

STATEMENT BY THE BOROUGH OF WESTMONT

The Borough Council of the Borough of Westmont announces that the American Arbitration Association has ruled by way of a Final Decision and Award, dated May 28, 2018, in the dispute between the Borough and its contractor, Inland Waters Pollution Control, Inc. (also known as IWPC), regarding the Westmont Sanitary Sewer Rehabilitation Project. The award rendered a net ruling against the Borough and in favor of its contractor in the sum of \$2,002,759.77. This approximate \$2 million figure is the sum of the award of contractor's entitlement, including interest and AAA administrative fees, minus a sum imposed by the arbitrators for sanctions against the contractor for the contractor's failures to provide timely expert testimony in the case.

Breaking down the arbitrators' ruling, the award of approximately \$2 million includes, in part, the sum of \$900,004.59. The arbitrators noted that the Borough must pay this sum of \$900,000, because the contractor had contractually earned this sum during the course of the Project. This sum had not been paid to the contractor, because the Borough withheld funds for the reason that IWPC had prematurely walked off the Project, and the Borough would incur additional costs to re-bid the Project. To be more precise, IWPC chose to abandon the Project on June 30, 2018, when the Project was well under 50% complete. Nevertheless, the arbitrators ruled that \$900,000 had been earned by IWPC before it walked off the Project, and that it should be paid that sum.

The balance of the award was for delay damages from March 1 to June 30, 2018. The arbitrators directed payment to IWPC for extra equipment costs in the sum of \$274,356.35 (less than one-half of IWPC's claim for labor and equipment), and to its excavating subcontractor Glenn Johnston, Inc. in the sum of \$743,821.90 (roughly three-quarters of its claim for idle equipment and additional trucking costs), and for interest. The Borough had always contended that the contractors' claims were inflated or unsupported, and they were.

Further in support of the Borough's position, the arbitrators denied IWPC's claims for Mobilization, Maintenance and Protection of Traffic, and Erosion and Sedimentation Control work. The arbitrators denied IWPC's claims for disagreements between the Borough and the contractor over Cure-In-Place Lining segments which did not pass the specified testing criteria and were rejected. The arbitrators denied IWPC's claims for laterals which did not meet contract requirements. The arbitrators denied the contractor's claims for remaining work performed by IWPC but not accepted by the Borough. The arbitrators denied the contractor's claims for additional labor and supervision costs. Finally, the arbitrators denied the contractor's claims for lost profits.

By way of background, this Project was undertaken in two Phases. Phase 1 and Phase 2 were performed at the same time through the Borough streets and grounds. Many of the members of the public were affected in a variety of ways during the construction from 2016 through 2018, sometimes in a good way and other times in a bad way.

On June 30, 2018, IWPC walked off the job, terminated its contracts for Phase 1 and Phase 2, and demanded the Borough pay it more money for alleged delays and disruptions. There was, in fact, a delay that occurred when the Pennsylvania Department of Environmental Resources shut down the Project on March 1, 2018, because, DEP claimed, the Borough needed to apply for and obtain an NPDES permit. This kind of permit is called for when earth is disturbed on a project.

DEP permits an exemption where roadway utility work is performed and the total earth disturbance is less than one-acre. Nevertheless, the arbitrators believed that the engineer should have prevented the contractor's delay by acting earlier to obtain a proper NPDES permit. The Borough's engineering consultant was ruled to have caused the delay by not applying for the NPDES permit. The arbitrators found that this delay was a material breach of contract, and denied the Borough its costs to re-engineer, to re-bid, and to re-contract for the Project. The Project was required to be completed under a Consent Order from the Pennsylvania Department of Environmental Protection.

Throughout the contractual dispute, the Borough vigorously contested the claims of IWPC. At the time of the arbitration hearings, IWPC submitted a claim in the amount of \$5,069,695.97. The actual award was far less, approximately \$2,000,000. Moreover, the Borough will seek to recover the contractor's so-called earned contractual entitlement (\$900,004.59) under its original financing program for the Project. Nevertheless, although the Borough has defended against the contractor's \$5,000,000 claim, it will have to address the arbitrators' actual award of over \$1,000,000. The Borough considers this a matter of significance to the public.

There are three remedies that are already in the public domain: (1) to appeal the award within 30 days to the Court of Common Pleas of Cambria County, (2) to prosecute the Borough's previously filed breach of contract claim against the Project performance bond in the United States District Court for the Western District of Pennsylvania. That suit is named the Borough of Westmont against Arch Insurance Company. And (3) to pursue a suit which has been previously filed as a protective measure in the Court of Common Pleas of Cambria County against the engineering consultant. This third remedy is in the nature of a protective suit, which is typical practice under these kinds of circumstances. Nothing further will be said on this. No attorney-client privileged communications will be disclosed about these options. On advice of counsel, no discussion will be entertained by any Council member or the Mayor or Borough staff regarding any of these options because they are pending litigation.

The 29 page Final Decision and Award of the Arbitration Panel will be available for public review.