

## INVESTIGATION REPORT

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|----------------------|--|---------------------------------------|
| <b>Client:</b>       | City of Northfield                     | <b>SUPPLEMENT TO<br/>FINAL REPORT</b> |
| <b>Subject:</b>      | Municipal Practices                    |                                       |
| <b>Report date:</b>  | February 18, 2007                      |                                       |
| <b>Submitted by:</b> | William J. Everett<br>Everett Law, LLC |                                       |

### INTRODUCTION AND SCOPE

On December 17, 2007, this firm submitted its *Final Report of Investigation Concerning Municipal Practices* to the City of Northfield. The Report noted one issue still outstanding: "Whether the City [had] a legal conflict of interest in the engagement or retention of the City Engineer." (Report, p. 5)

Since submission of that report, I have conducted an investigation into the "conflict of interest" that allegedly arose when the City contracted with Bolten and Menk, Inc., ("BMI") to:

1. Provide engineering services for the 5<sup>th</sup> Street improvement project; and
2. Provide general engineering services to the City and act as its designated City Engineer.

This investigation addresses the lawfulness, under the Northfield City Code and relevant state statutes, of the relationships that arose by virtue of these two agreements. It also examines these relationships under more generalized conflict of interest principles. The investigator has no basis for forming an opinion on whether engaging the same firm to provide both general engineering services and project engineering services is in keeping with best practices for municipalities, and no such opinion is offered.

### EXECUTIVE SUMMARY

As a legal matter, the City's decision to engage BMI to provide engineering services for the 5<sup>th</sup> Street improvement project – and later to provide general city engineering services – did not violate the Northfield City Code or applicable state laws. The investigation further discloses that upon making the agreement for general city engineering services, both the City and BMI recognized the arrangement created the potential for BMI to be making decisions about the services its firm would provide to the City as part of the 5<sup>th</sup> Street improvement project. The City and BMI responded by

placing provisions into the agreement for general engineering services that prevented BMI from making such decisions. In addition, the City expressed very clear expectations to BMI that it would not, in its capacity as designated city engineer, oversee services being provided by as part of the 5<sup>th</sup> Street project. The City structured reporting relationships that essentially removed BMI (in its capacity as city engineer) from the decision making process as it pertained to the 5<sup>th</sup> Street improvement project. In so doing, the City and BMI avoided generalized conflict of interest concerns.

### **AUTHORITY AND APPOINTMENT**

Section 3.7 of the Northfield Charter provides: "The council or an officer or officers formally authorized by the council may make investigations into the city's affairs. The council may provide for an examination or audit of the accounts of an officer or department of the city government. The council may conduct surveys or research studies of subjects of municipal concern."

At a regular meeting of the Northfield City Council on September 10, 2007, the Council passed Motion M2007-0131. The motion authorized Everett Law, LLC to undertake preliminary discussions with the Mayor, City Council and City Administrator to identify issues of concern and to determine the scope of work necessary to conduct an appropriate investigation. On October 15, 2007, the City Council reviewed the proposed scope of work and cost estimate. The Council approved Motion M2007-0153 authorizing this investigation.

### **INVESTIGATIVE STEPS AND METHODS**

I began this investigation by reviewing several documents provided to the City by a Northfield resident who had raised concerns regarding conflicts of interest. Other materials I reviewed included, but were not limited to:

- Proposal, agreement, and council records pertaining to the engagement of BMI to provide engineering services for the 5<sup>th</sup> Street improvement project.
- Council records and agreement pertaining to the engagement of BMI to provide general city engineering services to the city.
- Peer review document.

I also interviewed the following individuals:

- Heidi Hamilton (former City Engineer)
- Joel Walinski (Director, Public Services Department)
- Al Roder (City Administrator)

- Kathleen McBride (Finance Director)
- Mark Kasma (BMI; designated City Engineer)

## **FACTS**

### 2006 Staffing Issues – City Engineering

Heidi Hamilton served as the Director of Public Works/City Engineer for the City of Northfield from May 3, 2004 until November 8, 2006. Hamilton was a licensed professional engineer.

As work on the 5<sup>th</sup> Street improvement project picked up in early 2006, there was only one engineer other than Hamilton working for the City. That individual, however, was deployed abroad in the service of the military. (Walinski Intv.; Hamilton Intv.) Hamilton used BMI to perform work on the 5<sup>th</sup> Street improvement project and to assist the City with work on its assessment policy. (Hamilton Intv.; Kasma Intv.) In July, 2006, a new civil engineer joined the City's staff.

In approximately October, 2006, Hamilton announced she would be leaving her position at the City in favor of taking other employment. (Walinski Intv.) With one engineer still on military deployment, Hamilton's departure would leave only one engineer available at the City, the civil engineer, who had begun her employment only some four months earlier. The civil engineer had not yet transferred her professional engineer license to Minnesota. (Walinski Intv.)

In the City's judgment, the combination of these circumstances made it advisable to contract out city engineering work for some period of time. (Walinski Intv.)

### Selection Process for Contract City Engineer – November 7, 2006

The City went through a formal interview process to select an engineering firm to which it could contract out engineering services. On November 7, 2006, an interview panel made up of City staff interviewed five firms interested in serving as the contract engineer for the City.

### 5<sup>th</sup> Street Engineering Contract – November 20, 2006

BMI had been working with the City on the 5<sup>th</sup> Street improvement project since approximately April or May, 2006. (Hamilton Intv.; Kasma Intv.) On November 20, 2006, the Northfield City Council took action regarding the 5<sup>th</sup> Street project. The Council approved the development of plans and specification for the project, and at the same time approved a contract with BMI to develop those plans and specifications. (Resolution 2006-112) The City and BMI entered into a contract for this work dated November 23, 2006.

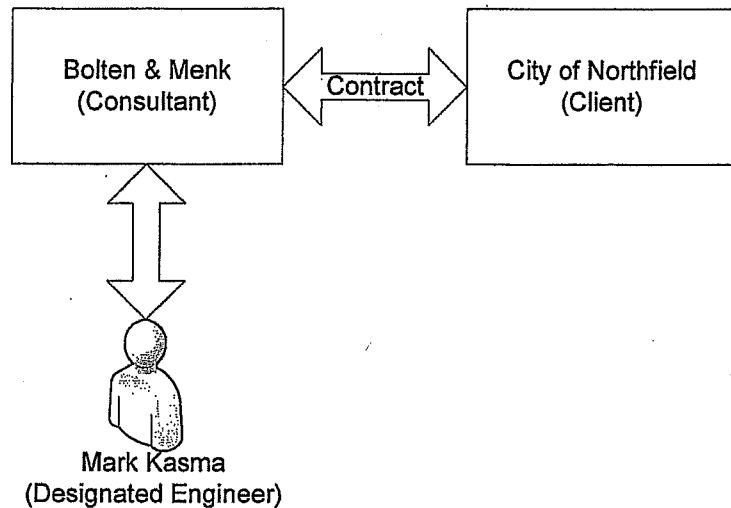
Designation of Contract City Engineer – January 22, 2008

On January 22, 2007, the City Council took formal action to approve a contract with BMI for city engineering services, and to designate Mark Kasma as the City Engineer.<sup>1</sup> The written council agenda item indicated Mr. Kasma would *not* be supervising the work of BMI on the 5<sup>th</sup> Street improvement project. The agenda item stated in relevant part:

Bolten & Menk, Inc. is currently under contract with the City to provide engineering services for the 5<sup>th</sup> Street Reconstruction Project. Brian Hilgardner, P.E. is the Project Manager for Bolten & Menk, Inc. on this project and reports directly to the Director of Public Services. Bolten & Menk started the preliminary work for this project in April of 2006.

On January 24, 2007, the City entered into a contract with BMI. Under the terms of the contract, BMI agreed to provide the services of Mark Kasma to the City to serve as its designated city engineer. The resulting agreement is graphically illustrated at right.

Generally, a city engineer would supervise the work that the City obtained from outside engineering firms. However, according to Mark Kasma, special care was taken in developing the contract with the City of Northfield to avoid any circumstances where he would be making decisions concerning work performed by his own firm.



