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February 25, 2008

The Honorable Lee Lansing and  
Members of the City Council  
c/o City Clerk Deb Little  
City of Northfield  
801 Washington Street  
Northfield, MN 55057

**Re: Municipal practices investigation**  
**Our File No.: 07-090**

Dear Mayor Lansing and Members of the City Council:

Mr. Greene and I have both recently received calls from the media about my firm's investigation of contract engineering services. Consistent with past practice, we have refrained from commenting directly to individuals or organizations seeking information about the investigation. I will instead direct my comments to the Council as a whole. A Northfield News journalist has asked why Mr. Dave Maroney was not interviewed during the investigation. The reasons for that decision are provided below. In addition, I am offering a few brief comments about the scope of the investigation to inform your further thinking on this matter.

At the outset, Mr. Maroney has provided an appropriate public service in this matter by shining a light on issues that reasonably appeared to him to involve impropriety. He is obviously a concerned citizen who seeks to ensure that government is accountable to the people it exists to service. Likewise, the Northfield News has raised a legitimate inquiry concerning the methodology of the investigation.

## **Background**

I was provided with a detailed list of questions and concerns prepared by Mr. Maroney concerning the City's relationship with BMI, a copy of which is enclosed. The first set of questions Mr. Maroney presented related mainly to whether a legal conflict of interest existed. Other alleged conflict of interest issues within the City had already been determined to warrant investigation. The issue Mr. Maroney raised was likewise sufficiently serious to warrant investigative review.

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Mr. Maroney raised other questions that, in my judgment, did not involve potential illegality, but are more accurately characterized as:

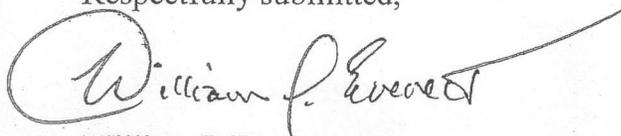
Questions that can be answered by reference to City records. These included, for example: total fees paid to BMI; the date of BMI's first invoice for general engineering services; the date Mr. Kasma ceased performing services as the designated City Engineer; the check payment date relating to a certain invoice.

Questions about the City's administrative processes. These included, for example: why staff didn't secure a specific fee proposal from BMI to prepare a feasibility study; whether the Council was aware in August 2006 of the extent of engineering work that BMI had already performed; whether the Council was prepared to pay BMI for engineering costs whether or not the 5<sup>th</sup> Street improvement project proceeded; why the City approved payment of additional fees to BMI "when the terms of the contract had not been adhered to?"

Whether and how best to respond to these additional issues are decisions committed to the sound discretion of the City Council. I offer my own observation that the purpose of an investigation is to gather facts in a manner sufficient to support a decision of significant consequence. An investigation is not an efficient mechanism for responding to requests for information that can be obtained from a review of existing records. An investigation is likely not the most appropriate tool for answering "why" questions when there is no discernable legal standard to be used in evaluating the information obtained.

Thank you for this opportunity to be of service to the City of Northfield. I invite the Council to contact me with any questions.

Respectfully submitted,

A handwritten signature in cursive script that reads "William J. Everett". The signature is written in black ink and is enclosed within a hand-drawn oval.

William J. Everett

Enclosure

c: Maren Swanson, Esq.  
Clifford M. Greene, Esq.

### **Investigative methodology**

As to the specific question raised by the Northfield News journalist, I contacted Mr. Maroney at the outset of my investigation in an effort to arrange a conversation with him. However, as the investigation proceeded, it became evident that interviewing Mr. Maroney would not yield factual information relevant to resolving the conflict of interest issue. Mr. Maroney had ably identified legal issues warranting review, but he was not in a position to offer firsthand evidence on the key factual issues which were:

- The extent to which the City and BMI were aware of the potential for conflicts of interest to arise given BMI's dual roles as project engineer and designated City Engineer; and
- The actions taken by the City and BMI to prevent BMI from being on both sides of transactions involving the City.

During my investigation, no one from the City or BMI denied being aware of the potential for BMI to be on both sides of transactions involving the City. Quite to the contrary, city staff and BMI acknowledged – without exception – they were aware of and indeed discussed how to address those issues.

Those individuals who were actually involved in the transactions pointed out provisions in the engineering services agreement, and consistently described conversations and working arrangements, that prevented BMI from being on both sides of City transactions. Mr. Maroney was not involved in these key interactions between the City and BMI, and was not in a position to offer evidence on these subjects.

### **Scope of the investigation**

Mr. Maroney raised an additional issue that was also addressed in my report: the failure to obtain council approval for engineering services before BMI began work on the 5<sup>th</sup> Street improvement project. In reporting on this matter, I deemed it important to explore this concern, observe the practice is not unlawful, but also to highlight this issue as one which the Council may wish to review.

## *Fifth Street Project Investigation – Engineering Contracts.*

*September 10, 2007*

### **Chapter One – Conflict of Interest Background Materials.**

- A. Northfield City Charter – Division 2 Code of Ethics.
- B. Northfield City Engineer Job Description.
- C. Professional Agreement for City Engineering Services (January 2007) appointing Mark Kasma (a shareholder of Bolton and Menk, Inc.) as City Engineer.
- D. TKDA “Peer” Review Contract.
- E. Resolution 2007-053 (May 2007) identifies Bolton and Menk, Inc. as the Interim City Engineer.
- F. State Auditor/State Statutes.

