

September 24, 2011

Released Closed Session Minutes, 2007-2011, Historic Courthouse - KMD Termination

Summary

compiled by Monroe A. Miller Jr.

[Editors Note: Two sets of minutes have been released regarding the KMD litigation. The first were redacted minutes held by Bob Meynardie, a lawyer representing Haywood County, [re: www.haywoodtp.net, [Redacted Closed Session Minutes \(Released Public Information\) - Historic Courthouse Renovation - KMD, from 9/10/2007 - 9/8/2009. 9/13/2011...](#)], and the second set were the entire set of closed minutes released by the County Commissioners [re: www.haywoodtp.net, [Released Closed Session Minutes, 2007-2011, Historic Courthouse - KMD Termination. 9/21/2011...](#) .]

Anything in this summary **highlighted in yellow** had been redacted. It appears, by the way, that the only significant items that had been redacted are opinions by the three lawyers involved, Bob Meynardie, Chip Killian and Leon Killian (actually, there were four (4) lawyers involved with this - Kirkpatrick is a lawyer.) I guess they were the ones doing all the redacting. Primarily, the highlighted portions of these released closed session minutes are presented here, with much of the other material omitted. The reader is encouraged to read the entire set of closed minutes.

I have done all the work in extracting out how these people's actions (lawyers plus Haywood County Commissioners) ultimately led to costing the county \$1.5 Million Dollars. All you have to do is read this summary.

The complete set of released minutes are on www.haywoodtp.net, [Released Closed Session Minutes, 2007-2011, Historic Courthouse - KMD Termination. 9/21/2011...](#) . A best attempt has been made to transcribe the contents of these released minutes in this summary. Any errors are unintentional, and the released minutes stand as the true material.]

9/10/2007 Mr. Cotton shared that the architects are doing a tremendous job with the construction. Meynardie and Killian advised **giving 30 days to present a schedule and review it at that time.** Mr. Roberson will continue to report the situation to County Attorney Killian.

10/15/2007 Mr. Bob Meynardie presented **the evaluation of the project schedule for KMD Construction concerning the historic courthouse renovation.** Mr. Chad Roberson and Mr. Bob Meynardie reviewed the contract terms and specifically covered the termination clause.

1/22/2008 Mr. Bob Meynardie began **by stating that there are concerns related to the lack of a contractually compliant schedule being delivered by KMD Construction.** Mr. Noland concurred with Mr. Meynardie's statement, **which was that the schedules thus far submitted by KMD Construction do not comply with the contractual requirements.**

Mr. Meynardie provided options **to force a contractually complaint schedule to be delivered by KMD Construction.** First, to hold all future pay applications or two, suspend KMD Construction from the job until such time as a contractually compliant schedule is delivered by the general contractor.

1/31/2008 Mr. Meynardie advised that hold KMD Construction to a contractually compliant schedule is of primary importance.

4/7/2008 Vice-Chairman Kirkpatrick inquired if the County shared any liability. The county should not pay KMD Construction without knowing that the subcontractor is paid. More investigation regarding liability of the subcontractor's lien should be researched by County Attorney Killian.

5/5/2008 **[Editors Note:** This is the day David Cotton sent out the Letter of Termination to KMD]. County Attorney Chip Killian advised that closed session minutes must be released unless there is a reason for these records to remain closed.

Attorney Bob Meynardie, Nelson Mullins Riley & Scarborough LLP, stated that he will read the closed session minutes before advising the Board as to releasing them. Attorney Meynardie stated that the best scenarios is to keep KMD Construction and expect them to perform in a manner of expertise, but they are not performing.

Chairman Ammons stressed the importance to thoroughly examine the renovation project thus far and locate everything that is wrong. Chairman Ammons stated that the County cannot continue with KMD Construction on the job site. They simply must abide by the instructions given them by the architects, but they have not. Mr. Meynardie stated that the bonding company would be responsible for everything over the bond.

Mr. Noland **[Editors Note:** from earlier in the meeting, "Mr. Roberson introduced William "Bill" Noland, with Noland Construction Consulting, LLC."] recommended terminating KMD Construction.

Mr. Meynardie stated that the Board should expect litigation. County Attorney Leon M. "Chip" Killian stated that the County has already prepared them for this probable litigation.

Mr. Meynardie reviewed the sequence of termination. Mr. Meynardie has prepared a letter of termination that he will e-mail to Mr. Cotton. The Board could review the letter and send it to KMD Construction and to the surety. Mr. Meynardie recommended that Mr. Cotton prepare to inventory the project and lock it down.