The January 24, 2007 agreement between BMI and the City of Northfield embodies an understanding that Kasma (as designated city engineer) would not be making decisions

<sup>1</sup> The contract with BMI appeared as Item 7 and on the consent agenda for the January 22, 2007 meeting of the Northfield City Council, designated as M2007-015. Minutes of the meeting reflect the City Council unanimously approved the consent agenda.

affecting the extent of services to be provided by BMI or the compensation paid to his firm.<sup>2</sup> The contract included the following language:

E. PROJECT ADMINISTRATION COORDINATION

On CITY projects utilizing federal and state transportation funding, the CONSULTANT shall provide technical and professional oversight of design and construction contract administration engineering services in general accordance with applicable MnDOT guidance documents and standards. Direct oversight of CONSULTANT'S services and general project administration, throughout design and construction phase and including funds administration, shall be provided by the City Administrator or the Administrator's designated qualified representative. Any administrative decisions or recommendations by the designated City Engineer which directly affect the extent of CONSULTANT'S services or compensation to the CONSULTANT shall be coordinated through, and subject to approval of, the City Administrator (or designated representative).

(Agreement, January 24, 2007 at p. 5)

City Discussions with Kasma – Segregation of Responsibilities

According to Joel Walinski, there was a clear understanding that Mr. Kasma, in his role as designated City Engineer, would not be involved with the 5<sup>th</sup> Street Project. According to Al Roder, it was "made clear to Kasma" that he was "not going to have anything to do with" the 5<sup>th</sup> Street project. According to Kasma, "I was told not to worry about that project [5<sup>th</sup> Street] and not have anything to do with it."

Work direction and supervision

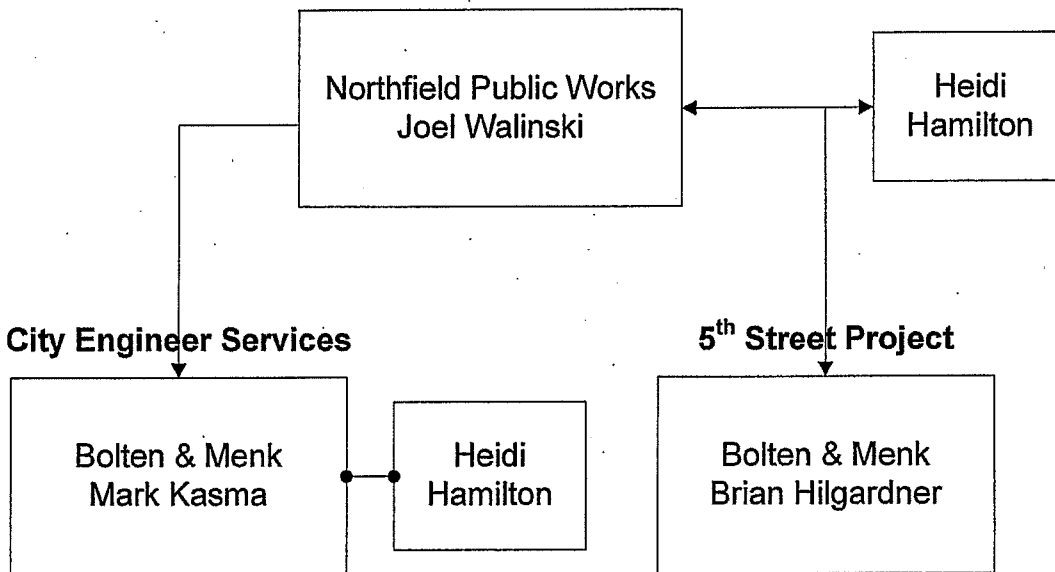
According to Joel Walinski, the following working arrangements were put in place:

- Mark Kasma was designated to work with Katy Gehler to address general engineering work for the City.
- Walinski was the project manager for the 5<sup>th</sup> Street project. Brian Hilgardner, another engineer from Bolten and Menk, was the company's lead person on the 5<sup>th</sup> Street project. Walinski provided work direction to Hilgardner. Katy Gehler would assist Walinski with decisions regarding engineering as they pertained to 5<sup>th</sup> Street.
- Mark Kasma was "out of the loop" with regard to the 5<sup>th</sup> Street project.

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<sup>2</sup> Bolten and Menk is referred to as "consultant" in both the November 23, 2006 agreement for engineering services relating to the 5<sup>th</sup> Street improvement project and the January 22, 2007 agreement for the provision of general engineering services.

The relationships that existed as a result of the written agreements, discussions, and reporting relationships may be graphically illustrated thusly:



Peer review

After hearing concerns from Mr. Dave Maroney, the City engaged an outside, independent engineering firm (TKDA) to conduct a technical/peer review of the engineering work performed by Bolten and Menk on the 5<sup>th</sup> Street reconstruction project.

**ISSUE**

Did a conflict of interest arise when the City of Northfield contracted with BMI to provide services for the Fifth Street construction project and to also serve as the City's designated engineer?

**ANALYSIS**

**1. What Is a Conflict of Interest?**

According to Office of the State Auditor, "a helpful concept to remember for analysis is that it is a conflict of interest to be on both sides of a contract or transaction."<sup>3</sup> In a similar vein, the Minnesota Supreme Court has observed:

The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to ensure that their decision will not be an arbitrary reflection of their own selfish interests.

*Lenz v. Coon Creek Watershed District*, 278 Minn. 1, 15, 153 N.W.2d 209, 219 (1967).

<sup>3</sup> Office of the State Auditor, Legal Compliance Manual, Conflicts of Interest at p. 2-1 (February, 2003).

Implicit in each of these descriptions is the notion that a conflict of interest involves an individual or entity confronted by two competing voices from within; one speaking a message of loyalty to a client or official duty, and another one tempting the individual to act in his own self interest. The existence of a conflict doesn't depend on which voice prevails over the other; the conflict is created by the mere fact that both are present.

The Northfield City Code and state law establish conflict of interest rules. These rules are discussed and applied to the facts at hand in the sections that follow.

## **2. Did the Contracts Between BMI and the City Give Rise to a Conflict of Interest in Violation of the Northfield City Code?**

This investigation did not examine (by either census or sampling) the myriad day-to-day decisions that were no doubt made as part of moving the 5<sup>th</sup> Street improvement project to completion. Rather, the focus of this investigation is on whether the relationships among the parties created a conflict of interest. The investigation results in two findings. First, as a legal matter, the Northfield City Code did not apply to Mark Kasma (the designated City Engineer) because the Code only governs the actions of City employees. Kasma was not a City employee and therefore there could be no violation. This legal conclusion is mandated by a technical reading of the ordinance. However, this conclusion is complemented by a concurrent finding that the City took affirmative and effective steps to prevent BMI from being "on both sides of a . . . transaction. . . ." as it served in its role as designated City Engineer. As a result, there was no conflict of interest as that term is commonly understood and described above in Section 1.

### **A. Northfield City Code**

The Northfield City Code contains provisions addressing ethical conduct. Section 2-122 states, "[t]he proper operation of democratic government requires that *public officials* be independent, impartial, and responsible to the people. . . ." (emphasis added) Section 2-125 states "[p]ublic officials are agents of public purpose and hold office for the benefit of the public." (emphasis added) Sections 2-127 and 2-128 define conflicts of interest for public officials and impose procedures for dealing with them.

The Code regulates the conduct of public officials. Thus, a threshold question in determining whether there was a violation of the code is whether Mark Kasma became a "public official" by virtue of the fact that the City retained his firm and designated him as its City Engineer. The Code is very specific in identifying those people who are public officials and thus subject to its requirements. Section 2-121 of the Code provides:

*Public official* includes and is limited to the mayor, city councilmembers, members of permanently established advisory boards and commissions,

the hospital board, and the following employees: \* \* \* (3) Public works director/city engineer.

(italics in original, underlining added for emphasis)

At the outset, a review of the evidence and the agreement between the City and BMI establishes there was no intention to "hire" Mr. Kasma or make him a city employee.

