

Lac qui Parle-Yellow Bank Watershed District  
Special Meeting Minutes #650.1  
(Final Hearing for the CD #42 Improvement Project)  
April 18, 2024

The special meeting of the Lac qui Parle-Yellow Bank Watershed District was called to hold the final contract acceptance hearing for the County Ditch #42 Improvement project. Managers present: Chairman Andrew Weber, Vice-Chairman John Cornell, Treasurer Jon Olson, Publicity Michael Knutson. Managers absent: Secretary David Craigmile. Staff present: Administrator Trudy Hastad, Ditch Inspector Jared Roiland, & Ditch specialist Cindy Brehmer. Others present: Attorney John Kolb, Engineers Chris Otterness & Joe Lewis, LQP County Commissioners Todd Patzer & DeRon Brehmer, Landowners Don Streich, Lyle Kruse, Cheryl Grengs, & Steve Grengs.

Chairman Weber officially called the hearing to order at 10:00 a.m. He explained the purpose of the hearing and discussed the order of business for the hearing. Chairman Weber asked for any comments from the Board of Managers. There being none, he turned the meeting over to Attorney Kolb.

Attorney Kolb explained that the original contract with Dirt Proz went into default with about 2/3 of the project completed. This put the WS board in a difficult position, they had to finish the process under the first contract to fulfill bond requirements, then they had to find a contractor willing to complete the work. He thanked the landowners for their patience in getting this project completed. He explained the hearing is to discuss if the completed project is done according to the plans & specs provided by the engineer pursuant to Minnesota Statutes, section 103E.555. Some issues remaining are related to the damages caused by the default & expenses by Dirt Proz which will be addressed after the hearing. There were areas the contractor went outside the marked damage areas & the engineer will address that in his report. There can be discussion on how to compensate for the additional damages due to Dirt Proz breach once we consider the completion of the work.

Administrator Hastad read the notice and reported that the notice was mailed to the landowners on April 4, 2024. Hastad reported not receiving any written or verbal comments.

Joe Lewis, Houston Engineering gave the engineer's contract acceptance report. Lewis reported the purpose of the hearing is to finalize the project according to MS 103E which states: "When a contract is completed, the engineer shall make a report to the drainage authority showing the contract price, the amount paid on certificates, the unpaid balance, and the work that is completed under the contract."

Engineer Lewis reviewed the timeline of events from when the original project was petitioned for improvement. He reviewed the bid summary. This project was bid twice. We only received one bid on the original bidding and the bid was way over the engineer's estimate. The second bidding cycle we received three bids with Dirt Proz the lowest bidder. Engineer Lewis then reviewed the construction timeline with the original contract until Dirt Proz declared default in September 2022. Dirt Proz contract amount was for \$574,700 with payments made in the amount of \$505,389.50. The Contract required Dirt Proz to correct work deemed to not meet specification. They did not show up to complete the work and declared default. The Watershed Board had to find a contractor to complete the work.

Engineer Lewis reviewed the correction work schedule completed by Ag Tech Drainage with temporary dewatering in December 2023 and final repairs completed after televising in January 2024. Correction work included replacing 2,240 feet of 24" tile; 1, 815 feet of 18" tile; 1,748 feet of 12" tile and spot repairs on 12 locations.

Dewatering work:

- Work completed - \$8,450.00
- Amount paid - \$8,450.00

Contracts for the correction work:

- Work completed- \$470,212.26
- Prior payments - \$454,456.65
- Retainage - \$15,755.61.

Engineer's report estimated 28.6 acres / \$24,252.80 of damages. Actual damages required to complete the project were 30.6 acres/ \$25,948.80. Total damages (in 2021): 35.6 acres/\$30,188.80. The excess damage of 5 acres/\$4,240 (was due to contractor's poor work practices).

Engineer Lewis reviewed the summary and final payment recommendations:

- Televising inspection has been completed to verify installed tile meets specifications.
- The system functions with 300-500% increase in capacity from original system.
- Recommends final payment to Ag Tech Drainage of \$15,755.61.
- Recommends damage payments of \$25,948.00 to landowners for initial construction.
- There were additional damages of \$4,240 for excess damages due to the contractors' poor work in the amount of \$4,240 that the Board can consider when awarding damages.

