reference to the development agreement, as it should.
- Page 2, Paragraph 1 of the WBP agreement is an acknowledgement of the contingencies associated with this project.
- Pages 3-10, Section 2 is an expansive description of the services and obligations WBP is undertaking in connection with the development of this project.
- Page 10, Section 3 – Compensation and Pricing
 - GMP Worksheet
 - Base pricing associated with Project
- Page 11, Section 4 - Responsibilities
 - Provide information as necessary
 - Obligation to respond to inquiries promptly, sign document, and make payments.
- Page 11, Section 5 – Changes to Work Orders
 - Decisions by City
 - Changes proposed by Developer
 - Changes driven by regulatory laws
 - Intended to apply a path and process by which those unforeseen conditions that create changes are dealt with inside of the contract.
 - Change orders will impact

- Cost
 - Description
 - Schedule
 - Not necessarily absorbed by the Developer
- Page 15, Section 6 – Construction Price
 - A provision that details the computation of the construction price.
 - The amount charged by Walbridge Aldinger under the design build agreement.
 - The design build contract is also a GMP contract and the language relative to the scope of change orders is exactly what was just discussed.
 - The protections relative to change orders and control of cost are parallel on behalf of the City.
 - Schedule of values
 - Savings
- Page 16, Section 7 - Payment
 - How draws are paid by the City
 - All funding will go through the Escrow Agent acting as a service processor for the benefit of the parties.
 - Construction price paid in monthly installments with the first installment due following the commencement of construction.
 - Developer fee paid in installments simultaneously and in proportion to the draws that are paid to the design builder.
 - Both the design builder draws and the developer fee installments are going to be netted out by a retention, which is a sum of money retained by the City until the project is completed to insure completion. The amount is 10% of all draws up to 50% completion. Thereafter, that money stays in control of the City. Retention drops to zero for the balance of the project. On average, there will be a 5% retention against the GMP. It is funded up front to take care of performance issues.
 - Payments associated with change orders.
 - There will be discussions on how those payment terms are addressed at the time of the change order.
 - Retention concept.
 - Detail of mechanism of Application of Payment.
 - Criteria for Application of Payment.
 - Certificate of Payment
 - Basis to object to a draw.
 - Obligation to pay sub-contractors.
 - Mechanic Liens
 - If payment is not made after 14 days of issuing a Certificate of Payment, the developer has the right to stop the work.
 - Requirements for Final Payment
 - Punch List Reserves
 - Certificate of Substantial Completion
 - General Administrative Issues
 - Record Retention
- Page 24, Section 8 – Default and Termination
 - Default by Developer
 - Owner’s Rights and Remedies
 - Add under Section 8.2.11, “The City has all remedies available at law.”

- Owner Default
- Developer's Rights and Remedies
 - Commissioners, City Officials, or City Employees ***are not*** liable for claims put forth by the developer or contractor.
- Page 29, Section 9 – Insurance
 - Terms are set forth in the Design Build Agreement
 - Coverages are adequate
- Page 29, Section 10 – Limitation on Liability
 - Clarifies the scope of the developer's obligation for events that are outside its purview.
 - If drawings are bad, the liability for bad drawings rest with the architect.
 - If Walbridge does not manage the site properly and there is an injury, Walbridge is responsible.
 - The developer is responsible to enforce performance of the two parties.
- Page 30, Section 11 – Miscellaneous
 - The developer, other than to Walbridge, shall not assign any of their rights or obligations without approval.
 - WBP must be controlled by Mr. Boji and one or more of his partners identified as Victor Saroki, or Paul Robertson
 - Indemnification obligation from the developer to the City for acts of the developer in performance of the contract.
 - Carries forward the representations, which the developers made to the City at the time of the signing of the development agreement in terms of its compliance with laws.

Mayor Bordman identified Section 2.1.11 as a conflict, because WBP approves payments applications submitted by Walbridge.

Mr. Fazio agreed that there is a possibility for conflict, hence the justification for the Owner's Representative who will monitor payments on a regular basis. The mere approval by WBP of the draws is not adequate to authorize payment. It is only to recommend to the City that those payments should be made based upon those submissions.

Commissioner Harris asked in the instance of change orders, what will be the City's portion/percentage of financial responsibility. In addition, does the agreement dictate how responsibility is decided? Mr. Fazio responded that it would depend on the nature of the cause of the change. If it is a discovery of an environmental condition that nobody knew existed, that is a risk allocation for which the market and papers in line with the market say the City is responsible. The agreement articulates a set of provisions for unknown conditions and it articulates categories. If not within those two categories, the developer carries the risk. Every change order will come back to City representatives for approval. Developers cannot expend more money than the GMP without the City's approval.