#### *Questions:*

1. The Northfield City Charter identifies the **City Engineer** as a **public official** requiring that the individual that serves as City Engineer be “independent, impartial and responsible to the people”. Furthermore, the Charter specifies that a **conflict of interest** exists if a public official has a personal interest in a “contract with the City.” The City of Northfield has approved several contracts with Bolton and Menk and Staff has authorized significant “additional” engineering services to be performed.

*Have the actions of the City of Northfield and its consulting engineer violated Division 2 of the Charter?*

2. The City Engineer job description specifies that the City Engineer will “manage public infrastructure projects to ensure quality, cost-effective improvements; will manage engineering consultants; will evaluate and define needed improvements; and will maintain responsibility for quality control of all engineering projects”.

*When the designated City Engineer is also employed by a private engineering firm that has been authorized to provide engineering services for public projects in the City of Northfield, how does he effectively perform the duties required of the City Engineer?*

3. In November 2006, Staff selected Mark Kasma as City Engineer. On January 22, 2007, the City Council approved the Professional Agreement for City Engineering Services assigning Mark Kasma as City Engineer. The Agreement specifies “general engineering” services to be provided at the rate of \$75 per hour for the first 16 hours of service each month. Hours in excess of 16 hours are compensated at the standard hourly rates for the year 2007 (for Mark Kasma, the standard rate is \$120 per hour).

“Additional Services” (studies, design, plan and specification preparation, survey, construction administration) if provided require additional compensation at the standard fee.

*In addition to the Fifth Street project engineering, what are the total fees paid to Bolton and Menk for work performed as City Engineer and other projects beginning in the fourth quarter of 2006 through termination of the Agreement?*

4. In response to questions expressed pertaining to the conflict of interest claim relating to the engineering of Fifth Street, Staff authorized another engineering firm to review the plans completed by Bolton and Menk for the Fifth Street project.

*If the City of Northfield did not believe that a conflict of interest existed, why did Staff authorize an additional expenditure of public funds to have such a review conducted?*

5. Council Resolution 2007-053 authorizes Bolton and Menk to perform engineering services for the Lincoln Street Project and identifies Bolton and Menk, Inc. as City Engineer.

*Initially, Mark Kasma (individually) had been designated as City Engineer. If the City of Northfield did not believe that a conflict of interest existed, why did Staff later choose to designate the firm of Bolton and Menk, Inc. as City Engineer?*

6. The State Auditor (Conflict of Interest Best Practices) and State Statutes (M.S. 471.87) each define when a conflict of interest exists and remedies thereto. In this instance, although the law allows a municipality to contract with an "interested officer" without first seeking competitive bids, the contract is only valid if the "City Council authorizes the contract in advance by resolution that sets out the essential facts and determines that the contract price is as low or lower than the price at which the service could be obtained for elsewhere" AND "before a claim can be paid, the interested officer must file an affidavit that includes a statement that the contract price is as low as or lower than the price at which the service could be obtained from other sources." If these requirements are not followed, the contract is void.

*If the City Council believes that a conflict of interest exists, how will this matter now be rectified?*

## **Chapter Two - Fifth Street Engineering Background Materials.**

- A. April 14, 2006 Original Engineering Services Proposal (\$58,560).
- B. April 26, 2006 Hamilton/Bolton and Menk e-mail.
- C. September 6, 2007 Walinski/Maroney e-mail.
- D. August 6, 2006 Council orders Feasibility Study.
- E. October 30, 2006 Revised Engineering Services Proposal (\$97,505).
- F. November 13, 2006 Revised Engineering Services Proposal (hourly not to exceed \$92,955).
- G. November 13, 2006 Assessment Policy Proposal (hourly not to exceed \$4,550).
- H. November 13, 2006 Addendum No. 1 to Preliminary Engineering Report (includes entire Winona Union Street sections between Fifth and Sixth Streets).
- I. November 20, 2006 Council approves an Engineering Services Contract (Design) with Bolton and Menk in an amount not to exceed \$92,955.
- J. February 20, 2007 Bolton and Menk requests an increase of fee from \$92,955 to an amount not to exceed \$110,000.
- K. May 7, 2007 Council approves an Engineering Services Contract (Inspection) with Bolton and Menk in an amount not to exceed \$101,668. Maroney e-mail of April 9, 2007.
- L. Bolton and Menk Invoices for services provided beginning in April 2006 through June 29, 2007.
- M. City of Northfield financial records for the Fifth Street Project.
- N. Bolton and Menk letter (not dated/for 11/20/06 Council meeting) stating that all of Oak and Union/Winona Streets between Fifth and Sixth Streets are included with the Fifth Street project.
- O. November 9, 2006 e-mail from Bolton and Menk to Joel Walinski relating to a conversation with Maren Swanson.