Engineer Lewis reviewed additional damages for the corrective repairs and the damages from flooding due to tile blockage that will be addressed after the hearing. These damages amount to \$55,628.80.

Attorney Kolb reported that Dirt Proz had to declare bankruptcy and the company no longer exists. Dirt Proz had to provide their security to the Bond company. The Watershed District should be getting back \$505,000 from the Bond company that was paid by the Watershed District to Dirt Proz.

Manager Jon Olson questioned if the 5 acres of damage in the amount of \$4,240 was part of today's hearing. Attorney Kolb responded it can be in play as part of the hearing. The \$55,628.80 damages are not part of today's hearing but we will defer & talk about that at the end of the hearing.

Manager Andrew Weber asked Kolb's recommendation on paying the additional five acres of damages. Attorney Kolb would recommend paying it.

Manager Weber asked if there were any other questions from the Board. There being none, he opened the meeting up for public comment but asked that they state their name & address prior to speaking.

Commissioner Patzer questions if he was tracking right that the \$505,000 is what we will get back from the Bond company?

Attorney Kolb responded we do not have it yet, but we can claim the actual cost of correction, cost of engineering, & some of liquidated damages. We are in excess of the \$505,000, but all the bond is required to pay is the \$505,000.

Commissioner Patzer felt highly confident we would get the full bond amount.

Attorney Kolb replied there is additional new money (legal, engineering, administration, damages) that will be added onto expenses, but the intent is to minimize impact to landowners in the short term. The landowners now have a good system so they have to look at the long-term benefits. We do have excess costs which will be an additional ask. We do not have that number yet but it is looking like approximately \$100,000.00

Chairman Weber asked the landowners for comments regarding awarding the additional damages, but reminded them that it will likely come back as an assessment to the ditch system. There were no comments made.

Chairman Weber asked for additional comments. There was some discussion between Attorney Kolb and Commissioners Brehmer & Patzer regarding lessons learned from this project. Engineer Otterness said they have made some minor changes to contracts on retainage, when to televise systems, etc.

Chairman Weber asked for other comments. There being none, Chairman Weber closed the public comment portion of the hearing.

Attorney Kolb asked the Board to review the deliberation guide to see if the work specified in the contract, including change orders, if any were acceptable, and consider additional claims for damages.

Attorney Kolb reminded the Board that they are faced with a unique situation. The original contractor, Dirt Proz, defaulted on its contract both by abandoning work yet to be completed and by not performing "completed" work to specification. Dirt Proz's default caused delay and additional damages in the form of crop loss, prevented planting and possible property damage. It was Dirt Proz default that was the proximate cause of these additional damages and not the performance of their work. These additional damages cannot be collected from

Dirt Proz's performance bond. Rather, these damages would be subject to compensation under Dirt Proz's liability insurance. We have assisted owners in documenting their damages and provided all required information to enable owners to file their claims. To date, the insurer has been less than responsive to the damage claims.

The Board has discretion to allow payment of additional damages in the proceedings and may want to consider payment of additional damages. Any additional damages awarded will be a cost of the system and will be paid from additional assessments to benefitted owners.

Kolb explained we are only able to collect the maximum remaining punitive sum on the performance bond of \$505K. Between the actual costs of completing and correcting the work abandoned by Dirt Proz in default, liquidated damages and engineering costs for the completion/correction work, actual costs for the project exceed the 505K we anticipate to collect from the performance bond. This means that actual project assessments will have to increase to cover the deficit.

The Board reviewed the following considerations for project completion:

- Has the project construction been substantially completed in conformance with the contract?
- Has the project construction been substantially completed within the time specified in the contract, or as modified by change order or approved modification to the construction timeline?
- Has the construction caused damages not contemplated or included in the original proceedings?
- Has the engineer properly identified the additional damaged area's and quantified the scope of additional damage payments in its final report?
- What amount per acre does the Board approve for additional damage payment?

Discussion followed with the Board finding that the above considerations have been met. With that, Attorney Kolb read findings and order accepting the contract. Manager Michael Knutson motioned to approve the attached (exhibit A) findings & order with excess damages to be paid in the amount of \$4,240.00, seconded by Manager Jon Olson. Upon vote, motion unanimously passed 4-0.