- The process the City used to engage BMI was different than the process used for hiring an employee. A contract for professional services was brought before the City Council for approval (see Code section 2-92 (mayor and council may retain, appoint, or remove professional services)).
- The parties to the professional services agreement are the City and BMI. Although Mr. Kasma is mentioned in the agreement, he is not a party to it.
- The agreement required BMI to maintain workers' compensation insurance coverage for its employees (reflecting an understanding that individuals providing service to the City under the agreement were in fact BMI employees and not municipal employees).
- The agreement required BMI to maintain professional liability insurance and included limitations on liability. These provisions would be unnecessary if Kasma were a city employee. See Minn. Stat. § 466.07 ("Subject to the limitations in section 466.04, a municipality . . . shall defend and indemnify any of its *officers and employees*, whether elective or appointive . . .").
- The agreement made provision for BMI to provide staff other than Kasma to help meet the City's engineering needs. It established rate schedules for their services.
- Kasma was not placed on the city payroll. He did not become a public employee for purposes of retirement or other benefits.
- Under the agreement, the City was obligated to pay Bolten and Menk for services provided, not Kasma.

Decisions from Minnesota's appellate courts fortify the conclusion that Kasma was not a city employee. Being an employee of an independent contractor falls short of making one an employee of the entity that engaged the contractor. See *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 260-61 (Minn. Ct. App. 1996) (where sales agency provided services to manufacturer under contract, agency's employees were not employees of manufacturer); *Milsap v. Arkay Const. Co.*, No. C9-97-989, 1997 WL 793300, at \*2 (Minn. Ct. App. Dec. 30, 1997) (subcontractor's foreman was not employee of general contractor). Courts also examine how the individual in question was compensated. *Midwest Sports Marketing*, 552 N.W.2d at 261 (payment to contractor company rather than individual contradicts finding of employment relationship). The City paid Bolten and Menk for services delivered. It did not pay Kasma.



In sum, the evidence indicates there was no intent to create an employment relationship between the City and Mr. Kasma and that no such relationship resulted. As such, Kasma was not subject to the provisions of the Northfield Code pertaining to conflicts of interest. The City Council's decision to designate Kasma as the City Engineer did not create a conflict of interest under the Northfield City Code.

### **B. Conflict of Interest – As Commonly Understood**

A basic indication of a conflict, as identified by the Office of the State Auditor, is when one is on both sides of a transaction. It is evident the City took effective measures to prevent Mr. Kasma (as designated city engineer) from being on "both sides" of transactions and decisions affecting his firm.

The City and BMI included provisions in the January 24, 2007 agreement for general engineering services to ensure that decisions about services to be provided by BMI, and compensation to be paid to BMI, would be "coordinated through, and subject to the approval of" the City Administrator or Public Works Director. Through this language, the City specifically ensured that Kasma did not have any power he otherwise would have had as designated engineer to make decisions that would affect the financial interests of his firm.

Beyond the language of the agreement, the evidence is uniform and undisputed that Public Services Director Joel Walinski and City Administrator Al Roder made it clear to Kasma that he was to have nothing to do with the 5<sup>th</sup> Street project.

The reporting relationships were structured so that Kasma was not involved in decisions with regard to the 5<sup>th</sup> Street improvement project. Walinski was the project coordinator for 5<sup>th</sup> Street. Walinski provided work direction concerning the project directly to Brian Hilgardner from BMI; Kasma was left out of the loop. Walinski had access to Katy Gehler, the City's civil engineer, in the event he needed technical expertise to address engineering issues.

Finally, after concerns were raised about a conflict of interest, the City engaged an outside, third-party engineering firm to conduct a technical/peer review of the work performed by BMI.

This investigation concludes the City and BMI went into the agreement for the provision of general engineering services with a very ample realization that there was a potential for BMI to be on both sides of transactions. The City and BMI worked together through the development of appropriate contract language, understandings, and work practices to ensure that BMI was not, in fact, placed in a position where it was on both sides of transactions. No conflict of interest resulted.

### 3. Did the Contracts Between BMI and the City Give Rise to a Conflict of Interest in Violation of Minnesota State Law?

Minnesota law similarly contains provisions that prohibit public officers from being on both sides of transactions. Minnesota Statutes, section 471.87 (2006), provides:

#### **471.87 PUBLIC OFFICERS, INTEREST IN CONTRACT; PENALTY.**

Except as authorized in section 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor.

Two conditions must be satisfied before this statute is applicable. First, the individual in question must be a public officer. There is no clear guidance under the law as to who is, or is not, a "public officer."<sup>4</sup> In Op. Atty Gen. 273-A-17 (Oct. 13, 1958), a question was presented to the Attorney General as to whether a member of the legislature could be employed as an attorney for the Seaway Port Authority of Duluth. The question arose because of a prohibition in the Minnesota Constitution of any senator or representative holding any other office. The Attorney General concluded that "[a]ccepting employment as an attorney . . . does not create an office, nor does it render the attorney employed an officer." The Attorney General went on to conclude that "[a]n attorney employed by a port authority is not a public officer within the purview of § 471.87 . . . ."

That opinion concludes that accepting direct employment as a municipal attorney does not make one a public officer under § 471.87. Entering into a consulting contract with a municipality for engineering services is an even more attenuated relationship than direct employment as a municipal attorney. It follows that entering into such a contract does not render the firm so engaged (or the individual designated to provide services) a "public officer."

The second condition that must be satisfied before the statute applies is the actual authority, in one's official capacity, to take part in any manner in making contracts on behalf of the municipality. In Op. Atty. Gen. 90-E (Oct 23, 1952), the Attorney General concluded that a city assessor had no power or duty to make contracts on behalf of the city that employed him, and therefore was not a public officer within the meaning of the statute. Likewise, there was nothing about the City's retention of BMI as a consultant and designated engineer that provided the latter with authority to make contracts on behalf of the City. Much of what was said above about conflicts of interest – both in the strict legal sense and as the term is commonly understood – applies with equal force here. The very language of the contract for general engineering services specifically provided that BMI did not have the authority to make decisions that would affect the firm's compensation.

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<sup>4</sup> A baseline requirement appears to be the existence of laws or statutes that define or describe the official's authority. See, e.g., *State v. Serstock*, 402 N.W.2d 514, 517 (Minn. 1987).

This investigation concludes there was no violation of Minn. Stat. §471.87.

#### **4. Best Practices**

This investigation was undertaken to examine and report on allegations of conflicts of interest. In the course of examining conflict of interest allegations, a municipal practice outside the scope of that inquiry emerged that may be worthy of political or management consideration. While this is not a conflict of interest, it does concern the policy and practice of engaging outside professionals to provide services to the City.

BMI began performing services for the City on the 5<sup>th</sup> Street improvement project commencing in the spring/early summer of 2006. It invoiced the City for these services and the City paid the invoices. The City perceived a need to move promptly on the 5<sup>th</sup> Street project. At the same time, staffing issues within the engineering ranks left the City with minimal resources to move the project forward on its own. There is no basis for questioning the City's judgment that it needed the assistance of outside resources. The issue of concern, however, is that the City did not approve a contract with BMI for these services until November, 2006. Simply put, BMI provided services to the City for a period spanning some seven months without there being a formal written agreement in place.

This does not appear to be a violation of law. The Uniform Municipal Contracting Law, Minn. Stat. § 471.345, subd. 2 (2006), applies to contracts for the "sale or purchase of supplies, materials, equipment, or the rental thereof, or the construction, repair, or maintenance of real or personal property." The Minnesota Supreme Court has noted that the services of lawyers, physicians, architects, surveyors, and engineers are technical and professional in character and personal in nature, and thus are not subject to competitive bidding laws. *Krohnberg v. Pass*, 187 Minn. 73, 76, 244 N.W. 329, 330 (1923). As more recently observed by the Minnesota Court of Appeals:

Professional services such as architectural and supervisory services need not be competitively bid and assigned to the lowest bidder. Because there is unique skill involved in these services, it is not necessarily in the public's best interest to use the lowest bidder. The statute requiring use of a low bid was not intended to apply to a contract for supervision of construction.

*Ruzic v. City of Eden Prairie*, 479 N.W.2d 417, 420 (Minn. Ct. App. 1991) (internal citations omitted).

This investigation takes notice of the issue without making an attempt to address the propriety of this practice. No inquiries were made to determine whether City Staff had been provided with guidelines concerning when formal written agreements are necessary, and when council action is necessary to approve the retention of outside consultants. While no unlawfulness is noted, the City may wish to consider whether it should take action, through policy, ordinance, or otherwise, to establish:

1. Whether, and under what circumstances, staff may engage outside professional services without a written agreement in place.