- P. January 9, 2007 letter from Joel Walinski to the residents of Oak-Union-Winona Streets.  
Q. July 9, 2007 letter from Mark Kasma to Maren Swanson.  
R. May 29, 2007 letter from Dave Maroney to Joel Walinski and the July 12, 2007 response to this letter by Maren Swanson.

*Questions:*

1. The "initial" (original) proposal submitted by Bolton and Menk for the Fifth Street Project is dated April 14, 2006. The fee proposal was offered on an *hourly basis for an estimated fee of \$58,560*. Then City Engineer Heidi Hamilton informed Bolton and Menk (e-mail of April 26, 2006) that because the fee exceeded \$50,000, the Council would need to award the contract. On September 6, 2007 by e-mail, Joel Walinski informed Dave Maroney that the April 14, 2006 proposal had never been approved by the City of Northfield. Nonetheless, Bolton and Menk began to perform work on the Fifth Street Project and began to invoice for work performed.

*Why did Staff choose not to submit the proposal to the Council for their approval as required by the City of Northfield Purchasing Manual?*

2. On August 6, 2006, the Council ordered preparation of a feasibility study for the Fifth Street Project. Through July 28, 2006, Bolton and Menk had already recorded (Invoice #0097224) \$34,683.75 of engineering fees and expenses against the Fifth Street Project. Furthermore, the April 14, 2006 proposal provided no specific fee estimate that would be incurred by the City of Northfield to prepare the feasibility study.

*Why didn't Staff secure a specific fee proposal from Bolton and Menk to prepare the feasibility study? Was the Council aware in August of 2006 that considerable engineering had already been completed for the Fifth Street Project without their authorization? Was the Council prepared to pay Bolton and Menk for engineering costs whether or not the Fifth Street Project proceeded?*

3. On November 20, 2006, the Council approved a contract with Bolton and Menk for "design" services for the Fifth Street Project. Compensation for services provided was offered on an *hourly basis not to exceed \$92,955*. The record clearly shows that the proposed work program/fee included engineering services for Fifth Street from Washington to Prairie Street along with Oak Street between Fourth and Fifth Streets and Union/Winona Streets between Fifth and Sixth Streets. In addition, the approved contract included services to be performed by Mark Kasma (\$8,800 for preliminary and final design, meetings and permits). When asked, Al Roder informed Dave Maroney that Mark Kasma would not be performing engineering work for Fifth Street at the same time that he was serving as City Engineer.

*When did Mark Kasma first invoice the City of Northfield for services that he provided as City Engineer? When did Mark Kasma end any and all responsibility as City Engineer?*

4. By letter dated February 20, 2007, Bolton and Menk informed the City of Northfield that they had provided "additional services" thereby necessitating an increase of *their previously proposed not to exceed fee of \$92,955 to a revised not to exceed fee of \$110,000*. It appears that the most significant justification for the increased compensation as described by the letter related to the "addition of portions of Winona and Union Streets" to the Fifth Street Project which simply is not true.

Based upon Invoice # 0104213, Bolton and Menk had recorded a total of \$104,659.19 to February 23, 2007, including \$4,550 for services provided to prepare the "Draft Assessment Policy". That said, thru February 23, 2007, Bolton and Menk had recorded a total fee of \$100,109.19 against the Fifth Street Project when the contract provided for a maximum fee of \$92,955; or, a maximum fee of \$84,155 if the \$8,880 relating to services proposed by Mark Kasma are reflected. Furthermore, the amounts invoiced by Bolton and Menk for services provided were inconsistent with the hourly rates provided by the contact.

*Why did the City of Northfield approve payment of additional fees to Bolton and Menk when the terms of the contract had not been adhered too? If as suggested by Bolton and Menk that "additional work" was needed, why was the work completed without the prior approval of the City as required by the contract? Finally, what is the "Check Payment Date" relating to Invoice #0104213(\$14,550.44)?*

5. On May 7, 2007, the City Council approved another Professional Services Agreement with Bolton and Menk in an amount *not to exceed* \$101,668 for construction-related services. The date of that Agreement (document) was April 11, 2007, signed by Mark Kasma. By e-mail on April 9, 2007, Dave Maroney notified Al Roder and Joel Walinski that Bolton and Menk was invoicing the City of Northfield at hourly rates that were greater than the rates agreed to in the then existing contact with Bolton and Menk. The April 11, 2007 proposal by Bolton and Menk identified a fee *not to exceed* \$101,668 applying "Average Rates", a change from all other prior proposals.

*If Staff and Bolton and Menk believed that the language used previously to define and administer engineering contracts was "acceptable", why then were the terms modified by the April 11, 2007 proposal?*

### **Chapter Three – Conclusion.**

Based upon the investigation and resulting findings, it would seem that the City of Northfield would be well advised to authorize the State Auditor to conduct their own examination of the engineering and administrative activities performed pertaining to the Fifth Street Project, including services provided/fees paid pursuant to the Professional Agreement for City Engineering Services (January 2007) and all other project engineering performed by Bolton and Menk during the period that Mark Kasma was serving as the City Engineer for the City of Northfield.

*This Document has been prepared by Dave Maroney, 508 College Street, Northfield.*