

Minnesota Public Drainage Manual – Chapter 2 – VI

Administration and Legal Considerations - Construction of Drainage Project

Summary

After a drainage project has been ordered, the petitioner's representative should ensure the order is date-stamped as received and filed with the county auditor or secretary of the watershed district. This starts the 30-day appeal period that must take place prior to a contract for the drainage project to be let. Appeals are discussed in Section VI.A.

Awarding the construction contract is different depending on whether the construction is for establishment of a new drainage project or for repair of an existing drainage system. Whether competitive bidding must be used depends upon the estimated cost of the contract. Other procedures for awarding the construction contract, including how the contract may be awarded ("bidding") and the procedure for rectifying bidding if a contract is not awarded due to bids or costs, are provided in Section VI.B.

The construction contract specifications are typically drafted by the project engineer, but prudence suggests that before the contracts are approved, the project attorney and the engineer discuss the objectives of the construction contract and how those objectives will be implemented. Both the contract and bond must include the required provisions from Minn. Stat. 103E and [Minn. Stat. § 574.26](#) (bonding for public works). The contract adopts the plans and specifications as prepared by the engineer. During and after the construction of the project, the project engineer is to inspect the work being completed and demand it be done according with the plan, specifications, and contract for construction. Contract terms and contract changes during construction, the guaranty of tile work, contractor's default, inspection of drainage construction and partial payments, and extension of time on the contract are further described in Section VI.C.

When the contract is complete, the engineer makes a report to the drainage authority showing the contract price, amount paid on partial payment certificates, unpaid balance, and a summary of the work completed under the contract. Upon receipt of the engineer's report, the auditor or secretary of the watershed district is required to set a time and place for hearing on the report. The hearing gives all affected parties an opportunity to state their objections or complaints to any portion of the construction process, such as damages to their land by the contractor not compensated for in the final order, failure to install culverts or inlet tile, etc. The final hearing proceedings are followed by a final acceptance order (Section VI.D), which is concluded by the engineer's final, as-constructed survey that shows the drainage project as actually constructed on the original detailed survey (Section VI.E).

A. General

Once a drainage project has been ordered, the petitioners' representative should ensure that the order is date stamped as received and filed with the county auditor or the secretary of the watershed district in order to commence the thirty day appeal period that must take place before a contract for the drainage project can be let.⁷¹⁸

If an appeal of the project's establishment order is made, a contract cannot be awarded until the appeal is final and the time for further appeals expires.⁷¹⁹

If an appeal regarding the benefits and damages is raised within thirty days of the order being filed, the drainage authority may wait until the appeal is finally determined or may proceed to order the contract be awarded while the appeal is pending.⁷²⁰ If an appeal is filed, it is recommended the drainage authority only proceed to award a contract if the benefits so far exceed the damages and costs that, even if successful, the appeals would not undermine the project. The auditor may initiate the request to the drainage authority to award a contract.⁷²¹ If the auditor does not initiate the request, the drainage authority must provide the auditor or secretary with five days' notice of the hearing.⁷²²

If, after the thirty-day period, no appeals regarding the determination of benefits and damages have been filed, then the letting process may begin and contracts may be awarded.

FOOTNOTES

⁷¹⁸ See Minn. Stat. § 103E.505, subd. 1 (2015) ("Thirty days after the order establishing a drainage project is filed, the auditor and the drainage authority or, for a joint county drainage project, a majority of the auditors of the affected counties shall proceed to award the contract to construct the drainage project.").

⁷¹⁹ Minn. Stat. § 103E.505 (2015).

⁷²⁰ Minn. Stat. § 103E.505, subd. 2 (2015).

⁷²¹ Minn. Stat. § 103E.505, subd. 2 (2015).

⁷²² Minn. Stat. § 103E.505, subd. 2 (2015).

B. Procedure for Awarding the Construction Contract

The procedure for awarding the construction contract is governed in part by the drainage code and in part by other statutes that govern municipal contracting.⁷²³

The method of contract awarding varies depending on whether the construction is for establishment of a new drainage project or for repair of an existing drainage system. Whether competitive bidding must be used also depends upon the estimated cost of the contract.

Work Done by Federal Government

If any drainage work is to be done by the United States or one of its agencies, a notice of awarding that contract does not need to be published and a contract for that construction is not necessary.⁷²⁴

Contracts for Drainage Projects

Contracts for drainage projects estimated to cost \$25,000 or less may be awarded upon negotiation after solicitation of at least two quotes or in open market.⁷²⁵

Contracts for drainage projects estimated to exceed \$25,000 but not \$100,000 may be awarded by solicitation of sealed bids or by negotiation after solicitation of at least two quotes.⁷²⁶

Whenever quotes are obtained for negotiation, the quotes must be kept on file by the drainage authority for a period of at least one year after receipt.⁷²⁷

Contracts for drainage projects estimated to exceed \$100,000 must be awarded after solicitation of sealed bids.⁷²⁸

Contracts for Repairs

Repairs to a drainage system that cost less for one year than the greater of the dollar amount requiring the solicitation of sealed bids under [Minn. Stat. § 471.345, subdivision 3](#) (\$100,000 currently) or \$1,000 per mile of open ditch in the system may be awarded without advertising for bids or entering into a contract.⁷²⁹

Repairs that cost more than the amount requiring the solicitation of sealed bids under [Minn. Stat. § 471.345, subdivision 3](#) (\$100,000 currently) or \$1,000 per mile of open ditch in the system must be contracted through the advertisement and solicitation of sealed bids.