During the recess, Mr. Meynardie e-mailed a proposed termination letter to Rebecca Morgan, Administrative Assistant, who printed the letter for review. The letter was addressed to KMD Construction. Mr. Cotton presented the letter to the Board. Mr. Meynardie advised that the letter was to be sent to KMD Construction and to Fidelity and Deposit Company of Maryland, the surety. Mr. Killian advised David Teague, Public Information Coordinator send a copy of the termination letter to the media. Also, the letter received from Mr. Roberson recommending the termination of KMD Construction should be sent to the media.

5/19/2008 **[Editors Note:** These minutes seem to have been completely omitted from the officially released set of redacted minutes! They have been included here in their entirety.]

[Editors Note: Comments by all lawyers (including Kirkpatrick), will continue to be highlighted in yellow].

Attorney Bob Meynardie, Nelson Mullins Riley & Scarborough LLP, stated that a seven day notice is required prior to termination of the contract with KMD Construction. The date of termination of KMD Construction was May 12th, 2008. Attorney Meynardie stated on May 6th, 2008, it was confirmed that the fifth floor on the historic courthouse project was not grouted properly. A subsequent letter was sent to KMD Construction which included this finding.

County Attorney Chip Killian stated that he received a call from Mr. Steve Smith who appears to represent KMD Construction as their attorney, but that has not yet been confirmed.

David Cotton, County Manager, stated that he received a letter from the Surety proposing a walkthrough with KMD Construction on Thursday, May 22nd, 2008 (sic) followed by a meeting on Friday.

A fourteen page letter was received from the office of Mr. Smith to Chad Roberson, PBC + L Architect. Mr. Roberson explained that this letter included responses for each of the points of poor workmanship by KMD Construction that was cited by the County. Mr. Roberson explained that he would respond to each point. Mr. Roberson presented the letter to the Board.

Mr. Roberson stated that on May 12th, 2008, his office received a lengthy rebuttal to the termination.

Attorney Bob Meynardie, Nelson Mullins, Riley & Scarborough LLP, stated that future litigation would be concerning dollars and not necessarily quality of workmanship. Eighteen different schedules were received from KMD Construction, one was handwritten. Vice-Chairman Kirkpatrick stated that the County needs to let the surety know of the poor workmanship.

Mr. Roberson has received telephone calls from numerous subcontractors who claim that they have not been paid. One subcontractor is owed \$95,000 and was advised to submit invoices to the Surety. The granite subcontractor is sending a letter stating what they were told to do by KMD Construction.

6/2/2008

[Editors Note: These minutes seem to have been completely omitted from the officially released set of redacted minutes! They have been included here in their entirety.]

The Board discussed that much of the Owner's willingness to allow KMD Construction to complete the project is based upon the Surety's willingness to have a full-time on-site project management for the first ninety days of the re-start. The scope, follow-up, and reporting of the testing of the CMU blocks should be controlled by the County. Therefore, the County intends to engage a testing agency to perform the testing. This change would remove the testing requirement from the Agreement and replace it with the requirement that the Surety repair or correct any deficiencies found. The Board expects the Surety to accept responsibility for the cost of this testing. The Surety is to establish an acceptable end date for paragraph 7 of the Agreement, which is dependent upon at least a preliminary schedule. The County would like the schedule to include, at a minimum, the interim milestones as required by the construction contract. The County will not allow the posting of any signage by KMD Construction during the completion of the project. Attorney Bob Meynardie agreed to submit

the above items of concern to Donald Spratt concerning revisions to the Takeover Agreement.

6/16/2008

[**Editors Note:** These minutes seem to have been completely omitted from the officially released set of redacted minutes! They have been included here in their entirety.]

Mr. Bob Meynardie, Attorney provided an overview of the proposed takeover agreement submitted by the Surety and characterized it as favorable to the County. Commissioner Enloe inquired as to the completion date and if the Courtroom would be available for the drama scheduled in December 2008 as part of the Bicentennial Celebration. Mr. Meynardie responded that the completion date presented by the Surety would suggest that possibility.

Vice-Chairman Kirkpatrick raised reservations about KMD Construction's ability to complete the project. Mr. Chad Roberson, Architect stated that there are three significant milestones identified in the contract. The milestones include a substantial dry in, temporary power and temporary mechanical. Commissioner Upton stated that the most important quality of work issue is related to the concrete masonry unit (cmu) walls and that we need to ensure that the walls are correct.