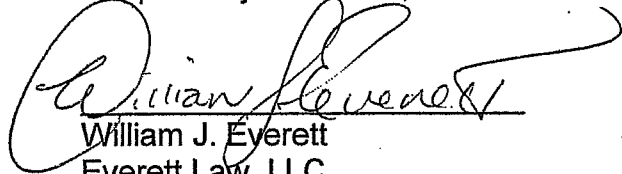
2. Objective criteria for identifying agreements that must be approved by the City Council.
3. Appropriate exceptions to the above (i.e., emergencies, short-term engagements, limited dollar amounts).

### STATEMENT OF SUBMISSION

This report is submitted to the City of Northfield, Minnesota. The Northfield City Council, acting as a whole or through a duly authorized representative, may contact the undersigned if there are issues requiring clarification or further information. The content of this report will not be altered or modified, except as may be required pursuant to the provisions of Minn. Stat. § 13.04, subd. 4, but additional or clarifying information will be provided upon request.

Dated: 2-18-08

Respectfully submitted,



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bill@everettlawllc.com

## INVESTIGATION REPORT

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|----------------------|--|---|
| <b>Client:</b>       | City of Northfield                     | <b>SUPPLEMENT TO<br/>FINAL REPORT<br/><br/>EXHIBITS</b> |
| <b>Subject:</b>      | Municipal Practices                    |   |
| <b>Report date:</b>  | February 18, 2007                      |   |
| <b>Submitted by:</b> | William J. Everett<br>Everett Law, LLC |   |

| <b>Exhibit No.</b> | <b>Description</b>  |
|--------------------|---|
| 1.                 | Excerpt from Council Minutes (11-20-06) approving agreement with Bolten and Menk for 5 <sup>th</sup> Street engineering work. |
| 2.                 | November 23, 2006 agreement between City and Bolten and Menk for work on 5 <sup>th</sup> Street improvement project.          |
| 3.                 | January 22, 2007 Council agenda item recommending contract with Bolten and Menk for general engineering services.             |
| 4.                 | January 24, 2007 agreement between Bolten and Menk and City for general engineering services.                                 |
| 5.                 | Interview summary – Al Roder  |
| 6.                 | Interview summary – Joel Walinski   |
| 7.                 | Interview summary – Mark Kasma  |
| 8.                 | Interview summary – Heidi Hamilton  |
| 9.                 | Interview summary – Kathleen McBride  |
| 10.                | Peer review request   |

# EXHIBIT 1

- 7) A motion was made by C. Vohs and seconded by C. Nelson to PASS RESOLUTION 2006-112 – AUTHORIZING THE DEVELOPMENT OF PLANS AND SPECIFICATIONS ON 2006 IMPROVEMENT NO. 04 – 5<sup>TH</sup> STREET IMPROVEMENTS AND APPROVING THE CONTRACT WITH BOLTON AND MENK, INC. TO DEVELOP THOSE SPECIFICATIONS. Yes votes by Vohs, Bond, Pokorney, Davis, Nelson, and Lansing. No vote by Malecha. Vote is 6-1, motion carried.

### **Regular Agenda**

- 14) Community Development Director O'Connell introduced this item relating to revision of the Comprehensive Plan and Land Development Regulations. A motion was made by C. Bond and seconded by C. Malecha to PASS RESOLUTION 2006-114 – APPROVING A PROFESSIONAL SERVICES AGREEMENT WITH AMERICAN COMMUNITIES PARTNERSHIP, LTD (ADBA ACP VISIONING & PLANNING, LTD.).

Jamie Greene of ACP Visioning & Planning, Ltd. spoke about the company and reasons for wanting to work in Northfield. He answered questions posed by Council and thanked them for the opportunity to work on this project.

Vote on Resolution 2006-114. All in favor. Motion carried.

- 15) Administrator Roder introduced this item. A motion (M2006-0127) was made by C. Vohs and seconded by C. Pokorney to AUTHORIZE STAFF TO ENTER INTO A PROCESS OF MEDIATION IN AN EFFORT TO RECONCILE THE UNPAID UTILITY BILL FOR CULLIGAN, AND DIRECT THE MEDIATION TEAM TO BRING ANY MEDIATED AGREEMENT BACK TO COUNCIL FOR FINAL APPROVAL. Council discussed this matter and asked questions of staff. Yes votes by Vohs, Bond, Pokorney, Davis, Nelson, and Malecha. No vote by Lansing. Vote is 6-1, motion carried.

### **Adjourn**

A motion was made by C. Malecha and seconded by C. Bond to adjourn the meeting. All in favor. Motion carried.

Time: 11:08 p.m.

Respectfully submitted,

Jennifer Nash  
Recording Secretary

# EXHIBIT 2



# PROFESSIONAL SERVICES AGREEMENT

AGREEMENT made this 23 day of November, 2006 by and between the CITY OF NORTHFIELD, a Minnesota municipal corporation ("City"), and Bolton & Menk, Inc. whose business address is 12224 Nicollet Avenue, Burnsville, MN ("Consultant").

IN CONSIDERATION OF THEIR MUTUAL COVENANTS THE PARTIES AGREE AS FOLLOWS:

1. SCOPE OF SERVICES.

5<sup>th</sup> Street Improvement Project  
Engineering services as specified in Attachment A

2. COMPENSATION.

Not to exceed \$92,955

A. **Records.** Consultant shall maintain complete and accurate records of time and expense involved in the performance of services.

B. **Additional Work.** Any expansion of the scope of the work which may result in increased compensation due Consultant shall require prior written approval by the City Manager or his or her designee. The City will not pay additional compensation for services that do not have prior written authorization with specific estimate by Consultant of type and time and maximum costs, prior to commencement of the work.

C. **Suspension of Work.** If any work performed by Consultant is abandoned or suspended in whole or in part by the City, Consultant shall be paid for any services performed prior to receipt of written notice from the City of such abandonment or suspension.

3. **TERM.** This Agreement shall commence when signed by both parties and, unless otherwise agreed by the parties in writing, shall terminate upon completion of the Consultant's services or at any time by written notice to the other party.

4. **SUBCONTRACTORS.** Consultant shall not enter into subcontracts for services provided under this Agreement without the express written consent of the City.

5. **NON-DISCRIMINATION.** During the performance of this Agreement, Consultant shall not discriminate against any employee or applicants for employment because of race, color, creed, religion, national origin, sex, sexual preference, marital status, status with regard to public assistance, disability, or age. Consultant shall post in places available to employees and applicants for employment, notices setting forth the provision of this non-discrimination clause and stating that all qualified applicants will receive consideration for employment.

6. **ASSIGNMENT.** Neither party shall assign this Agreement, nor any interest arising herein, without the written consent of the other party.

8. **SEVERABILITY.** The provisions of this Agreement are severable. If any portion hereof is, for any reason, held by a court of competent jurisdiction to be contrary to law, such decision shall not affect the remaining provisions of this Agreement.

9. **ENTIRE AGREEMENT.** The entire agreement of the parties is contained herein. This Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof as well as any previous agreements presently in effect between the parties relating to the subject matter hereof. Any alterations, amendments, deletions, or waivers of the provisions of this Agreement shall be valid only when expressed in writing and duly signed by the parties, unless otherwise provided herein.

10. **COMPLIANCE WITH LAWS AND REGULATIONS.** In providing services hereunder, Consultant shall abide by all statutes, ordinances, rules and regulations pertaining to the provisions of services to be provided. Any violation shall constitute a material breach of this Agreement and entitle the City to immediately terminate this Agreement.

11. **WAIVER.** Any waiver by either party of a breach of any provisions of this Agreement shall not affect, in any respect, the validity of the remainder of this Agreement.

12. **INDEMNIFICATION.** The Consultant shall indemnify and hold harmless the City its officers, agents, and employees, of and from any and all claims, demands, actions, causes of action, including costs and reasonable attorney's fees, arising out of or by reason of the execution or performance of the work or services provided for herein and against all losses by reason of the failure of Consultant fully to perform, in any respect, all obligations under this Agreement.