Contracts for repairs and construction after a disaster are not required to advertise for bids. Any of the following disaster conditions qualify:

1. Repair of a drainage system destroyed or impaired by floods, natural disaster, or unforeseen circumstances;
2. The area where the drainage system is located has been declared a disaster area by the President of the United States and federal funds are available for repair or reconstruction; and
3. The public interests would be damaged by repair or reconstruction being delayed.⁷³⁰

Best Value Alternative

The Best Value Alternative bidding process is an alternative contract awarding method to the “lowest responsible bidder” method of competitive bidding.⁷³¹ Drainage authorities may award a contract for construction, alteration, repair, or maintenance work to the contractor offering the “best value.”⁷³² The Best Value Alternative allows the drainage authority to consider performance factors rather than just cost. Some examples of performance criteria include, but are not limited to:

1. The quality of the contractor’s performance on previous projects;
2. The timeliness of the contractor’s performance on previous projects;
3. The level of customer satisfaction with the contractor’s performance on previous projects;
4. The contractor’s record of performing previous projects on budget and ability to minimize cost overruns;
5. The contractor’s ability to minimize change orders;
6. The contractor’s ability to prepare appropriate project plans;
7. The contractor’s technical capabilities;
8. The individual qualifications of the contractor’s key personnel; or
9. The contractor’s ability to assess and minimize risks.⁷³³

The solicitation documents under the Best Value Alternative must state the weight that will be given to price and the other selection criteria.⁷³⁴

A project may be split up into several contracts by section or by labor and material or let as one job.⁷³⁵ Where a project involves both open ditching and drain tile work, the open portion and the drain tile portion may be let to different contractors, since there is different expertise involved. Sometimes the entire project is let to an excavation contractor who will then sublet the drain tile work. Subletting, while not unlawful, is not highly desirable because of the loss of control that the drainage authority experiences in selecting the subcontractor and supervising the work. When a project calls for more than one specialty, it is recommended to break the project up and to let it in sections.

1. Notice of Contract Awarding

The notice of awarding of the contract is to be published in a legal newspaper in the county or counties where the project is to be constructed.⁷³⁶ If the estimated cost is more than \$25,000, the notice must also be published in a construction trade newspaper.⁷³⁷

The notice of contract awarding must contain the following:

1. Time and location for awarding the contract;
2. The approximate amount of work and its estimated cost;
3. That bids may be for the work as one job, or in sections, or separately, for bridges, ditches, and open work, tile, or tile construction work, if required or advisable;
4. That each bid must be accompanied by a certified check or a bond furnished by an approved security corporation payable to the drainage authority for ten percent of the bid, as a security that the bidder will enter into a contract and give a bond; and
5. That the drainage authority reserves the right to reject any and all bids.

A sample notice of contract awarding is found in [Template A](#).

If the project is a county or joint county project, the invitation to bidders must be published two consecutive weeks in a legal newspaper in the county or counties where the work is to be done.⁷³⁸ For projects that are conducted by the watershed district, publication only needs to be done once and does not have to be published as a legal notice in the county where the project is pending. Rather, the statute calls for publication “in at least one of the newspapers in the state where notices are usually published.”⁷³⁹

2. How Contract May Be Awarded (“Bidding”)

Where the solicitation of bids is required, the contract must be awarded to the lowest responsible bidder.⁷⁴⁰ When bidding is conducted under the Best Value Alternative method, the contract must be awarded to the lowest responsible bidder after applying the weighted selection criteria.⁷⁴¹

The lowest bidder is not necessarily the lowest responsible bidder. The drainage authority may find a bidder to be irresponsible based upon reasonable, documented judgment of integrity, skill, ability, and the likelihood of the bidder doing faithful and satisfactory work.⁷⁴² Prior, unsatisfactory work by the bidder may justify the drainage authority in rejecting the bid.⁷⁴³ Having rejected the lowest bid, the drainage authority may accept the next lowest bid.⁷⁴⁴

If the drainage authority wishes more time to consider the bids, it may take the letting under advisement and adjourn, notifying the bidders of its decision by mail. In so doing, the drainage authority should check the bid specifications for limitations in the length of time that the drainage authority may hold a bidder to its bid.