Commissioner Curtis inquired if KMD would sue and if KMD is aware that the County may sue for additional costs incurred. Mr. Meynardie responded that they have made several assertions of delay in time and money.

Chairman Ammons asked about ensuring the quality of the granite installation. Mr. Roberson stated that the specification clearly outline the proper installation technique. Also, KMD has not installed a mock up which has been approved by PBC+L.

Commissioner Curtis stated that he has significant concerns about safety and allowing KMD back on the job. Mr. Meynardie stated that the Surety will want to use KMD as the completing contractor. He stated that if we do not agree to allow KMD to complete the project, the Surety may walk away. A final point stated by Mr. Meynardie was that the County is relying on the Surety and their engineer to complete the project. Commissioner Upton inquired as to what capacity KMD would serve if allowed to complete the project. Mr. Roberson responded that the Surety would use KMD Construction's General Contractor's License Number. He stated that KMD is not self performing substantial work but rather subcontracting.

Mr. Meynardie stated that the materials testing component of the takeover agreement is under negotiations. The Surety is proposing to only pay for the portion of the testing which reveals any defects. Mr. David Cotton, County Manager stated that the reason we are requesting this testing is directly related to KMD Construction's performance and that the Surety should pay for all the testing. He also suggested that the County directly engage MACTEC to perform the materials testing before agreeing to the takeover agreement. Mr. Meynardie stated that he would inform the Surety of this directive.

6/30/2008

[**Editors Note:** These minutes seem to have been completely omitted from the officially released set of redacted minutes! They have been included here in their entirety.]

[Editors Note: Will change format a little at this point and continue only with lawyers comments, including Kirkpatrick's.]

County Attorney Leon M. “Chip” Killian, III, and Bob Meynardie with Nelson Mullins Riley & Scarborough LLP, were present by conference call to discuss the initial verbal report received from MACTEC concerning the historic courthouse renovation.

Attorney Meynardie stated that he corresponded via e-mail with the Surety on Friday, June 27th, 2008. The e-mail stated that the findings of MACTEC inspection were worse than the County expected.

... Vice-Chairman inquired as to when the inspections should have taken place.

Vice-Chairman Kirkpatrick asked what arrangements could be put in place with KMD Construction and the Surety in order to protect Haywood County and make KMD Construction solely responsible. Vice-Chairman Kirkpatrick also inquired if a guarantee could be made stipulating that the County is only using KMD Construction’s license within the terms of the Takeover Agreement. Attorney Meynardie stated that he was not certain that a guarantee could be reached, but that he would research this question. Vice-Chairman Kirkpatrick reiterated that the County could not give KMD Construction any authority on this project. **Chairman Ammons agreed and stated that in his opinion, KMD Construction has committed fraud.** Vice-Chairman Kirkpatrick and County Attorney Killian stated that fraud could be difficult to prove. However, there seems to be evidence to prove negligence.

[Editors Note: **Underlining and bold** above is mine].

7/7/2008

[Editors Note: These minutes seem to have been completely omitted from the officially released set of redacted minutes! They have been included here in their entirety.]

[Editors Note: Comments by all lawyers (including Kirkpatrick), will continue to be highlighted in yellow].

[Editors Note: Staff present included for the first time, Bruce Crawford, Haywood County’s Chief Building Inspector. From the formal complaint filed with the NCDOT, “I requested an examination of the Certificate of Occupancy for the Haywood County Fairgrounds Arena Building from Bruce Crawford January 4, 2011. He indicated the building is under a Temporary Certificate of Occupancy, for which there is no time limit or expiration date, it can be extended indefinitely.” NCDOT rode into town and the next thing you knew, the Temporary Certificate of Occupancy had been pulled.]

Attorney Bob Meynardie with Nelson Mullins Riley & Scarborough LLP, was present by conference call to discuss the report received from MACTEC concerning the historic courthouse renovation.

David Cotton, County Manager, introduced Bruce Crawford, Haywood County’s Chief Building Inspector. Mr. Cotton stated that questions regarding inspections could be answered by Mr. Crawford. Mr. Crawford explained that KMD Construction was responsible for contacting the Inspection’s office. When KMD Construction contacted the Inspection’s office, inspections were performed, but only on areas designated for inspections by KMD Construction. Various inspections were performed approximately thirty times on the historic

courthouse renovation.

Commissioner Enloe stated her opposition to allowing KMD Construction on the site of the historic courthouse property. **[Editor's note: Why?]** Commissioner Upton also expressed concern regarding KMD Construction being on site. **[Editor's note: Why?]**.

