

**SPECIAL MEETING
BOARD OF REGENTS
UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA
System Administration Conference Room
5550 W. Flamingo Road, Suite C-1, Las Vegas
Monday, February 25, 2002**

Members Present:

Mrs. Thalia Dondero, Chair
Mr. Mark Alden
Dr. Jill Derby
Mrs. Dorothy S. Gallagher
Mr. Douglas Roman Hill
Mrs. Linda Howard
Dr. Tom Kirkpatrick
Mr. Howard Rosenberg
Mr. Steve Sisolak
Members Absent: Mrs. Laura Hobbs {Excused}
Mr. Doug Seastrand {Excused}
Others Present: Chancellor Jane Nichols
Vice Chancellor, Finance & Administration Dan Miles
Vice Chancellor, Academic Affairs Dick Curry
Vice Chancellor, Technology, Davan Weddle
General Counsel Tom Ray
Assistant General Counsel Mark Ghan
President John Lilley, UNR
President Ron Remington, CCSN
Chief Administrative Officer Suzanne Ernst
Mr. William A.S. Magrath II, Attorney
Mr. David W. Clark, Clark & Sullivan Construction
Mr. B.J. Sullivan, Clark & Sullivan Construction

Also present were UCCSN representatives Mr. John Amend, Mr. Larry Eardley, and Mr. John Kuhlman and UNR representatives Ms. Denise Baclawski, Mr. Bob Dickens, Dr. Paul Neill, and Mr. Matthew Wolden. Others present included Dr. Bob Anderson, Vice President, Student Services-CCSN; Mr. George Scaduto, Associate Vice President, Finance-UNLV; and Mr. Scott Nash, Johnson Consulting Group.

Chair Thalia Dondero called the meeting to order at 10:20 a.m. on February 25, 2002 with all members present except Regents Hobbs and Seastrand who were excused.

1. Approved-Fire Science Academy, UNR - UNR presented information and requested authority from the Board to expend sums necessary to complete the design and construction improvements to the Fire Science Academy pursuant to the terms of the litigation settlement agreement. The Board was presented with alternative means for completion of the project and, consistent therewith, UNR sought authority to execute any contracts necessary for completion of the project.

President Lilley thanked his colleagues for their support and turned the meeting over to General Counsel Tom Ray.

General Counsel Ray provided a brief background of the issue. There has been litigation regarding the Fire Science Academy (FSA). UCCSN received approximately \$5 million with the settlement agreement. Related issues included that the Academy open on May 1 and whether any additional costs for repair should be born by the university. He explained that a special meeting had been called due to the urgency of getting the project completed by May 1st. He related that the purpose of the meeting was to reach agreement regarding authorization of funds to complete the project. He stated that Board members met earlier with legal counsel to discuss matters pertinent to litigation.

Regent Alden asked who had authored the budget update documents prepared by Clark & Sullivan (on file in the Board office). Mr. Bill Magrath, an attorney with McDonald, Carano, Wilson, McCune, Bergin, Frankovich & Hicks, LLP representing Clark & Sullivan, replied that the record in question was a Clark & Sullivan document intended to provide a summary of the accounting records for the FSA project. Regent Alden noted that Clark & Sullivan was supposed to provide a weekly accounting of the project and asked whether that had been done. Mr. Magrath replied that regular meetings had been held to discuss the project.

General Counsel Ray suggested opening the process for questions. Chair Dondero asked to hear from Clark & Sullivan.

Mr. Magrath stated that he was a proud UNR graduate. He noted that his clients, Mr. David Clark and Mr. B.J. Sullivan, had accompanied him to the meeting. He stated that he had participated in the Elko settlement conference. He said that Clark & Sullivan was faced with saving the facility or it would collapse. He noted that if the repairs were not made, litigation would take too long for the Academy to open within a reasonable amount of time. Good customers and students would have located another site to attend classes. Mr. Magrath related that the settlement agreement consisted of a 9-page outline of the areas requiring improvement, with rough ideas for the costs. He stated that no one knew what it would take. One week after the settlement, UNR staff began meeting with Clark & Sullivan staff to begin the repair process. He stated that the process for cleaning the water was very technical, adding that there was diesel fuel and accelerant burning at a regular rate. It was agreed in the Elko meeting to use six oil/water separators, which was attached to the settlement agreement. A test project revealed that the process would not work (i.e. meet EPA requirements). It was determined that the water needed to be cleaned to a higher level, requiring a more technical and chemically related system. A new design was developed from the test protocol and final plans were developed for a highly sophisticated water cleaning system-DAF system (dissolved air flotation). He reported that the new system would clean the water to 100 parts per million, which was a cleaner, better system and more environmentally clean and friendly. No pricing was provided at the Elko meeting because a design had not yet been developed. As the experts developed the design and submitted it to the appropriate authorities, Clark & Sullivan was finally able to submit the project to a number of subcontractors. He noted that the process would allow the water to be reused. He reported that, in the past, diesel and gasoline were mixed together, which was found to contain contaminants that could be harmful to the soil and firemen's lungs. So gasoline was eliminated and a synthetic accelerant (Hexane) has been substituted. He said the product would be safer for the firefighters. He said that Clark & Sullivan planned on having the facility open by the deadline, adding that he believed classes would start May 6th. He cited several examples of the cost overruns:

- When the fire marshal inspected the building that would house the DAF, he asked about the fire sprinkler system. Clark & Sullivan does not believe that a sprinkler system is necessary, but if one is, that too will cost more money.
- The Department of Transportation required changes to the roadway into the Academy, which were never contemplated in Elko.

He estimated that the cost of repairs (including an enhanced water treatment system and an enhanced liner system) could total \$6.1-\$6.3 million. He said that Clark & Sullivan could not guarantee those prices because they were unsure of the final cost. He related that President Lilley had advised Clark & Sullivan that the system must work and to save money when possible. Mr. Magrath stated that the cost now exceeded the amount of money allotted for repairs (\$4.6 million in trust). He noted that the agreement stated that if the costs exceeded the settlement agreement, the university was to provide additional funds or make cuts elsewhere in the project. He stated they were 65-70 days away from opening the facility and required direction from the university as to which portions of the project to cut or they would require additional funds. Mr. Magrath stated that Clark & Sullivan stayed with the project knowing that other construction companies would likely be unwilling to take on the project. He said that Clark & Sullivan could track every single dollar, adding that their books were open for review. He said that the contractor was even using discarded stairways to save every dollar that they could. He related that Clark & Sullivan had also proposed to share in a portion of the cost overruns as part of a compromise proposal. He said that Clark & Sullivan was prepared to show everything they had done and how the plans had changed along the way. He stated that it was a very technical and sophisticated improvement from which the university would benefit.

Chair Dondero asked whether the \$4.6 million held in trust was earning interest. Mr. Magrath replied that it was in an interest bearing account.

Regent Kirkpatrick expressed the need for the Board to be judicious since they were working with the public's money. He requested clarification regarding the compromise proposal. He understood that the university was expected to pay the first \$750,000 over the \$4.6 million. After reaching \$750,000, the university would split the costs with the contractor, with the maximum cost to UNR being \$1,350,000. Mr. Magrath replied that Regent Kirkpatrick's understanding was correct. The details of the \$750,000 were itemized in his letter (on file in the Board office). He stated that Clark & Sullivan had provided a figure under great duress from System attorneys. Regent Kirkpatrick asked whether a May 1st opening date could be guaranteed. Mr. Magrath replied that Clark & Sullivan could guarantee that the facility would be operational on May 6th, with the opening date at the discretion of the Board. All of the DAF system will not necessarily be up and working, but it would be clean enough to use as the DAF system was integrated. Regent Kirkpatrick stated that it appeared the Board was signing away all of their rights. He asked about recourse if the Board agreed to pay additional money and the job was not completed to their satisfaction. Mr. Magrath replied there was a warranty obligation that Clark & Sullivan would remain on the warranty. The proposal to share costs beyond \$750,000 was intended to prevent Clark & Sullivan from being further involved with the project after completion. He said that Clark & Sullivan would warrant the work. General Counsel Ray stated that the warranty related to operation of the facility. He explained that the key issue was what rights the Board wanted to reserve.

Regent Hill stated that it was difficult for the Board to negotiate as a public body. He observed there were a few alternatives:

- Go with Clark & Sullivan's proposal, which he found completely unacceptable.
- UNR pays for everything and demands an accounting upon completion and a lawsuit ensues.