The project engineer must attend the meeting to award the contract.⁷⁴⁵ The engineer ensures that each bid conforms to the plans and specifications: a bid must be rejected if it is not responsive.⁷⁴⁶

If no satisfactory bid is received, the drainage authority may reject all bids, with or without giving reasons therefor, and may then re-advertise.⁷⁴⁷ If no satisfactory bid is received a second time and if no petition is received for adjustment of the engineer’s cost estimate or the viewers’ report within a reasonable time,⁷⁴⁸ the drainage authority may dismiss the petition as not feasible.

A contract may be let even if there is only one satisfactory bid from a responsible bidder.

3. Procedure if Contract Not Awarded Due to Bids or Costs

If all bids exceed 130 percent of the total construction cost as estimated by the project engineer or in excess of the benefits, less damages and other costs, no contract may be awarded unless a special re-evaluation procedure is followed.⁷⁴⁹

The special procedure involves a petition by a person interested in the drainage project to have the estimated drainage project costs or the plans and specifications re-evaluated.⁷⁵⁰ The successful petition will raise the engineer's estimate of costs or will reduce the bids. There are three types of petitions that may be brought:

1. A petition stating the person's determinations regarding an error(s) made in the estimate of the drainage project cost;⁷⁵¹
2. Petition stating that the plans and specifications could be changed in a manner materially affecting the cost of the drainage system without interfering with efficiency;⁷⁵² or
3. A petition stating that bids were received only for a price more than 30 percent in excess of the detailed survey report because inflation increased the construction cost between the time the detailed survey cost estimate and the time of awarding the contract, or that after the contract was awarded there was unavoidable delay not caused by the contractor, and between the time of awarding the contract and completion of construction inflation increased construction costs resulting in the contract not being completed for an amount equal to or less than the assessed benefits.⁷⁵³

The petition should request the drainage authority refer the detailed survey report and viewers' report back to the engineer and the viewers for additional consideration.⁷⁵⁴

A sample petition for reevaluation of estimated costs or plans and specifications after project is established is found in [Template B](#).

After the petition is received, the drainage authority must order a hearing by designating the time and place of the hearing and directing the auditor to give notice of the hearing by publication.⁷⁵⁵

A sample order setting hearing on petition for reevaluation of estimated costs or plans and specifications after project is established is found in [Template C](#).

A sample notice of hearing on petition for reevaluation of estimated costs or plans and specifications after project is established is found in [Template D](#).

At the hearing, the drainage authority shall consider the petition and then take public comments from all interested parties.⁷⁵⁶

After the hearing, the drainage authority may order the engineer to amend the detailed survey report if the drainage authority determines and adopts the following findings:

1. The detailed survey report cost estimate was erroneous and should be corrected;
2. The plans and specifications could be changed in a manner materially affecting the cost of the drainage project without interfering with efficiency; and

3. With the correction or modification, a contract would be awarded within the 30 percent limitation and equal to or less than benefits.⁷⁵⁷

If the drainage authority finds that the amended changes affect the amount of benefits or damages to any property or that the benefits should be reexamined because of inflated land values or inflated construction costs, it shall refer the viewers' report to the viewers to reexamine the benefits and damages.⁷⁵⁸

If a new viewers' report is adopted, a party may appeal the benefits and damages to district court.⁷⁵⁹

There is no statutory right to appeal from the order granting or denying the relief asked for in the petition to modify. The entire matter could be reviewed by filing a petition for a writ of certiorari to the Minnesota Court of Appeals.⁷⁶⁰ The drainage authority should not rescind the order establishing and dismiss the petition for the project until after the time for review by certiorari of its order rejecting the petition to modify the order establishing has run out. If no action is commenced within 60 days after notice of denial is given to the petitioner,⁷⁶¹ the drainage authority may proceed to rescind the order establishing, order the dismissal of the petition, and further order the petitioners to pay the costs.

FOOTNOTES

⁷²³ See, e.g., Uniform Municipal Contracting Law, 2007 Minn. Laws, ch. 148, art. 3, § 8, codified at Minn. Stat. § 471.345 (2015); see, specifically, Minn. Stat. § 471.345, subd. 6 ("The purpose of this section is to establish for all municipalities, uniform dollar limitations upon contracts which shall or may be entered into on the basis of competitive bids, quotations or purchase or sale in the open market. To the extent inconsistent with this purpose, all laws governing contracts by a particular municipality or class thereof are superseded. In all other respects such laws shall continue applicable.").

⁷²⁴ Minn. Stat. § 103E.505, subd. 8 (2015).

⁷²⁵ Minn. Stat. § 471.345, subd. 5 (2015).

⁷²⁶ Minn. Stat. § 471.345, subd. 4 (2015).

⁷²⁷ Minn. Stat. § 471.345, subds. 4 & 5 (2015).

⁷²⁸ Minn. Stat. § 471.345, subd. 3 (2015).

⁷²⁹ Minn. Stat. § 103E.705, subd. 5 (2015).

⁷³⁰ Minn. Stat. § 103E.705, subd. 7 (2015).