Attorney Meynardie stated that he was inclined to call KMD Construction's legal representative and ask how much of this work was to be self performed in order to allow them an opportunity to explain the failures of KMD Construction.

7/21/2008 **[Editors Note: Continuation of minutes in the release set of redacted minutes resumes here. The last page number for the 5/5/2008 set of minutes was HCC-017767, and the next sequential page for the minutes of 7/21/2008 is HCC-017768. Why were the above minutes not included in the released redacted set of minutes? Did KMD receive the missing minutes?]**

Attorney Bob Meynardie, Nelson Mullins Riley and Scarborough, stated that Bernie Friesmuth with Nicholson Consulting, P.C., was waiting outside the meeting room. Mr. Friesmuth may be called upon to join the closed session meeting in order to answer questions. Attorney Meynardie explained that presently his office is negotiating with the Surety. MACTEC has issued a report regarding construction issues. Attorney Meynardie presented a memorandum to the Board of County Commissioners, which summarized his interviews with representatives for KMD Construction and his recommendation for agreeing to allow KMD Construction as the completing contractor per the Surety's request.

Attorney Meynardie stated that there is no evidence that KMD Construction performed in a manner to intentionally harm the County. The conclusion is that the quality problems are due because KMD Construction provided poor oversight and management, but their failures were not due to misconduct.

Attorney Meynardie stated that legally the County has terminated KMD Construction and has no obligation to hire them. Attorney Meynardie reviewed the process in the event that the County authorizes the Takeover Agreement with the Surety. William "Bill" Noland, with Noland Construction Consulting, LLC, explained that if KMD Construction does not finish the renovation of the historic courthouse, the Surety would be required to engage another contractor to finish the project. This is an expensive proposition requiring a new bidding package. County Attorney Chip Killian explained that once the Surety signs, they would be responsible for completion of the project.

Attorney Meynardie stated that payment of MACTEC is a stipulation that could be added to the agreement.

8/4/2008 Attorney Bob Meynardie, Nelson Mullins Riley and Scarborough, presented a draft Takeover Agreement between the County and Fidelity and Deposit Company of Maryland, the Surety, in order to complete the renovation project on the historic courthouse. The Board discussed revisions to the proposed Takeover Agreement.

Commissioner Enloe stated that the Surety is insisting on using the contractor that the County fired, and therefore, she will vote against the motion as a matter of principle. **[Editors Note: (expletive deleted)]**. Vice-Chairman Kirkpatrick inquired as to the alternatives in the event

that the Board did not sign the Takeover Agreement. Attorney Meynardie explained that without the Takeover Agreement, the Surety would either walk away from the project or hire a contractor. **[Editor's note: Why is Kirkpatrick, who is a lawyer, asking another lawyer a question he should know the answer to, since he is a lawyer?]** Vice-Chairman Kirkpatrick inquired as to the time line for completing the project in the event that the Board did not approve the Takeover Agreement. Attorney Meynardie stated that a new bid package would be necessary. This would be a very time consuming step. Vice-Chairman Kirkpatrick inquired if Mr. Friesmuth would present regular reports on the project. Attorney Meynardie confirmed that Mr. Friesmuth would report regularly. Mr. Meynardie stated that Mr. Friesmuth is ready to begin working on the project.

10/7/2008 Attorney Bob Meynardie, Nelson Mullins Riley and Scarborough LLP, was present by conference call to discuss proposal requests presented by Chad Roberson, Architect with PBC+L. Mr. Roberson presented pricing that was negotiated for proposal requests 13 (slope), 14 (floor levels), 15 (4th and 5th floor windows), 16 (audio and visual work - courtroom), 17 (courtroom plaster work), and SK27. Mr. Cotton explained that the proposals are to repair some unforeseen conditions of the historic courthouse. Attorney Meynardie explained that the owner is responsible for costs that arise due to unforeseen conditions during renovation of the historic courthouse since these were not discovered until after the time of the contract.

11/3/2008 County Attorney Killian recommended that even though Attorney Bob Meynardie, is no longer with Nelson, Mullins Riley and Scarborough, he should remain involved with the renovation project.

11/17/2008 Attorney Bob Meynardie explained that within ten days the architect must respond to the delay claim.

Mr. Meynardie reiterated the need to respond to the delay claim.

12/15/2008 Mr. Meynardie explained that the Takeover Agreement states that the Surety will pay for all third party inspections related the CMU wall remediation. The Surety new states that the County should pay for the inspection.