13. **INDEPENDENT CONTRACTOR.** The City hereby retains Consultant as an independent contractor upon the terms and conditions set forth in this Agreement. Consultant is not an employee of the City and is free to contract with other entities as provided herein. Consultant shall be responsible for selecting the means and methods of performing the work. Consultant shall furnish any and all supplies, equipment, and incidentals necessary for its performance under this Agreement. The City and Consultant agree that Consultant shall not at any time or in any manner represent that Consultant or any of Consultant's agents or employees are in any manner agents or

employees of the City. Consultant shall be exclusively responsible under this Agreement for Consultant's own FICA payments, workers compensation payments, unemployment compensation payments, withholding amounts, and/or self-employment taxes if any such payments, amounts, or taxes are required to be paid by law or regulation.

**14. INSURANCE.** The Consultant shall purchase and maintain insurance to protect itself from claims under the Worker's Compensation Act. The Consultant shall purchase and maintain insurance to protect itself from claims for damages because of bodily injury, including personal injury, sickness or disease, or death of any of its employees for any person other than its employees; and from claims for damages because of injury to or destruction of tangible property including loss or use resulting there from and from claims arising out of the performance of this Agreement by the Consultant. The base limits of this policy shall be \$1,000,000 combined single limit. The Consultant shall provide the City with evidence of insurance in the form of a certificate from the insurer naming all policies no later than fifteen (15) days after the execution of this Agreement. The City shall be an additional named insured on the Consultant's insurance policy. All such insurance policies shall contain a provision that they may not be cancelled unless prior written notice thereof is given to the City not less than ten (10) business days prior to such cancellation date.

**15. INTEREST BY CITY OFFICIALS.** No elected official, officer, or employee of the City shall during his or her tenure or employment and for one year thereafter, have any interest, direct or indirect, in this Agreement or the proceeds thereof.

**16. COVENANT AGAINST CONTINGENT FEES.** Consultant warrants that it has not employed any person to solicit or secure this Agreement for a commission, percentage, brokerage, or contingent fee.

**17. COVENANT AGAINST VENDOR INTEREST.** Consultant warrants that it is not employed by any vendor of equipment or service provider that could result in a commission, percentage, brokerage, or contingent fee as a result of Consultant's association with the City.

**19. WORK PRODUCT.** All documents including Drawings and Specifications prepared or furnished by CONSULTANT pursuant to this Agreement are instruments of service and CONSULTANT shall retain exclusive ownership and property interest therein. The CONSULTANT shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights including the copyright. The CITY may make and retain copies for information and reference purposes; however, such documents are not intended or represented to be suitable for reuse by CITY or others on similar projects, studies, situations or circumstances without written verification or adaptation by CONSULTANT. Reuse of documents other than for the specific purpose intended will be at the CITY'S sole risk and without liability or legal exposure to CONSULTANT.

20. **MINNESOTA GOVERNMENT DATA PRACTICES ACT.** Consultant must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to (1) all data provided by the City pursuant to this Agreement, and (2) all data, created, collected, received, stored, used, maintained, or disseminated by the Consultant pursuant to this Agreement. Consultant is subject to all the provisions of the Minnesota Government Data Practices Act, including but not limited to the civil remedies of Minnesota Statutes Section 13.08, as if it were a government entity. In the event Consultant receives a request to release data, Consultant must immediately notify City. City will give Consultant instructions concerning the release of the data to the requesting party before the data is released. Consultant agrees to defend, indemnify, and hold City, its officials, officers, agents, employees, and volunteers harmless from any claims resulting from Consultant's officers', agents', city's, partners', employees', volunteers', assignees' or subcontractors' unlawful disclosure and/or use of protected data. The terms of this paragraph shall survive the cancellation or termination of this Agreement.

21. **CONTROLLING LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota.

**CITY OF NORTHFIELD**

By: 

Lee Lansing  
Mayor

**CONSULTANT: Bolton & Menk, Inc.**

By: 

Mark Kasma  
Burnsville Office Manager

# EXHIBIT 3

City Council Meeting Date: January 22, 2007  
Consent  
ITEM: 7

**ITEM:** Consider awarding a contract with Bolton & Menk, Inc. to provide general engineering services and assignment of designated City Engineer.

**ACTION REQUESTED:**

**Proposed Motion For Consideration:** \_\_\_\_\_ **Motion** \_\_\_\_\_ **Second**

*The City Council of the City of Northfield hereby authorizes execution of a contract with Bolton & Menk, Inc for general engineering services and the assignment of Mark Kasma, P.E. as designated City Engineer.*

**SUMMARY**

The City Council is being asked to approve a professional services agreement with Bolton & Menk, Inc. for general engineering services and the assignment of Mark Kasma, P.E. as designated City Engineer. This agreement is necessary because of the current vacancies in the City Engineering Division. The agreement shall remain in full effect until December 31, 2007 or may be terminated by either party with a 30 day written notice. Compensation for the contracted work is a base of \$1200 monthly and additional charges based on hours and work specified. The City Administrator or his designee, the Public Services Director, provides work direction and authorization. The City Attorney has reviewed the agreement.

**ADDITIONAL INFORMATION:**

On November 7, 2006 five engineering firms were interviewed to provide the City general engineering services and a designated City Engineering. The interview panel consisted of Al Roder, City Administrator, Joel Walinski, Interim Public Services Director, and Katy Gehler, Assistant City Engineer. The panel selected Mark Kasma, P.E. of Bolton & Menk, Inc because of his expertise and understanding of the work needing to be completed and his understanding of the role of designated City Engineer.

Bolton & Menk, Inc is currently under contract with the City to provide engineering services for the 5<sup>th</sup> Street Reconstruction Project. Brian Hilgardner, P.E. is the Project Manager for Bolton & Menk, Inc. on this project and reports directly to the Director of Public Services. Bolton & Menk started the preliminary work for this project in April of 2006.

**SUBMITTED BY:** Joel Walinski, Public Services Director

**ATTACHMENTS:**

1. Professional Services Agreement

# EXHIBIT 4

**PROFESSIONAL AGREEMENT**  
**CITY ENGINEERING SERVICES**  
**NORTHFIELD, MINNESOTA**

This Agreement, made this 24 day of January, 2007 by and between BOLTON & MENK, INC., 12224 NICOLLET AVENUE, BURNSVILLE 55337 hereinafter referred to as CONSULTANT, and the CITY OF NORTHFIELD, 801 WASHINGTON STREET, NORTHFIELD, MINNESOTA 55057, hereinafter referred to as CITY.

WHEREAS, the CITY wishes to obtain professional municipal engineering services for general engineering matters and the CONSULTANT agrees to furnish the various professional services required by the CITY.

NOW, THEREFORE, in consideration of the mutual covenants and promises between the parties hereto, it is hereby agreed:

**SECTION I - CONSULTANT'S RESPONSIBILITIES**

**A. GENERAL**

1. The CONSULTANT agrees to perform the various professional general engineering services as hereinafter stated.
2. The CONSULTANT shall serve in the position as City Engineer under the direction of the City Administrator or his designee.
3. The CONSULTANT agrees to assign Mark Kasma, P.E. to be the designated City Engineer and perform the required services and to provide such other staff as may be appropriate or necessary to complete requested services. Except as may be otherwise specifically required for oversight and administration of state aid transportation program, the term "City Engineer" as used herein shall refer to the designated City Engineer or the CONSULTANT staff performing requested services under the direct supervision of the designated City Engineer.

**B. PROFESSIONAL SERVICES - GENERAL ENGINEERING**

The CONSULTANT shall provide the following general engineering services to be compensated as described in Section III.

1. The City Engineer shall attend CITY staff meetings as requested and shall assist staff on engineering related issues.
2. The City Engineer shall attend CITY Council meetings, and other meetings as requested by CITY staff.



3. The City Engineer shall advise and provide engineering services to CITY staff and Council for general engineering matters in which the CITY becomes involved.
4. The City Engineer shall provide additional administrative and engineering direction as may be requested by CITY staff to fulfill day-to-day CITY operating requirements.
5. The City Engineer shall provide professional and technical oversight of CITY engineering staff relative to the City of Northfield's improvement program, including but not limited to: assistance with preparation of improvement report; review of and assistance with improvement plans and bidding documents; assistance with construction contract administration.
6. The City Engineer shall serve as CITY'S official designated representative for administration of municipal state aid transportation funding and shall be authorized to perform such duties as may be normally required of the designated City Engineer by the office of Minnesota Department of Transportation State Aid. The City Engineer shall coordinate all activities with the City Administrator and shall not be authorized to expend state aid funds without consultation with and authorization by the City Administrator or the administrator's staff designee.
7. The City Engineer shall review building and site plans and other documents for conformance with CITY engineering standards as requested by CITY staff.