⁷³¹ Minn. Stat. § 103E.505, subd. 5 (2015).

⁷³² Minn. Stat. § 471.345, subds. 3a & 4a (2015).

⁷³³ Minn. Stat. § 16C.28, subd. 1b (2015).

⁷³⁴ Minn. Stat. § 16C.28, subd. 1(c) (2015).

⁷³⁵ Minn. Stat. § 103E.505, subd. 5 (2015).

⁷³⁶ Minn. Stat. § 103E.505, subd. 3 (2015).

⁷³⁷ Minn. Stat. § 103E.505, subd. 3 (2015).

⁷³⁸ Minn. Stat. § 375.21, subd. 1 (2015).

⁷³⁹ Minn. Stat. § 103D.811, subd. 2 (2015).

⁷⁴⁰ Minn. Stat. § 103E.505, subd. 5 (2015).

⁷⁴¹ Minn. Stat. § 16C.28, subd. 1(c) (2015).

⁷⁴² *Kelling v. Edwards*, 134 N.W. 221, 223 (Minn. 1912).

⁷⁴³ *Kelling v. Edwards*, 134 N.W. 221, 223 (Minn. 1912).

⁷⁴⁴ *Den Mar Constr. Co. v. Am. Ins. Co.*, 290 N.W.2d 737, 741 (Minn. 1979).

⁷⁴⁵ Minn. Stat. § 103E.505, subd. 4 (2015).

⁷⁴⁶ Minn. Stat. § 103E.505, subd. 4 (2015).

⁷⁴⁷ Minn. Stat. § 103E.505, subd. 3(5) (2015).

⁷⁴⁸ See Section VII, Paragraph B.3.

⁷⁴⁹ See Minn. Stat. §§ 103E.505, subd. 5; 103E.511; & 103D.801. The procedures are similar whether it is a county,

joint county or watershed district project. Compare Minn. Stat. § 103E.511, with Minn. Stat. § 103D.801.

⁷⁵⁰ See Minn. Stat. §§ 103E.511, subds. 2 & 3 (2015).

⁷⁵¹ Minn. Stat. § 103E.511, subd. 2 (2015).

⁷⁵² Minn. Stat. § 103E.511, subd. 2 (2015).

⁷⁵³ Minn. Stat. § 103E.511, subd. 3(a) (2015).

⁷⁵⁴ Minn. Stat. §§ 103E.511, subds. 2 & 3 (2015).

⁷⁵⁵ Minn. Stat. § 103E.511, subd. 4 (2015).

⁷⁵⁶ Minn. Stat. § 103E.511, subd. 5(a) (2015).

⁷⁵⁷ Minn. Stat. § 103E.511, subd. 5(b) (2015).

⁷⁵⁸ Minn. Stat. § 103E.511, subd. 5(c) (2015).

⁷⁵⁹ Minn. Stat. § 103E.511, subd. 5(f) (2015).

⁷⁶⁰ See Section VIII, Paragraphs B.6 & D.3.

⁷⁶¹ See Minn. Stat. § 606.01 (2015) (“No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby. The party shall apply to the Court of Appeals for the writ.”).

C. The Construction Contract and Bond

Ordinarily, the engineer prepares the construction contract; however, the drainage code contemplates that the drainage authority’s attorney, the engineer, and the attorney for the petitioners must prepare the contract and bond.⁷⁶²

The contract adopts the plans and specifications as prepared by the engineer.⁷⁶³ The plans and specifications section should provide that the engineer has the right, with the consent of the drainage authority, to modify the plans and specifications as work progresses and as circumstances require and that the contractor is obligated to provide it at the same rate stated in its bid.⁷⁶⁴

The contract should also include special terms that cover the following:

1. The work is subject to the inspection and approval of the engineer;⁷⁶⁵
2. Time is of the essence of the contract;⁷⁶⁶ and
3. If there is a failure to perform the work according to the terms of the contract within the time given in the original contract or as extended, the contractors shall forfeit and pay the affected counties an amount stated in the contract as liquidated damages.⁷⁶⁷

The contract and bond must include all provisions discussed in this chapter of the manual, in addition to the provisions found in [Minn. Stat. § 574.26](#) to [574.32](#), and the Public Contractors’ Performance and Payment Bond Act.” The act requires the two bonds:

1. the contractor must give a performance bond to the drainage authority for the use and benefit of the drainage authority to complete the contract according to its terms, and conditioned on saving the drainage authority harmless from all costs and charges that may accrue on account of completing the specified work;⁷⁶⁸ and
2. the contractor must give a payment bond for the use and benefit of all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for the labor and materials.⁷⁶⁹

The penalty of performance bond and the payment bond must not be less than the contract price.⁷⁷⁰ If the contract price increases after the bond is given, the drainage authority may require additional bonds, the penalties of which must not be less than the amount of the increase in the contract

price.⁷⁷¹ The work under the contract shall cease if the bonds demanded are not furnished within ten days.⁷⁷²