He said that Clark & Sullivan's proposal did not meet the needs of the System. He understood that the agreement provided for weekly accountings to UNR representatives, adding that UNR said that never occurred, which created difficulties, hard feelings, and suspicion. He took issue with paragraph 5 of the compromise proposal, which stated that the university would release and waive any challenge to those expenses the university had identified as "contractor errors". Regent Hill said that Clark & Sullivan's failure to provide accountings, as required by the settlement agreement, was a cause of real concern to the Board. Mr. Magrath stated that the concept of weekly accountings was governed by the settlement agreement, which stated that the parties agreed to have weekly meetings to include UCCSN representatives and that UCCSN would be provided with all budgets of the Academy improvements, but would not be involved in funding approval and release of funds for Academy improvements. He said that the written agreement did not require weekly accountings, but rather weekly meetings, which did occur. He explained that budgets were created when the project began. \$1.4 million was set aside for firewater treatment. Accountings did not arise until the hiring of subcontractors began. He related that Clark & Sullivan had opened their books for review, adding that Ms. Denise Baclawski met weekly with them. He stated that weekly accountings were not part of the agreement, adding that Clark & Sullivan was not trying to hide anything and the System had their budgets. He reported that cost overruns were first noted in November. He referenced a December 7, 2001 memo from Mark Ghan documenting that cost overruns had been realized with the firewater treatment. Regent Hill said that he respectfully disagreed with Mr. Magrath's interpretation of "budgets" and "accounting".

Regent Alden stated that he understood from legal counsel that at the settlement agreement reached in Elko there were independent engineers representing Clark & Sullivan and UNR. Those engineers reviewed all of the components to repair the Academy and agreed there was sufficient funding left to cover the costs. General Counsel Ray replied that was essentially correct. He clarified there were consulting experts from both sides who developed an outline of what needed to be done. The consulting experts felt it could be done for that amount. Regent Alden stated that both parties signed a legal agreement that the cost of getting the Academy operational would be covered by the \$4.6 million held in trust and would not exceed that. General Counsel Ray stated that the final agreement provided that if the amount held in trust was not sufficient to complete the project, the university would need to fund any further work. Regent Alden agreed that "budgets" and "accounting" were synonymous. He asked how quickly Clark & Sullivan provided an accounting after it was requested. Ms. Baclawski, Executive Director of the Fire Science Academy, replied that she received an accounting of the original project in October 2000. She requested an accounting November 1st and received it January 15th. Regent Alden noted that it took 75 days for Clark & Sullivan to respond to her request. Mr. Magrath felt the information was provided in a timely manner. He observed that the contract stated that the parties identified specific areas of the Academy where improvements were necessary. Estimates of the budgeted costs necessary to complete the project were included with the agreement. He related that 45 days were spent negotiating the terms of the agreement. By that time costs had increased and the scope of the project had changed. A pilot study was conducted to determine whether or not the water cleaning system would work. He related that the project could have stayed within budget if UCCSN had not changed the water cleaning system. He noted that they still did not have a final design. Regent Alden stated that 75 days was not considered timely. He then referred to the Clark & Sullivan Budget Update document, noting that the majority of changes were due to the DAF system. Mr. Magrath agreed, adding that originally there was not going to be a liner underneath the entire DAF system. The university specifically requested it and it is now in the ground. Regent Alden asked whether change orders had been prepared to document the cost when deviating from the original plan. General Counsel Ray replied that, due to the time constraints, it was a work in progress and no change orders were contemplated. Mr. Magrath stated that the university understood that this was not a fixed cost contract on which change orders could be written. He related that plans were drawn and submitted to subcontractors. The prices went up as liners and the DAF system were added. He explained that the university could not require a change order because there was no original contract to begin with. Regent Alden felt there should have been a method for documenting changes.

Regent Sisolak asked whether Mr. Magrath was willing to commit to a clause that Clark & Sullivan would incur liquidated damages if the facility did not open on time, noting that the university would incur losses in cancelled classes and irreparable damage to their reputation. Mr. Magrath replied he was not. He related that he wrote a letter to General Counsel Ray notifying him that there were 90 days of work to complete in approximately 65 days and that some work would need to be cut. He did not want to commit to liquidated damages for which his client was not contractually obligated. He stated that Clark & Sullivan was hoping for a May 2nd celebration that the project was completed. All of the work will not be completed by May 1st, but the Academy will be operational. He stated that classes could be taught while the contractor was fine-tuning the DAF system and other elements of the facility. Regent Sisolak asked when the project would be completely finished. Mr. Magrath replied that they were hoping by the end of May. Regent Sisolak asked whether Clark & Sullivan was committing to a June 1st completion date. Mr. Magrath replied that he was not committing to anything at this point. Regent Sisolak asked whether Mr. Magrath would commit to liquidated damages that the Academy would be operational on May 2nd. Mr. Magrath replied that he could discuss it with his client, but he could not predict what the future held. He said there could be another September 11th and the oil/water separators might not make it to Carlin due to a national emergency. He said that he could not commit to liquidated damages. Regent Sisolak suggested that Clark & Sullivan could have made on-time delivery a condition of their agreement with suppliers. Mr. Magrath replied that there were not many firms that construct 50,000-gallon tanks. He said that Clark & Sullivan understood the devastating effect it would have on the Academy if it did not open on time.