Chairman Andrew Weber adjourned the public hearing at 11:05 a.m.

Chairman Andrew Weber opened the special Watershed meeting at 11:07 a.m. to discuss the additional damages caused by the default of Dirt Proz.

Attorney Kolb explained that these damages would need to be submitted against Dirt Proz insurance. Landowner had submitted their damages and the County submitted to the insurance company. Don Streich said the township had heard back from the insurance company requesting photos and dates.

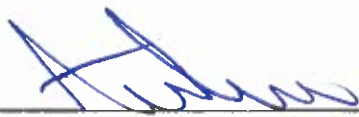
Discussed following ways to help landowners recoup their costs if Dirt Proz insurance doesn't respond, the landowners can submit a claim against the insurance company. The Watershed District could submit a claim to their insurance MCIT and see if they will try to recoup the money from the insurance company, or last option the Watershed compromises and pays some out of their pocket. Kolb explained we have to follow a process and be patient & let us try to collect up those damages. He said we are not trying to pull anything over on anyone, just trying to full-fill the Watershed obligations. Commissioner Patzer inquired at what point does it become a Watershed claim and what is the process so it doesn't escalate.

Kolb said the landowners would have to turn in a claim against the Watershed District as we don't have a claim until we get a claim against us and then we turn over to our MCIT insurance. The Watershed did not cause the damage, the contractor did. Currently the landowners should try to get their claims against the contractors' insurance. It doesn't become a WS claim until a landowner takes a step against us. Commissioner Patzer encouraged the Board to engage the help of Attorney Kolb to help with the landowner claims. Discussion followed.

Manager Jon Olson felt the Watershed District should have John Kolb do whatever he can to help landowners with their insurance claims, with the other managers agreeing.

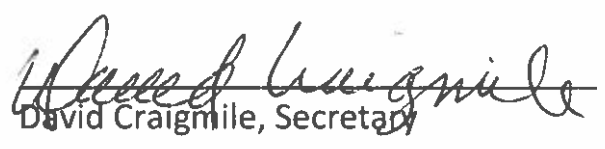
Attorney Kolb again thanked the landowners for their patience. No further action was taken.

Chairman Weber closed the special WS meeting at 11:23 a.m.



Chairman, Andrew Weber

ATTEST:



David Craigmile, Secretary





STATE OF MINNESOTA  
LAC QUI PARLE-YELLOW BANK WATERSHED DISTRICT BOARD OF MANAGERS  
SEATED AS DRAINAGE AUTHORITY UNDER STATUTES CHAPTER 103E  
FOR THE IMPROVEMENT OF LAC QUI PARLE COUNTY DITCH 42

The matter of the petition of Kruse and others for the improvement of Lac qui Parle County Ditch 42

FINDINGS AND ORDER ACCEPTING CONTRACT

The Board of Managers of the Lac qui Parle-Yellow Bank Watershed District (LQPYBWD), sitting as Drainage Authority for the improvement of Lac qui Parle County Ditch (CD) 42, held a hearing on the acceptance of completion of the contract for the improvement of CD 42 on April 18, 2024, at which hearing Manager Knutson moved, seconded by Manager Oison for adoption of the following Findings and Order:

Findings:

1. By order dated August 4, 2020, the Board established the improvement of CD 42.
2. Upon advertised bids, the Board awarded a contract for construction to Dirt Proz.
3. Concurrent with the proceedings to establish the project, the Board appointed viewers for the purpose of determining benefits and damages for the project.
4. In the proceedings, damages were awarded based on the anticipated impact construction of the system would have on adjacent properties and to account for the future burden and entry for ongoing maintenance and inspection of the system.
5. Dirt Proz began work in early 2021, but failed to return to the site in June 2021 to complete items in the contract including work to correct deficiencies. Partial payments were made to Dirt Proz, but on the last partial payment, the retainage amount was increased from the standard 5% of work completed due to insufficient documentation to verify the adequacy of the tile installation. The partial payment recommendation identified conditions that Dirt Proz was required to meet prior to further payment. The conditions were not subsequently satisfied by Dirt Proz, and no additional pay requests were received from Dirt Proz.
6. Televising video was obtained after installation of the tile and showed defects, which defects were detailed in correspondence to Dirt Proz. Dirt Proz failed to address any of the deficiencies as required by the contract. As a result, LQPYBWD declared Dirt Proz in default of the contract.