The Public Contractors' Performance and Payment Bond Act allows for reasonable attorneys' fees, costs, and disbursements to be awarded in an action to enforce claims under the act.⁷⁷³

There is no statutory limit on how much time the contractor has to enter into a contract. In addition, if any portion of the work is to be done by the United States or an agency of the United States, a bond or contract is not necessary for that work unless required by laws governing the United States or its agencies.⁷⁷⁴

1. Contract Changes During Construction

If a change increases the cost of the project, the engineer must bear in mind that the damages and costs' of the project may not exceed the benefits found by the drainage authority.⁷⁷⁵ No change may be made if it will substantially impair the usefulness of any part of the project or system or substantially alter its original character.⁷⁷⁶

No changes to the original contract may be made that will cause any detrimental effects to the public interest under the environmental, land use, and multipurpose water management criteria in section [103E.015, subdivision 1](#).⁷⁷⁷

As a practical matter, minor changes are made by the engineer without a hearing.

2. Guaranty of Tile Work

If the drainage authority receives a request for a guarantee of tile work from a majority of the persons affected by the part of any project which is made up of drain tile, that part of the construction contract must be let separately.⁷⁷⁸ Such a request must be made before advertising for the letting of the work has begun.⁷⁷⁹ If the tile work is let separately, the contractor must guarantee the tile work installed pursuant to the contract for three years after its completion against any fault or negligence on the part of the contractor.⁷⁸⁰ The invitation to bid must make it clear that such a guarantee is required.⁷⁸¹ The contractor's performance bond in such case must contain a special provision guaranteeing the tile work.⁷⁸²

It is noteworthy that the statute requires the contractor only to guarantee the work against any fault or negligence on the part of the contractor. What if the material (the tile itself) fails?⁷⁸³ The contractor's guarantee does not cover that. The drainage authority might have a cause of action against the manufacturer for breach of warranty, express or implied. Such an action could be brought for unreasonable failure of the product, even after three years had expired.

3. Contractor's Default

If a contractor fails to perform the contract according to specifications, the auditor or secretary should mail a notice of the default to the contractor, to the surety on the performance bond, to the engineer, and to the auditors of all affected counties.⁷⁸⁴ The notice should specify the default and state that, if the default is not promptly cured and the contract completed, the unfinished portion of the contract will be awarded to another contractor.⁷⁸⁵

The surety, on receiving such a notice, can be expected to respond. The surety will first contact the contractor to try to determine whether the contractor can or will perform. Often the problem ends

there. If the contractor has become insolvent, bankrupt, or otherwise unable to complete the contract, the surety may hire a contractor of its own to complete the job. The auditors or secretary may grant an extension of time to accommodate the surety without convening the drainage authority.⁷⁸⁶ If the contract is completed by the surety, the balance owing on the contract should be paid to the surety, less damages incurred by the affected counties from the default.⁷⁸⁷

Damages incurred may be a matter of dispute. As always, it is difficult for the drainage authority to show damage. It is the landowners who are damaged, but the landowners do not get a chance to make a claim on the bond. The drainage authority cannot make a claim on behalf of the landowners. The only damages likely to be suffered by the drainage authority may come in the form of extra legal and engineering fees.

If the surety does not undertake to complete the contract or, having undertaken to do so, does not complete it within the specified time or extended time, the auditors of the affected counties or the secretary for a watershed district project may advertise for bids to complete the contract in the manner provided in the original letting.⁷⁸⁸ The drainage authority may recover any increased costs in completing the project from the original contractor's bonding company.⁷⁸⁹ Such increased costs are not only the administrative costs involved in re-letting (publication, extra engineering, and legal), but also any construction costs in excess of the original contract.⁷⁹⁰

4. Inspection of Drainage Construction and Partial Payments

Part of the job of the project engineer is to inspect the work as it is being completed and to demand that it be done in accordance with the plan, specifications, and contract for construction.⁷⁹¹ The project engineer is to submit a monthly report to the drainage authority showing the work completed since the previous report and all materials furnished under the contract.⁷⁹²

The contractor does not get paid until the engineer certifies a preliminary certificate for "work done and approved or for materials delivered."⁷⁹³ The engineer's certificate must show the station numbers covered by the certificate and state the value of the work done and the materials furnished according to the contract.⁷⁹⁴

Each preliminary certificate should show the volume in cubic yards of the excavation completed and must show that a loss will not occur if partial payment is made.⁷⁹⁵ For joint county drainage systems, the certificate must also show the total value to be paid by each county in the proportion fixed by the drainage authority order.⁷⁹⁶ A duplicate of the engineer's preliminary certificate is delivered to the auditor of each affected county or to the secretary of a watershed district.⁷⁹⁷

The affected counties or watershed district must then pay the contractor (based upon the certificate) 90 percent of the total value of the work done and approved and 90 percent of the total value of the material furnished and delivered.⁷⁹⁸ The contractor is not to cause materials to be delivered until they are needed and until delivery is authorized by the engineer.⁷⁹⁹