Commissioner Sherman asked if savings are measured line by line or overall; and how would the allowance work into that example. It seemed to him that \$600,000.00 has been allowed for incidentals, so are the allowances different from the actual line items? He further asked if a schedule of values will be netted together and the allowances dealt with separately. If so, he expressed that he is not comfortable with that practice. Mr. Fazio answered that it is overall, for example, if there are savings in one line item and cost overruns in another, the development

team has a right to apply those savings to the cost overruns but not in excess of the GMP. The allowances are a matter of categorization and a defined term where there is a sum of money based on an unknown price. The schedule of values are line items that determine what each component of the project cost are. He will follow up with Commissioner Sherman after further review of the most recent GMP Schedule of Values.

Commissioner Hoff asked who determines the amount of monthly payments and the basis for payment. Mr. Fazio responded that it is based upon actual work completed, reviewed and certified by the developer, architect, and owner's representative.

Mayor Bordman asked should there be a fatality on site, is there a remedy beyond general liability of ~~\$300,000~~ \$300,000,000¹. Mr. Fazio explained the design build agreement at the very end on page 38-40 outlines insurance requirements for the developer. He further explained that the developer and Walbridge are responsible for safety activities on the site. Indemnification would apply as well. Mr. Fazio spoke on context if the Commission approves the draft agreement on Monday, because of the numerous contingencies that remain open whether it is signed or not is somewhat irrelevant at this time. Rather what is going to be critical is when the parties execute and confirm their direction to proceed and Commencement Notice is issued, this agreement will become binding.

Commissioner Harris referenced Section 11.9 regarding disputes and pointed out that it mentions that the first step is non-binding mediation and the process is not delineated in more detail. Mr. Fazio said that while there is a dispute resolution mechanism, all disputes are going to be resolved by litigation as opposed to arbitration or otherwise. Litigation could be used as the first step in a dispute.

AIA Document A141 – Owner (WBP) and Design-Building Agreement

- Page 4, Section 1.3 – Litigation is the means by which disputes are resolved
- Page 6, Article 3 – Provisions related to how work will progress
- Page 7, Section 3.18 – Progress Report Description
- Page 8, Section 3.1.12 – Warranty that everything will be built according to the plans.
- Page 9, Section 3.1.16 – Obligation of the Design Builder to maintain the performance bonds.
- Page 10, Section 5 – Progression of Work
- Page 13, Article 6 – Change Order Mechanism
- Page 15, Article 7 – Owner's Obligation
 - City is not the owner in this situation and not a party to this contract.
 - WBP is the Owner
- Page 18, Article 9 – Payment Applications
- Page 21 – Definition of Substantial Completion
- Page 24, Section 9.11 – Records and Accounting Requirements
- Page 28 and 29 – Provision relating to the ownership and use of the plans for the project.
 - City has the exclusive right to use these plans going forward for any reason associated with this project.
 - City will have copies of all of the plans.
 - Copyrights retained by the Architect.
- Page 29, Article 13 – Termination and Interruption of Work

¹ As corrected July 8, 2019.

- Page 38, Insurance Requirements
- Page 40, Bond and Property Insurance Requirements
- Addendum, Exhibit A – Material
 - Economics of this Contract
 - Page 4 has a series of schedules and exhibits to the contract

Commissioner Harris asked if there were any connection on the timing of the signing of the AIA document and the signing of the Construction Agreement. Mr. Fazio said that they would occur simultaneously.

Commissioner Hoff directed a question to City Manager Valentine regarding the submission of the preliminary site plan per approved Development Agreement and why the Commission was being asked to approve an agreement before the preliminary site plan is done. City Manager Valentine responded that the timeline she was referring to was met. The preliminary site plan was submitted to the City for Planning Board consideration. This is why the plans are not included with the contract, because the review process is ongoing. Further, in order to move forward, the terms by which you move must be established and clarified first. It is one of the many contingencies to satisfy before issuing a Notice of Commencement.

Ann Honhart, 197 E. Frank Street, asked Mr. Saroki to explain the large pieces of glass illustrated in the presentation because there is a great concern in North America about the loss of birds due to collisions with glass. Ms. Honhart would like the City to consider bird friendly glass.

- Mr. Saroki described the area where the pieces of glass will land as stair/elevator towers made of all glass. The elevators are also glass, allowing a view and providing a safety feature that is implemented in parking structures today.

Heather Zane, 1014 Chestnut St., representing the Board of Gateway Montessori expressed that one of her main concerns as a parent of young children is that there are no children’s spaces. Would like to see more family friendly elements and accessibility.

- Mr. Saroki replied that everything will be ADA compliant. The plaza is ADA compliant inclusive of ramps. Crosswalks are designed to City standards.
- Mayor Bordman added that unlike older sidewalks in Birmingham, there is a new effort to widen the sidewalks, and sidewalks are expected to be 12’ wide around the site.

In response to questions from Commissioner Hoff, City Manager Valentine confirmed the construction agreement only refers to sites 1A, 1B, and the Liner, which is 3. Building 2 would come before the Commission in the form of a ground lease in July. It requires a separate approval. Site 2 cannot be built if Phase I is not built because there is an existing parking structure on the site.

IV. ADJOURN

Mayor Bordman adjourned the meeting at 9:32 p.m.

J. Cherilynn Mynsberge, City Clerk