C. ADDITIONAL SERVICES

1. Engineering services requested for specific project related studies, surveys, design, plan and specification preparation and construction administration may be authorized as Additional Services and shall be compensated in accordance with Section IIIA2. Scope and compensation for such services shall be documented by separate work order and invoiced as a separate project number.
2. Assistance with review services, and boundary surveys, topographic surveys, engineering location and elevation surveys, preparation of drawings and exhibits by CONSULTANT staff members, other than the designated City Engineer shall be considered Additional Services and shall be compensated in accordance with Section III A2.

**SECTION II - CITY'S RESPONSIBILITIES**

A. GENERAL

1. The CITY agrees to acquire the engineering services of the CONSULTANT.
2. The CITY designates the CONSULTANT to serve as the City Engineer during the term of this Agreement.

B. RESPONSIBILITIES

1. The CITY shall compensate the CONSULTANT in accordance with Section III of this Agreement and the CITY'S payment timing procedures.

2. The CITY shall designate the City Administrator to direct the services of the CONSULTANT through the Public Services Director, who shall be empowered to request and make work assignments, approve work schedules and coordinate the work of the CONSULTANT with other City staff members.
3. The CITY shall furnish all data, records, reports, plans, maps and other pertinent information or copies thereof, which may be required by the CONSULTANT to perform its services.
4. The CITY shall reimburse the CONSULTANT for any special costs or expenses incurred by the CONSULTANT on behalf of the CITY, including reproductions, sub-consultants and testing. The CONSULTANT shall have approval from the City Administrator or his designee prior to incurring special costs or expenses.

### SECTION III - COMPENSATION

#### A. SCHEDULE OF FEES

1. The CITY agrees to compensate the CONSULTANT at the rate of \$75.00 per hour for the first 16 hours of general engineering service performed each month by the designated City Engineer.
2. Compensation to the CONSULTANT for services in excess of 16 hours per month by the designated City Engineer and for services provided by other staff members of the CONSULTANT shall be at the following rates for calendar year 2007:

|  |                        |
|--|------------------------|
| Principal Engineer/Land Surveyor ..... | \$100.00 - \$120.00/hr |
| Associate Engineer .....               | \$80.00 - \$105.00/hr  |
| Project/Design Engineer.....           | \$60.00 - \$90.00/hr   |
| Senior Technician.....                 | \$55.00 - \$85.00/hr   |
| Technician/Draftsperson .....          | \$40.00 - \$75.00/hr   |
| Clerical .....                         | \$20.00 - \$50.00/hr   |

Charges are based on hours spent at hourly rates in effect for the individuals performing the work. The hourly rates for Principals, Associates and members of the staff vary according to scale and expertise.

3. The CONSULTANT shall provide a monthly itemization of time spent performing general engineering and any additional services for the CITY.

### SECTION IV - GENERAL

#### A. STANDARD OF CARE

Professional services provided under this Agreement will be conducted in a manner consistent with that level of care and skill ordinarily exercised by members of the CONSULTANT'S profession currently practicing under similar conditions.

**B. TIME OF PERFORMANCE**

Engineering services as described herein shall commence as directed by the CITY following the date of this Agreement and shall be carried out expeditiously by the CONSULTANT. Unless earlier terminated by either party in accordance with Section IV.K, this Agreement shall remain in full force and effect until December 31, 2007, or the completion of projects authorized during 2007 and may be extended by amendment upon the action of the CITY incorporating any adjustments in rates in the Schedule of Fees listed in Section III.A. as may apply.

**C. LIMITATION OF LIABILITY**

1. CONSULTANT agrees, to the fullest extent permitted by law, to defend, indemnify and hold harmless CITY, its officers, employees and agents, from and against any claims, costs, losses and damages, to the extent caused by the negligent acts, errors or omissions of CONSULTANT or CONSULTANT'S officers, employees or agents, and CONSULTANT'S independent professional associates, if any, in the performance and furnishing of CONSULTANT'S services under this Agreement.
2. CITY agrees, to the fullest extent permitted by law, to defend, indemnify and hold harmless CONSULTANT, its officers, employees and agents, from and against any claims, costs, losses and damages, to the extent caused by the negligent acts, errors or omissions of CITY or CITY'S officers, employees or agents, and CITY'S independent professional associates, if any, in the performance of CITY'S obligations under this Agreement. This provision shall not be interpreted as a waiver of the limits of liability established by Minnesota Statutes Chapter 466.

**D. CONFLICT OF INTEREST**

The CONSULTANT shall promptly notify the CITY of potential conflicts of interest and shall, when so requested by the City, disqualify itself from public discussions on and review of affected issues.

**E. PROJECT ADMINISTRATION COORDINATION**

On CITY projects utilizing federal and state transportation funding, the CONSULTANT shall provide technical and professional oversight of design and construction contract administration engineering services in general accordance with applicable MnDOT guidance documents and standards. Direct oversight of CONSULTANT'S services and general project administration, throughout design and construction phase and including funds administration, shall be provided by the City Administrator or the Administrator's designated qualified representative. Any administrative decisions or recommendations by the designated City Engineer which directly affect the extent of CONSULTANT'S services or compensation to the CONSULTANT shall be coordinated through, and subject to approval of, the City Administrator (or designated representative).

**F. CONSTRUCTION SERVICES**

It is agreed that the CONSULTANT and its representatives shall not be responsible for the means, methods, techniques, schedules or procedures of construction selected by a contractor or the safety precautions or programs incident to the work of the contractor.

## G. INSURANCE

1. CONSULTANT shall maintain statutory worker's compensation coverage.
2. CONSULTANT shall also maintain general liability insurance insuring CONSULTANT against claims for bodily injury, death and property damage arising out of CONSULTANT'S general business activities (including automobile use). Said policy shall provide general aggregate limit of not less than \$1,000,000 combined single limit. CITY shall be named as an additional insured on such policy. Such insurance shall not be canceled until 30 days after CITY has received written notice of the insurer's intention to cancel this insurance.
3. CONSULTANT shall also maintain a professional liability insurance policy, insuring CONSULTANT against damages for legal liability arising out of the performance of professional services hereunder, if such legal liability is caused by an error, omission or negligent act of the insured or any person or organization for whom the insured is legally liable. Said policy shall provide professional liability insurance in the sum of not less than \$1,000,000 annual aggregate, claims made basis.
4. All required insurance policies shall be provided at CONSULTANT'S expense. Before commencing its services, CONSULTANT shall provide CITY with certificates of insurance.

## H. CONFIDENTIALITY

CONSULTANT and CONSULTANT'S officers, agents and employees will hold confidential all information obtained from CITY, not otherwise previously known to them or in the public domain. CONSULTANT is not responsible for information which comes into the public domain through no fault of CONSULTANT'S or CONSULTANT'S officers, agents or employees, or is furnished to CONSULTANT by a third party who is under no obligation to keep such information confidential or information for which the CONSULTANT is required by law to provide.

## I. REUSE OF DOCUMENTS

All documents including Drawings and Specifications prepared or furnished by CONSULTANT pursuant to this Agreement are instruments of service and CONSULTANT shall retain exclusive ownership and property interest therein. The CONSULTANT shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights including the copyright. The CITY may make and retain copies for information and reference purposes; however, such documents are not intended or represented to be suitable for reuse by CITY or others on similar projects, studies, situations or circumstances without written verification or adaptation by CONSULTANT. Reuse of documents other than for the specific purpose intended will be at CITY 'S sole risk and without liability or legal exposure to CONSULTANT.

## J. OPINIONS OR ESTIMATES OF CONSTRUCTION COST

Opinions or estimates of construction cost provided by CONSULTANT will be based upon public construction cost information. Since the CONSULTANT has no control over the cost of labor, materials, competitive bidding process, weather conditions and other factors affecting the cost of construction, all cost estimates are opinions for general information of the CITY and no warranty or guarantee as to the accuracy of construction cost opinions or estimates is made. The CITY agrees that

costs for project financing shall be based upon actual, competitive bid prices with reasonable contingencies.