The contractor may, on a single contract exceeding \$50,000, file a verified petition with the auditor requesting an order be made to pay 40 percent of the retained value of work and material if the following statements are true and made in the petition:

1. the contract, exclusive of materials furnished and not installed, is one-half or more complete; and

2. the contractor is not in default.⁸⁰⁰

When a verified petition is filed, the auditor or secretary shall set a time and location for a hearing on the petition before the drainage authority and provide at least five days' notice, by mail, of the hearing to the engineer, the attorney for the petitioners, the surety of the contractor's bond, and auditors of the affected counties.⁸⁰¹

A sample notice of hearing on petition for partial payment of retained contract amounts is found in [Template E](#).

The drainage authority has the discretion of whether to grant the petition, but may only do so if it finds the following:

1. the facts stated in the petition are correct;
2. the work thus far has been performed in a satisfactory manner; and
3. if a portion of the retainage is released, the interests of the affected counties or watershed district will not be endangered.⁸⁰²

A template findings and order granting contractor's petition for partial payment of retained contract amounts is found in [Template F](#).

5. Extension of Time on Contract

The auditors or secretary may, without convening the drainage authority, extend the time for the performance of a construction contract upon the contractor's written application.⁸⁰³ Notice of the application for extension must be given to the project engineer, to the attorney for the petitioners, and to the auditors of the affected counties in the case of a joint county drainage project, but the decision is within the discretion of the auditor or watershed district secretary.⁸⁰⁴ The auditor(s) or secretary may grant an extension if sufficient reasons are shown.⁸⁰⁵ The granting of an extension does not necessarily mean that no liquidated damages may be sought.⁸⁰⁶ If the time for completing the contract expired before the extension was granted, there may still be liquidated damages sought and collected.⁸⁰⁷ If the extension expires, liquidated damages may again be sought.⁸⁰⁸

When a project takes more than one season to complete, the contractor may, after the first year's work is completed and accepted by the engineer, apply for a reduction in the amount of the performance bond in order to reduce the renewal premiums thereon.⁸⁰⁹ The application must be filed with the auditor and state the following:

1. the work that has been certified by the project engineer as completed;
2. the value of the certified work;
3. the amount of money received by the contractor and the amount retained by the drainage authority;
4. the amount unpaid by the contractor for labor or material furnished on the contract; and
5. a request for an order to reduce the amount of the contractor's bond.⁸¹⁰

The auditor, upon receiving the application, must set a time and location for a hearing on the application and provide ten days' notice of the hearing by publication in each affected county and notice by mail given to the engineer, the attorney for the petitioners, and the auditor of each affected county.⁸¹¹ The contractor is responsible for the costs of publishing the hearing notice.⁸¹²

It is within the drainage authority's discretion whether to reduce the contractor's bond, but it must only do so after it determines that the contractor is not in default and that a loss will not result from reducing the bond.⁸¹³ If the drainage authority orders the bond to be reduced, the bond amount must still be sufficient to protect the affected counties or watershed district from loss and damage and may not be reduced by more than 35 percent of the amount already paid to the contractor.⁸¹⁴ The reduction does not affect the remaining amount on the bond, does not affect the liability incurred on the bond before the reduction, and does not affect a provision for a three-year guaranty of tile work.⁸¹⁵

FOOTNOTES

⁷⁶² Minn. Stat. § 103E.501, subd. 1 (2015).

⁷⁶³ Minn. Stat. § 103E.501, subd. 3 (2015).

⁷⁶⁴ Minn. Stat. § 103E.501, subd. 4 (2015).

⁷⁶⁵ Minn. Stat. § 103E.501, subd. 3 (2015).

⁷⁶⁶ Minn. Stat. § 103E.501, subd. 3 (2015).

⁷⁶⁷ Minn. Stat. § 103E.501, subd. 3 (2015). The county auditor or watershed district secretary fixes the amount of liquidated damages owed for each day the contract fails to perform. Minn. Stat. § 103E.501, subd. 3 (2015). The function of liquidated damages is to provide the contractor with an incentive to finish the project in a timely manner. Beyond that, liquidated damages are required because it is difficult to prove the amount of damages incurred by the drainage authority when the project is completed late. Liquidated damages are often threatened, but seldom recovered. The problem with liquidated damages is the courts hold uniformly that liquidated damages may not be awarded unless there are some actual damages incurred by the person who has the right to claim liquidated damages. When a project is late in being completed, the persons who experience the loss are the affected landowners. It has been held that landowners have no right to recover from the contractor or from the contractor's performance bond for loss of profits arising from failure to complete a project on time. *Grams v. Murphy*, 103 Minn. 219, 114 N.W. 753 (Minn. 1908). Apparently, this is still good law since this case has never been overturned.

⁷⁶⁸ Minn. Stat. § 574.26, subd. 2 (2015).