7. **Liquidated damages accrued against Dirt Proz's contract starting on the required substantial completion date.**
8. **Due to Dirt Proz's default, additional engineering costs were incurred.**
9. **Due to Dirt Proz's default and failure to correct deficiencies in the project, three separate contracts were awarded to AgTech Drainage in June 2023 to complete the project and make corrective repairs.**
10. **AgTech Drainage completed the initial corrective repairs between June and August 2023. As correction work began, AgTech Drainage discovered additional segments of tile that required replacement due to excessive tile deflection or significant grade issues. Conversely, in some locations the planned correction work was deemed to be unnecessary.**
11. **AgTech Drainage inspected the tile with televising equipment between August and December 2023 and provided televising video data.**
12. **AgTech Drainage completed punch list items in January 2024 to address issues observed in the inspection data.**
13. **Upon completion of construction of the improvement (including completion and correction work performed by AgTech), the project engineer inspected the construction and prepared a report to the Board showing the contract price, the amount paid on certificates, the unpaid balance, and the work that is completed under the contract.**
14. **Excepting Dirt Proz's incomplete and insufficient work, the engineer has concluded that all the work is now complete according to the plans and specifications for the improvement, and was performed by AgTech in a timely and workmanlike manner.**
15. **The engineer has concluded that all amounts under the three correction contracts with AgTech, including change orders and penalties, if any, have been duly paid to AgTech and that any retainage should be released to AgTech as provided in the contracts.**
16. **Upon receipt of the engineer's report, the Board set a time and location for a hearing on the report, gave notice of the hearing by mail to affected landowners at least ten days before the hearing and by posting at the county courthouse for three weeks. The notice included an invitation that a party objecting to the acceptance of the contract may appear and be heard.**
17. **At the hearing, the Board took public comment on the project and completion of the contract. Several owners appeared and provided comments to the Board regarding the**

construction and possible additional damages related to the construction.

18. Based on the proceedings and record herein, the Board determines that the contract correcting work has been completed in accordance with the plans and specifications and that all work has been performed within the right of way area contemplated and included in the proceedings for which damages have been ordered and authorized for payment.
19. Additional damages have been alleged as a result of Dirt Proz's default on the original contract. Such additional damages were not caused or anticipated by construction of the improvement. Rather, these damages were the result of Dirt Proz's default and are subject to claims by affected landowners against Dirt Proz's liability insurance. The Board has provided assistance to owners in documenting their damages and filing claims with Dirt Proz's insurer. The Board reserves a decision on the award of additional damages related to Dirt Proz's default.
20. Notwithstanding the above discussion of damages related to Dirt Proz's default, the engineer has identified construction limits wider than anticipated for a portion of the alignment and an access route utilized outside of the work limits leading to a higher amount of damaged area. The estimated damaged area in the FER was 28.6 acres, while the actual measured damaged area was approximately 35.4 acres (based on field measurements and aerial photography).
21. Between the construction contracts with AgTech Drainage and Dirt Proz, the specified work within the original contract has been completed. The correction work was inspected by televising to confirm that defects have been addressed. The engineer has provided an as-built record drawing showing the documented alignment, invert elevations, and inlet locations.
22. The engineer recommends payment to AgTech Drainage of any remaining amounts on contracts and all retainage.

**Order:**

- A. The contract between the Board and Dirt Proz remains in default and subject to claims against the performance bond under that contract.
- B. The correction and completion contracts between the Board and AgTech are accepted as complete.
- C. Any retainage under the AgTech contracts shall be released to the contractor upon proof of release of all liens of subcontractors or materialmen related to the project.
- D. Due to the nature of Dirt Proz's original default and the correction work performed by AgTech, the Board has no expectation of warranty for the work performed.

- E. Additional damages are awarded as recommended by the engineer.
- F. The Board's treasurer, working with the Lac qui Parle County Auditor, is ordered to pay the balance due on the AgTech contracts, if any, the damages awarded herein and the costs of the improvement as provided by Statutes Chapter 103E.