Regent Howard asked whether Clark & Sullivan had ever worked on a similar project before. Mr. Magrath replied that Clark & Sullivan had been in the construction business for 20 years. There has only been one fire science academy built in the last 20 years in America. His understanding was that the facility in Texas had been in operation for quite some time. He replied

that Clark & Sullivan had not built a fire science academy before, but they had built these types of mechanical systems in general, had installed oil/water separators, and were capable of doing the work on this project. He stated that it was a unique treatment and the emulsification process was unusual. He related that a more sophisticated system was required because the original design and other proposals did not work. He stated that Clark & Sullivan had spent \$300,000 in design and test protocols. Regent Howard asked whether Clark & Sullivan had previously underbid a job to this extent. Mr. Magrath clarified that there was no bid, adding that rough estimates were provided in Elko and that since then the work had dramatically increased. He compared the two rough oil/water separators, the four finishing oil/water separators without liners and concrete pads vs. the more sophisticated DAF system. He said it was not a matter of underbidding, but the scope of work dramatically increased, which cost more money. He noted that the university had the option in the agreement to put in more funds or cut the scope of the project. Regent Howard asked whether Mr. Magrath felt that clause #5 was really fair to UNR. Mr. Magrath replied that he did believe it was fair because his client was not obligated to spend a penny towards the completion of the repairs, but was committed to completing the project. He noted that his client made the offer to share costs above \$750,000, which was already more than they were obligated to do. He said that his client did not want to litigate further after the project was completed. He wanted to be able to be finished with the project if his client was giving up hundreds of thousands of dollars. He said that they were willing to litigate, though they did not want to. Regent Howard stated that the System had lost a lot of money on this project. Mr. Magrath stated that it was a world-class facility, adding that they just needed to get the facility open and students enrolled.

Regent Hill observed the necessity for having budgets and accountings so the university could determine what expenditures could be cut from the project when cost overruns were realized. Mr. Magrath replied that by changing from one system to another there was no way they could have done that. He clarified that the settlement agreement stipulated that the university could value engineer the project. Regent Hill asked how that could be accomplished when they did not have an accounting. Mr. Magrath replied that they did have budgets. He said that budgets were provided in late November when it was realized the new, improved DAF system would cost more money than was in the budget and again in January. He related that the settlement agreement stipulated that the university would not have a say in the cost of repairs. Regent Hill clarified that he meant the issue of not providing dollars spent, which Mr. Magrath claimed the settlement agreement did mandate be provided. Mr. Magrath agreed, adding they had provided everything the settlement agreement required. He explained that the work began in November and they rushed to get the concrete work done. He asked what other work could have been cut. Regent Hill replied that they could have cut out the concrete work on the sidewalk. Mr. Magrath agreed, adding that an attorney for Granite Construction had recommended the concrete work be done in the Spring. Under direction from the university the concrete work was performed. He noted that the university cut the size of the sidewalks to save money. Regent Hill asked whether they had knowledge of the ultimate costs when the concrete work was performed. Mr. Magrath replied that they had no knowledge of what the cost of the DAF system would be. Regent Hill asked whether a more reasonable middle ground might have been chosen. Mr. Magrath replied that choices were made weekly and Clark & Sullivan followed those choices. Regent Hill asked who was responsible for involving the engineers. Mr. Magrath replied that Stantec was a subcontractor of Granite Construction. Clark & Sullivan was the general contractor for the project. Regent Hill felt the engineers were very slow in deriving the specifications. Mr. Magrath respectfully disagreed, adding that the scope and complexity of the design was still changing today. He related that they were reviewing the replacement of stainless steel tanks with fiberglass in an effort to save money. Regent Hill asked whether the requirements expressed were made by the university or the EPA. Mr. Magrath replied that the university worked with Clark & Sullivan in a joint effort and submitted plans to the Nevada Division of Environmental Protection and ultimately the Division approved, in general, the concept of the liners and was now in the process of approving the DAF system.

Regent Kirkpatrick asked whether the Board could discuss legal alternatives privately with legal counsel. General Counsel Ray replied that they could.

Regent Sisolak moved approval of a recess. Regent Rosenberg seconded.