⁷⁶⁹ Minn. Stat. § 574.26, subd. 2 (2015).

⁷⁷⁰ Minn. Stat. § 574.26, subd. 3 (2015).

⁷⁷¹ Minn. Stat. § 574.26, subd. 3 (2015).

⁷⁷² Minn. Stat. § 574.26, subd. 3 (2015).

⁷⁷³ Minn. Stat. § 574.26, subd. 2 (2015).

⁷⁷⁴ Minn. Stat. § 103E.501, subd. 5 (2015).

⁷⁷⁵ Minn. Stat. § 103E.501, subd. 4 (2015).

⁷⁷⁶ Minn. Stat. § 103E.501, subd. 4 (2015).

⁷⁷⁷ Minn. Stat. § 103E.501, subd. 4 (2015).

⁷⁷⁸ Minn. Stat. § 103E.501, subd. 6 (2015).

⁷⁷⁹ Minn. Stat. § 103E.501, subd. 6 (2015).

⁷⁸⁰ Minn. Stat. § 103E.501, subd. 6 (2015).

⁷⁸¹ Minn. Stat. § 103E.501, subd. 6 (2015).

⁷⁸² Minn. Stat. § 103E.501, subd. 2 (2015).

⁷⁸³ See Minn. Stat. § 103E.121 (granting the Director of the Division of Waters of the Department of Natural Resources the authority to investigate the methods used in the manufacture of drain tile, determine the causes of drain tile failure, and conduct research and experimentation to improve the quality of drain tile).

⁷⁸⁴ Minn. Stat. § 103E.551, subd. 1 (2015).

⁷⁸⁵ Minn. Stat. § 103E.551, subd. 1 (2015).

⁷⁸⁶ See Minn. Stat. § 103E.551, subd. 2 (2015).

⁷⁸⁷ Minn. Stat. § 103E.551, subd. 2 (2015).

⁷⁸⁸ Minn. Stat. § 103E.551, subd. 3 (2015).

⁷⁸⁹ Minn. Stat. § 103E.551, subd. 3 (2015).

⁷⁹⁰ Minn. Stat. § 103E.551, subd. 3 (2015).

⁷⁹¹ Minn. Stat. §§ 103E.521 & 103E.531, subd. 1 (2015).

⁷⁹² Minn. Stat. § 103E.531, subd. 1 (2015).

⁷⁹³ Minn. Stat. § 103E.531, subd. 2 (2015).

⁷⁹⁴ Minn. Stat. § 103E.531, subd. 2 (2015).

⁷⁹⁵ Minn. Stat. § 103E.531, subd. 2 (2015).

⁷⁹⁶ Minn. Stat. § 103E.531, subd. 2 (2015).
⁷⁹⁷ Minn. Stat. § 103E.531, subd. 2 (2015).
⁷⁹⁸ Minn. Stat. § 103E.531, subd. 3 (2015).
⁷⁹⁹ Minn. Stat. § 103E.531, subd. 3 (2015).
⁸⁰⁰ Minn. Stat. § 103E.535, subd. 1 (2015).
⁸⁰¹ Minn. Stat. § 103E.535, subd. 2 (2015).
⁸⁰² Minn. Stat. § 103E.535, subd. 3 (2015).
⁸⁰³ Minn. Stat. § 103E.541 (2015).
⁸⁰⁴ Minn. Stat. § 103E.541 (2015).
⁸⁰⁵ Minn. Stat. § 103E.541 (2015).
⁸⁰⁶ Minn. Stat. § 103E.541 (2015).
⁸⁰⁷ Minn. Stat. § 103E.541 (2015).
⁸⁰⁸ Minn. Stat. § 103E.541 (2015).
⁸⁰⁹ Minn. Stat. § 103E.545, subd. 1 (2015).
⁸¹⁰ Minn. Stat. § 103E.545, subd. 1 (2015).
⁸¹¹ Minn. Stat. § 103E.545, subd. 2 (2015).
⁸¹² Minn. Stat. § 103E.545, subd. 2 (2015).
⁸¹³ Minn. Stat. § 103E.545, subd. 3 (2015).
⁸¹⁴ Minn. Stat. § 103E.545, subd. 3 (2015).
⁸¹⁵ Minn. Stat. § 103E.545, subd. 3 (2015).

D. Hearing for Final Acceptance of Project

When the contract is complete, the engineer makes a report to the drainage authority showing the contract price, the amount paid on the partial payment certificates, the unpaid balance, and a summary of the work completed under the contract.⁸¹⁶ The auditor or secretary of the watershed district, upon receipt of the engineer's report, is required to set a time and place for hearing on the report.⁸¹⁷ Notice is given by publication or by mail to all owners of affected property at least ten days before the hearing.⁸¹⁸ The notice must state that the report is filed, the time and location for the hearing, and that any party objecting to the final acceptance of the contract may appear and be heard.⁸¹⁹

A sample notice of hearing on final acceptance of the project is found in [Template G](#).