K. TERMINATION

This Agreement may be terminated by either party for any reason or for convenience by either party upon thirty (30) days written notice.

In the event of termination, the CITY shall be obligated to the CONSULTANT for payment of amounts due and owing including payment for services performed or furnished to the date and time of termination, computed in accordance with Section III of this Agreement.

L. CONTINGENT FEE

The CONSULTANT warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the CONSULTANT to solicit or secure this Contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift or any other consideration, contingent upon or resulting from award or making of this Agreement.

M. NON-DISCRIMINATION

The provisions of any applicable law or ordinance relating to civil rights and discrimination shall be considered part of this Agreement as if fully set forth herein.

N. CONTROLLING LAW

This Agreement is to be governed by the laws of the State of Minnesota.

O. SURVIVAL

All obligations, representations and provisions made in or given in Section IV of this Agreement will survive the completion of all services of the CONSULTANT under this Agreement or the termination of this Agreement for any reason.

P. DISPUTE RESOLUTION

Any unresolved claims or disputes made during or after the performance of services between CONSULTANT and the CITY shall be submitted first to mediation and then, if still unresolved, to non-binding arbitration prior to proceeding to litigation. Except as otherwise mutually agreed in writing, arbitration shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

Q. SEVERABILITY

Any provision or part of the Agreement held to be void or unenforceable under any law or regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon CITY and CONSULTANT.

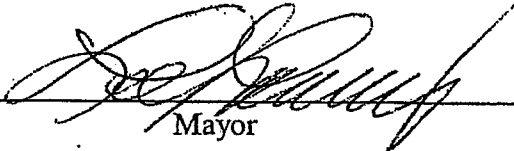
**SECTION V - SIGNATURES**


THIS INSTRUMENT embodies the whole agreement of the parties, there being no promises, terms, conditions or obligation referring to the subject matter other than contained herein. This Agreement may only be amended, supplemented, modified or canceled by a duly executed written instrument signed by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in their behalf.

CITY: CITY OF NORTHFIELD

CONSULTANT: BOLTON & MENK, INC.

  
\_\_\_\_\_  
Mayor

  
\_\_\_\_\_  
Principal

  
\_\_\_\_\_  
City Clerk

# EXHIBIT 5

**INVESTIGATIVE ACTIVITY REPORT**  
**Everett Law, LLC**

Matter: City of Northfield, Municipal Practices  
Our File 07-090

Activity: Interview of City Administrator Al Roder

Date: February 12, 2008

By: William J. Everett

---

I contacted Mr. Roder on the above-listed date by telephone to interview him about the alleged conflict of interest concerning city engineering services. In response to my questions, Mr. Roder provided the following information.

- Heidi Hamilton had been the City Engineer. She was a licensed professional engineer. Her title was Public Works Director/City Engineer.
- Ms. Hamilton left the city's employment to take a job elsewhere.
- Her departure provided the organization with an opportunity to consider restructuring. The result of the restructuring was to create a Public Services Division. Public Works, Community Development, Engineering, and Parks and Recreation were combined in the new Public Services Department.
- Mr. Roder had two engineers on staff who might be eligible to replace Hamilton as City Engineer.
- Ore was deployed on military service at the time of the opening. Mr. Roder learned this individual might be interested in applying for the engineer position.
- The City decided to defer making a decision on the engineer position until this individual returned.
- The other did not have substantial public sector experience. The City determined to contract out engineering services, at which time the City could give full consideration to the interests expressed by both potential candidates.
- The City contracted with BMI for the services of Mark Kasma to serve as the designated city engineer during the intervening period.



- Roder indicated Kasma had no authority to make any decisions about the 5<sup>th</sup> street project. It was "made clear to Kasma" that he was not "going to have anything to do with" the 5<sup>th</sup> Street project.
- Roder indicated a citizen (Dave Maroney) expressed concerns about the dual roles of Bolten and Menk serving as both the city engineer and their work on the 5<sup>th</sup> Street project. Roder related that out of deference to Maroney's concerns, the City agreed to bring in another independent engineering firm to assist Joel Walinski in reviewing Bolten & Menk's work on the 5<sup>th</sup> Street project.

# EXHIBIT 6

**INVESTIGATIVE ACTIVITY REPORT**  
**Everett Law, LLC**

Matter: City of Northfield, Municipal Practices  
Our File 07-090

Activity: Interview of Joel Walinski

Date: February 14, 2008

By: William J. Everett

---

I contacted Mr. Walinski on the above-listed date by telephone to interview him about the alleged conflict of interest concerning city engineering services. In response to my questions, Mr. Walinski provided the following information.

- The 5<sup>th</sup> Street project was slated for construction in 2007.
- BMI submitted a proposal in April, 2006 outlining the work that it would do for the project.
- The first neighborhood meetings concerning the project were conducted in approximately May, 2006.
- Heidi Hamilton was, at the time, the Public Works Director/City Engineer.
  - The City had only one other engineer on staff at the time. This individual was deployed abroad in service of the military.
  - As plans came together for preparatory work on the 5<sup>th</sup> Street project, Hamilton was uncertain, because of staffing issues, how much of the work the City could complete in house.
  - The City used Bolten and Menk to assist with this preliminary work.
- Katy Gehler began working for the City in July, 2006 as a civil engineer.
- In approximately October, 2006, Hamilton announced that she had obtained other employment and would be leaving.
- When Hamilton left [city records indicate last date of employment was November 8, 2006], Walinski was placed in charge as director of the Public Services Department.

- Walinski is not an engineer.
  - The City is required to have an "engineer" for some purposes.
  - The civil engineer had only been working for the city for approximately four months. She was licensed as a professional engineer in another state, but had not yet transferred her license to Minnesota.
  - These circumstances combined to make it necessary to obtain the services of a contract engineer to serve as the designated city engineer for a period of 6-9 months.
- The last week Hamilton was employed by the City, they interviewed five engineering firms to serve as the designated city engineer. One of the firms they interviewed was Community Partners.
  - The City selected BMI with the understanding that Mark Kasma would be the designated engineer and would be in the office "X" days per week.
  - There was an understanding that Kasma, as the city engineer, would not be involved with the 5<sup>th</sup> Street project.
  - Walinski described the arrangement that resulted:
    - Mark Kasma was the contracted city engineer. He would work with Katy Gehler, the civil engineer. They would take care of general engineering for the city.
    - Walinski would be the project manager for the 5<sup>th</sup> Street project, Walinski would provide work direction to Brian Hildgardner from BM concerning the 5<sup>th</sup> street project. Gehler would help out with any decisions regarding engineering on the 5<sup>th</sup> Street project.
    - "Mark [Kasma] was out of the loop" with regard to the 5<sup>th</sup> Street project.
  - Walinski wanted Kasma to provide mentoring to Gehler.
  - Dave Maroney began raising concerns within a couple of days after it became known the City was appointing Mark Kasma as the designated engineer. Walinski attended a meeting that included Al Roder, Dave Maroney, and Bruce Bullert. During the meeting, Maroney or Bullert:
    - Questioned Walinski's ability to manage the department.

- Questioned the proposal the City had gotten from Bolten and Menk as being too low (the implication being that change orders or additional work would drive the cost much higher).
- Raised the issue of having a member of BMI serving as city engineer and overseeing the 5<sup>th</sup> Street project.
- Walinski indicated at the meeting that Mark Kasma would be having nothing to do with the 5<sup>th</sup> Street project. Walinski indicated this may have provided Maroney with little comfort if Maroney didn't believe Walinski could manage the project.
- At least partially in response to concerns Maroney raised at the first meeting and later in city council meetings, the City determined to have an outside engineering firm conduct a "peer review" of the 5<sup>th</sup> Street project. The firm of TKDA was engaged to provide this service.
  - The peer review consisted of retracing and analyzing the rationale of decisions made during the engineering process as well as reviewing plans and specifications.
  - TKDA suggested one correction to the plans having to do with an "invert" that had been placed at the wrong level.
  - Walinski estimates the peer review was conducted in March, 2007.