After discussion, the Board President called the question. The question was on the adoption of the foregoing findings and order and there were 1 yeas and 0 nays as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Absent</u>	<u>Abstain</u>
Craigmile	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cornell	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Knutson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Olson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Weber	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Upon vote, the President declared the motion Passed.

  
 \_\_\_\_\_  
 Andrew Weber, President

Dated: 4/18, 2024

\* \* \* \* \*

I, David Craigmile, Secretary of the Lac qui Parle-Yellow Bank Watershed District, do hereby certify that I have compared the above motion, findings and order with the original thereof as the same appears of record and on file with the Board of Managers and find the same to be a true and correct transcript thereof. The above order was filed with me, Secretary of the Board of Managers, on April 18, 2024.

IN TESTIMONY WHEREOF, I hereunto set my hand this 18<sup>th</sup> day of April, 2024.

  
 \_\_\_\_\_  
 David Craigmile

Table 1 - Summary of Damages

Parcel ID	Section	Description	Estimated Damages in FER (acres)	Damage Payment (Viewers Report)	Total Damage			Actual Damages Req'd to Complete Project	Recommended Damage Payment	Excess Damage	
					Area: Initial Construction (2021) (acres)	Area: Initial Construction (2021) (acres)	Area due to Contractor Performance			Area due to Contractor Performance	Excess Damage Amount
	27	NESE	0.4	\$339.20	0.2	0.2	0.2	\$169.60			
	27	SESE	2.1	\$1,780.80	2.4	2.4	2.4	\$2,035.20			
32-0083-000	27	SESW	1.9	\$1,611.20	1.3	1.3	1.3	\$1,102.40			
	27	SWSE	2.9	\$2,459.20	3.0	3.0	3.0	\$2,544.00			
	26	NESW	2.0	\$1,696.00	4.0	3.2	3.2	\$2,713.60	0.8		\$678.40
	26	NWSW	4.4	\$3,731.20	6.0	5.5	5.5	\$4,664.00	0.5		\$424.00
32-0081-000	26	SESW	6.0	\$5,088.00	8.4	6	6	\$5,088.00	2.4		\$2,035.20
	26	SWNW	0	\$0	1.3	0	0	\$0	1.3		\$1,102.40
	26	NWNE	0.2	\$169.60	0.2	0.2	0.2	\$169.60			
32-0079-000	26	SWNE	3.9	\$3,307.20	4.0	4.0	4.0	\$3,392.00			
32-0078-000	26	NENE	3.0	\$2,544.00	3.0	3.0	3.0	\$2,544.00			
32-0077-000	25	NWNW	1.6	\$1356.8	1.6	1.6	1.6	\$1,356.80			
32-0072-000	24	SWSW	0.2	\$169.6	0.2	0.2	0.2	\$169.60			
	<b>Totals</b>		<b>28.6</b>	<b>\$24,252.80</b>	<b>35.6</b>	<b>30.6</b>	<b>30.6</b>	<b>\$25,948.80</b>	<b>5.0</b>		<b>\$4,240.00</b>

\*Total damages incurred is based on \$848/acre cost indicated in the Viewers Report

# Technical Memorandum

---

**To:** Trudy Hastad, Administrator  
Jared Roiland, Ditch Inspector  
Lac qui Parle-Yellow Bank Watershed District (LqPYBWD)

**From:** Joe Lewis, PE

**Subject:** Project Acceptance Report

**Date:** April 17, 2024

**Project:** Lac qui Parle CD 42 Improvement Project – Damage Summary

## INTRODUCTION

The purpose of this addendum is to provide a summary of damages associated with the CD 42 improvement project construction that were necessary to complete the project. A total damage amount of 35.6 acres was identified in the CD 42 Acceptance Report dated January 31, 2024. A portion of that damage amount was a result of the contractor's poor practices unnecessarily increasing the damage area. The following table divides the area into 1) necessary damages and 2) unnecessary damages caused by the contractor for every individual parcel and 40-acre tract.

From the summary table, a total damage payment of \$25,948.80 is recommended to landowners. This amount is based on the project requiring 30.6 acres of area and a rate of \$848 per acre (consistent with the Viewers Report).