The proceedings at such a hearing are intended to give any person who has a complaint about the completed work to be heard. Typical complaints aired at such a hearing are the contractor damaged crops in excess of that allowed by the viewers for damages, the contractor failed to bury the stumps and brush deep enough to permit agricultural operations over the top, or the contractor failed to properly install the side inlets thereby not allowing the water to drain into the open ditch through the berm. There is a question, then, as to who will pay the landowner. There is no legal authority for the drainage authority to pay for such losses. Doing so would, in effect, amends the viewers' report in the amount of damages to be paid.

One way of handling complaints against the contractor is to have the contractor pay the damaged landowner. The drainage authority can, upon recommendation of the engineer, reimburse the contractor with a change order provided the limits in increasing the construction costs do not impose an obstacle.⁸²⁰ This may be the proper way to handle these situations if the damages are determined by the engineer or drainage authority to be no fault of the contractor. The contractor must, however, be responsible for any faulty performance, such as failure to bury brush or to install drainpipes through the berm. If the contractor fails to make settlement with the landowner, the landowner may commence action against the contractor's bond. The landowner has, in such case, no cause of action against the drainage authority.⁸²¹

The final acceptance hearing is also the time and place at which inquiry should be made by the drainage authority as to whether all laborers, materialmen, and subcontractors and payroll tax authorities have been paid. The drainage authority may demand to see proof of payment. The drainage authority should also demand that the contractor produce waivers of suppliers of materials and subcontractors who might otherwise file claims on the bond.

If there are significant complaints by landowners about the contractor's performance, or if there is doubt about whether all persons entitled have been paid, the drainage authority may adjourn the hearing to another date certain. This would give the contractor the opportunity to correct the complaints and to provide the proof of payments requested. No new notice for the resumption of the continued hearing need be given.

When the drainage authority is satisfied that the work is complete and that all complaints have been dealt with, and everyone entitled has been paid, the drainage authority may order payment of the balance due on the contract.⁸²² If there is a question about whether liquidated damages are due, the drainage authority may waive them; if not waived, the drainage authority may deduct them.⁸²³ In any case, an order should be made by the drainage authority directing the auditor or watershed district secretary to pay the balance due on the contract, after accepting the contract as having been performed in accordance with specifications.⁸²⁴

A sample of a final acceptance order is found in [Template H](#).

FOOTNOTES

⁸¹⁶ Minn. Stat. § 103E.555, subd. 1 (2015).

⁸¹⁷ Minn. Stat. § 103E.555, subd. 1 (2015).

⁸¹⁸ Minn. Stat. § 103E.555, subd. 1 (2015).

⁸¹⁹ Minn. Stat. § 103E.555, subd. 1 (2015).

⁸²⁰ The total increase in costs may not exceed 10 percent of the original contract price; benefits may not exceed the sum of construction costs and damages. Minn. Stat. § 103E.501, subd. 4 (2015).

⁸²¹ *Grams v. Murphy*, 114 N.W. 753 (Minn. 1908). Aggrieved landowners suit against bond is limited to damages resulting directly from contractor's failure to complete the contract. Landowners may not recover for loss of use of land attributable only to delay in completion of the contract.

⁸²² Minn. Stat. § 103E.555, subd. 2 (2015).

⁸²³ Minn. Stat. § 103E.555, subd. 2 (2015).

⁸²⁴ Minn. Stat. § 103E.555, subd. 2 (2015).

E. Engineer's As Constructed Survey and Discharge of Duties

After the drainage authority makes its final acceptance order, the engineer has one more responsibility. The engineer is to revise the plan, profiles, and design of structures to show the drainage project as actually constructed on the original tracings⁸²⁵. Such revised engineer's final report is to be filed with the presiding auditor or watershed district secretary.⁸²⁶ The auditor is required to forward a copy of the revised engineer's final report to the Director of the Division of Waters at the Department of Natural Resources.⁸²⁷

The legal effect of final acceptance is discharge of the contractor and the performance bond. That is, no one will successfully be able to make a claim against the performance bond of the contractor after the contractor has been discharged, except in those instances where the contractor has been required to guarantee the tile work for three years. In such case, any claim against the bond would be limited to failure of the tile work due to the fault or negligence of the contractor.

The same can probably be said about the engineer's bond. The bond is conditioned on the payment of "any person or the drainage authority for damages and injuries resulting from negligence of the engineer while the engineer is acting in the proceedings or construction and that the engineer will diligently and honestly perform the engineer's duties."⁸²⁵ It would seem that once the project has been accepted, the engineer is no longer acting in the proceedings or construction. The engineer's job is complete and the bond is discharged.

FOOTNOTES

⁸²⁵ Minn. Stat. § 103E.295 (2015).

⁸²⁶ Minn. Stat. § 103E.295 (2015).

⁸²⁷ Minn. Stat. § 103E.295 (2015).

⁸²⁸ Minn. Stat. § 103E.241, subd. 2 (2015).