# EXHIBIT 7

**INVESTIGATIVE ACTIVITY REPORT**  
**Everett Law, LLC**

Matter: City of Northfield, Municipal Practices  
Our File 07-090

Activity: Interview of Mark Kasma

Date: February 15, 2008

By: William J. Everett

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As previously arranged, I interviewed Mark Kasma by telephone on February 15, 2008. In response to my questions, Mr. Kasma provided the following information.

Kasma had been working as BMI's lead person on the 5<sup>th</sup> Street reconstruction project commencing in April or May of 2006. Details:

- BMI started the work on the 5<sup>th</sup> Street project on May 2, 2006 based on an email from Heidi Hamilton.
- The services BMI provided included work on both the 5<sup>th</sup> Street project and a new assessment policy for the City.
- No contract was in place when BMI started in May of 2006. The contract was approved in November. BMI understands that work performed without a contract is at their risk.
  - Kasma indicated they had a long history of working with the City of Northfield (since approximately 1992).
  - If it had been a city they had never worked for before, they would have required a signed contract before commencing work.
- Kasma had been the principal in charge on the 5<sup>th</sup> Street project.
- Once he went through the interview process for city engineering services, the City wanted Brian Hilgardner placed in charge of the 5<sup>th</sup> Street project. The City wanted Joel Walinski supervising Hilgardner instead of Kasma.

Conflict of interest issues:

- They worked "on the front end" to address and avoid conflicts of interest.
- There were discussions about avoiding conflicts of interest before the agreement was presented to the city council. Provisions were added to the agreement to ensure that Kasma, as designated city engineer, would not be making decisions affecting the financial interests of his firm.
  - The City was aware that any decisions regarding compensation of BMI required close supervision by designated city staff.
  - Kasma referenced Articles B(6), B(7), D, E, and H of the agreement as terms that addressed potential conflict of interest issues.
- Walinski and Roder told Kasma they did not want him directing work to his company. Joel Walinski was in charge of making decisions about selecting firms and directing work.
- On his first day serving as designated city engineer, Al Roder and Joel Walkinski told him "everything went through Joel."
- After the agreement was approved on January 22, 2007, Kasma was told "not to worry about [the 5<sup>th</sup> Street] project and not have anything to do with it."
  - Kasma had one hour of time billed on that project after being designated as the city engineer. That occurred when Joel Walinski asked me to attend the construction bid opening of bids on that project. Kasma was mentioned at the bid opening at the city engineer.
- Joel Walinski was providing work direction to Brian Hilgardner.
- Walinski was providing day-to-day work direction to Kasma.



# EXHIBIT 8

**INVESTIGATIVE ACTIVITY REPORT**  
**Everett Law, LLC**

Matter: City of Northfield, Municipal Practices  
Our File 07-090

Activity: Interview of Heidi Hamilton

Date: February 14, 2008

By: William J. Everett

---

I interviewed Heidi Hamilton by telephone. In response to my questions, Hamilton indicated:

- When she began working for the City in May 2004 there was only one engineering technician. The City had lost a bunch of staff before she got there.
- The one other engineer on staff was deployed in the service of the military.
- BMI sent a proposal for the Fifth Street improvement project.
- There was a lot going on and very little staff.
- The City needed horsepower and worked with consultants to help out. They were very dependent on outside consultants to act as an extension of inside staff.
- While all of this was going on "we needed to get 5<sup>th</sup> Street underway to take the time to do proper neighborhood process." Hamilton indicated they wanted to get it started early.
- The City had obtained a proposal from BMI. They needed an engineer to supplement City staff.

- Hamilton thought BMI was a perfect firm to hire since they were familiar with the city's standards and practices; they agreed to partner with the City's staff.
- It was not unusual to have contract execution lag behind the actual commencement of work.

Hamilton indicated that once she announced her resignation, there were discussions about how the City would keep functioning.

- Part of the discussions was about the wisdom of bringing in outside engineer. Hamilton thought it was a good idea.
- The only engineer left on staff had just started in July. She was going to need support from an engineering firm and the City was going to need engineering support.
- Hamilton recalls they talked about different scenarios. The City (but not she) interviewed a number of firms.
- The idea was to hire the consultant and use it as mentoring experience for the engineering staff that remained.

# EXHIBIT 9

**INVESTIGATIVE ACTIVITY REPORT**  
**Everett Law, LLC**

Matter: City of Northfield, Municipal Practices  
Our File 07-090

Activity: Interview of Kathleen McBride

Date: February 14, 2008

By: William J. Everett

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I contacted Kathleen McBride on the above-listed date by telephone to interview her about city engineering services. In particular, I questioned her regarding the propriety of having Bolten and Menk perform services for the City commencing in April, 2006 prior to the execution of a formal contract. McBride indicated:

- It is not uncommon for departments to establish a budget for outside professional services.
- The engineering department had a budget for \$50,000 for "other professional services" for the year 2006.
- It is not uncommon for staff to use outside consultants to assist with "overflow work" without taking the matter before the City Council for formal approval.

# EXHIBIT 10

February 22, 2007

Mr. Larry D. Bohrer, P.E.  
TKDA  
1500 Piper Jaffray Plaza  
Saint Paul, MN 55101

Re: City of Northfield  
5<sup>th</sup> Street Improvement Project  
Technical Review

Dear Mr. Bohrer,

As identified in the City of Northfield/TKDA agreement concerning the technical/peer review of the 5<sup>th</sup> Street Reconstruction project, please proceed with a technical review of the enclosed plan set. The City's primary concern is that the plans are reviewed for constructability and cost-efficiency. We would like to schedule a plan review with you late next week March 1<sup>st</sup> of 2<sup>nd</sup> or early the following week so any modifications can be made in preparation for Council approval of plans and specs on March 19, 2007. Brian Hilgardner from Bolton-Menk will contact you on Monday February 26, 2007 to arrange this meeting. The expectation would be a discussion among you, Brian, and City staff on any redlines or questions you would have after reviewing the plan set

The project consists of a complete street and utility reconstruction along portions of 5<sup>th</sup> Street, Union Street, Oak Street and Winona Street in the City of Northfield. As you complete your review, there are a few items to consider and/or will help you better understand the design rationale. These are:

- The existing storm sewer at the west end of the project (connection point) is undersized. Currently, the majority of the stormwater from this area flows overland and either collects in the storm sewer system at Water Street or drains directly into the Cannon River. The remaining blocks west of the proposed project will be reconstructed in the next 2-5 years, and the storm sewer will be upgraded. We are proposing sump catch basins on the west end of the project to minimize sediment transport. The overall impervious area is also being reduced because of the narrower streets.
- Sanitary Manhole No. 8, located at the intersection of Oak Street and 5<sup>th</sup> Street is actually a high point in the sewer system. The Wastewater Department recommended that we use one manhole at this intersection for cleaning and flushing purposes, as well as it is cost-effective as opposed to multiple manholes.
- One of the primary design concerns was to limit as much tree removal as possible along the project corridor. The proposed profile was designed to disturb as little as possible beyond the boulevard trees. In some areas, especially near Winona Street, low points were required to provide efficient drainage and there will be some disturbance. The storm sewer mains were placed in the streets, rather than along the curblines to minimize trench impacts to the trees.
- The 12" storm sewer flowing from CB No. 12 to CB No. 13 connects at an angle slightly against the stormwater flow direction. The city is aware of this and decided that the drainage area coming into CB No.12, combined with the limited alternate connection options, warranted this alignment.

specification is also being modified at this time. If there are any items particular to this project that you would recommend including in the special provisions, please advise.

- The cross-sections have been referenced for design, but will still be edited by City Staff, for improved accuracy.
- The city will continue to edit the plans for aesthetics, but please recommend any revisions that you feel are substantial.

Again, the Project Manager for this project is Brian Hilgardner, P.E. with Bolton & Menk, Inc. Please feel free to contact him with any technical review questions that you encounter, (952) 890-0509.

I am available at (507) 645-3037 or (612) 328-8614 for any questions or comments.

Sincerely,

Joel Walinski  
Director of Public Services  
City of Northfield

cc: Brian Hilgardner, P.E. – Bolton & Menk, Inc  
Tom Eggum, P.E. - TKDA