General Counsel Ray suggested that the Board could recess the meeting temporarily in order to provide time for Board members to meet privately in an attorney-client setting to discuss the litigation ramifications. Regent Alden asked whether a recess would violate the Open Meeting Law. General Counsel Ray replied that it would not as they were discussing matters relating to litigation or potential litigation.

Regent Sisolak noted a point of order. He asked whether Mr. Magrath would consult with his clients to provide an answer to his question. Mr. Magrath replied that he would try to do so.

Motion carried.

The meeting recessed at 11:20 a.m. and reconvened at 11:45 a.m. with all members present except Regents Hobbs and Seastrand.

Regent Kirkpatrick moved approval of authorizing President Lilley and General Counsel to develop the necessary information to expend an additional \$1.35 million for completion of the Fire Science Academy, with an operational date of May 1, 2002 and a completion of June 1, 2002. Failure to meet any of those dates would result in a \$50,000/day liquidated damage

penalty. Upon completion of the Academy, a full accounting of the project is to be made available to the Board of Regents. Regent Hill seconded.

Regent Sisolak proposed a friendly amendment to include, "a maximum of \$1.3 million." Regents Kirkpatrick and Hill accepted the friendly amendment.

President Lilley asked whether he needed to identify a source of funds. Regent Kirkpatrick replied that the source of funding would be President Lilley's decision.

Upon a roll call vote the motion as amended carried. Regents Alden, Derby, Dondero, Gallagher, Hill, Howard, Kirkpatrick, Rosenberg, and Sisolak voted yes. Regents Hobbs and Seastrand were absent.

2. Public Comment - Regent Kirkpatrick expressed the Board's appreciation for Clark & Sullivan's efforts on the project, adding that he was sure they shared the Board's desire for a successful project completion and successful operation of the Fire Science Academy.

Regent Alden thanked General Counsel Ray and the Board members present for their hard work.

Mr. Magrath stated that the current settlement agreement did not provide for liquidated damages. He felt that imposing \$50,000/day in penalties could stymie the project. He explained that the damage penalties provided an incentive to the university to drag its feet and delay the project by no longer jointly cooperating with Clark & Sullivan. He said it was a terrible burden for a contractor. He related that his client could not sign up for that responsibility, adding that progress on the project might have been stopped with this action. Regent Gallagher replied that \$50,000/day would not come close to compensating the System for what would happen if the Academy does not open on time. She said that those costs would never be recovered. She told Mr. Magrath that he was sadly mistaken if he thought the System would drag their feet in order to gain \$50,000/day. Mr. Magrath stated that Clark & Sullivan was not currently obligated to pay liquidated damage penalties, noting that such penalties could accumulate to \$750,000 over a 15-day period, or \$1,500,000 over a 30-day time span. Regent Gallagher observed that the Board was not talking about the past, but rather about the time from now forward. Mr. Magrath stated that, if a design had been finalized, he could tell the Board when the project would be completed. He noted that a final design had not yet been approved by the university or by governmental authorities. Because he did not know what would be built, he could not guarantee a completion date.

Regent Rosenberg observed that it was in everyone's best interests to complete the project. He said that the Board was expected to trust Clark & Sullivan and they were asking the same of Clark & Sullivan. He acknowledged that horrible circumstances (i.e. September 11th) could be resolved by both parties with reasonable discussion. He noted that Clark & Sullivan had asked the Board to give up any recourse, which had been a major consideration. He felt the penalties were not unreasonable given the circumstances the Board was facing. Mr. Magrath agreed that the parties involved needed to trust one another. He said that the Board's action meant that the trust would end on May 1st and would penalize Clark & Sullivan \$50,000/day each day beyond that. He again stated that Clark & Sullivan was not currently obligated to those conditions under the settlement agreement. He felt it would be financial suicide for a contractor to undertake those conditions. He said he would hate to see the project fail as a result of the liquidated damages conflict.

Regent Hill recalled that he had cautioned Mr. Magrath about the negotiating ability of the Board as a public entity. He said that it was unfortunate that Mr. Magrath and General Counsel Ray had not worked out an agreement prior to this meeting. He stated that a decision by committee was one of the problems with negotiating with a board. He clarified that the conditions were that the facility be operational by May 1st and all completed by June 1st. Regent Hill acknowledged that litigation could be a likely outcome of the meeting.

Regent Sisolak stated that he would not attend another meeting on this issue, adding that it was the second special meeting on this subject. He acknowledged that court might be the only resolution. He expressed his appreciation for everyone contributing their time to the matter.

3. New Business - None.

The Meeting adjourned at 11:55 a.m.

Suzanne Ernst
Chief Administrative Officer to the Board