Mr. Meynardie advised that KMD Construction provides the license for the work. Bernie Friesmuth, Nicholson Consulting, P.C., was to be onsite everyday for the first ninety days.

Mr. Meynardie stated that he will request the Surety to provide an estimate of the completion date for the historic courthouse.

1/5/2009 Chairman Kirkpatrick stated that the delay claims have been analyzed by Mr. Roberson and Attorney Bob Meynardie. The Surety may request mediation no later than thirty days after being notified of the denial by the County. **[Editors Note: Here we go - into arbitration!]** Attorney Meynardie stated that he will report back to the Board as to how the County finds a mediator. Mr. Meynardie stated that the two mediations can be combined so that two separate mediations will not be necessary.

1/20/2009 Mr. Cotton explained that a letter requesting additional fees has been received from PBC+L. The request includes compensation for additional work by Chad Roberson, PBC+L Architect and consulting engineers hired directly by the Architect. County Attorney Killian explained

that the amount requested is \$101,028 in additional compensation. Mr. Killian stated that he discussed this request with Attorney Bob Meynardie. Mr. Killian stated that Mr. Meynardie recommended that the County not withhold payment, but ask how the amount was determined, and pay with a reservation on the question of entitlement for additional contract administration.

2/2/2009 5) Chad has spoken to Attorney Bob Meynardie on how to access liquidated damages. Attorney Meynardie is researching this issue.

David Cotton, County Manager, stated (sic) that Attorney Meynardie said the first half is mediation then arbitration.

8/3/2009 Attorney Bob Meynardie explained that a lawsuit was filed against Haywood County by KMD Construction for \$2 million. David Cotton, County Manager, and the County were served in June 2009. The County moved for a thirty day extension of time. An Appeal arbitration is a single hearing. As part of the contract, they can force the County into arbitration. The complaint concludes problems with design, and not knowing that the jail on the fourth floor was part of the structural support for the fifth floor. Attorney Meynardie stated that he is working a strategy for all four parties to go to arbitration, but is doesn't look promising. Attorney Meynardie stated that he feels very confident about the County's position.

8/15/2008 **[Editors Note: These minutes seem to have been completely omitted from the officially released set of redacted minutes! The next and last set of meeting minutes is 9/8/2009. The minutes following below appears to be out of sequence, 8/15/2011, and is included here and also in it's proper date sequence at the end of this summary.]**

8/15/2011 The Board discussed potential legal action against the architect. **[Editors Note: What? More damned lawsuits?]**

8/27/2009 Attorney Meynardie spoke to Attorney Steve Smith, representing KMD Construction, who was surprised that we did not want to go into arbitration. ...

9/8/2009 **[Editors Note: This is the last of the released redacted minutes. Readers are encouraged to read the rest of these minutes in there entirety.]**

10/5/2009 **[Editors Note: More opinions by Meynardie and Killian. Please read the actual minutes.]**

11/2/2009 County Attorney Killian stated that KMD Construction is joining the arbitration.

12/7/2009 The surety owes the subcontractors approximately \$325,000, which the County as agreed to pay directly to the subcontractors.

6/7/2010 Marty Stamey, Assistant County Manager, stated that three boxes were shipped to Attorney Bob Meynardie. County Attorney Chip Killian stated that there is a three-person panel. Chairman Kirkpatrick stated that the decision of the panel is final.

[Editors note: When I asked to review the boxes that had been returned from Bob Meynardie,

there were only two, not three.]

2/21/2011 Attorney Meynardie advised the Board that after careful review, his findings are that the County had just cause to terminate.

[**Editors Note:** Evidently, the arbitration board thought otherwise.]

Attorney Meynardie stated that the County could be out as little as \$110,000.

[**Editor's Note:** This sounds similar to the quote from Swanger in the article in The Mountaineer on Aug. 10, 2011 by Vicki Hyatt, County ordered to pay contractor \$713,000 in courthouse dispute: "The county withheld \$360,000 from the final payment to KMD, Swanger said, so excluding attorney and other fees, which were largely paid for in the previous budget year, the unbudgeted amount the county must come up with is \$121,500."]

Ms. Davis confirmed that Bill Noland has been paid in full. Vice-Chairman Kirkpatrick stated that had PBC+L done their job the County would not have needed to hire Mr. Noland. Settlement authority of \$179,000 was approved by the Board.

[**Editors Note:** Well, this answers the question of who hired Bill Noland, but it doesn't explain why Bill Noland sent his invoices over to Bob Meynardie at Nelson Mullins up to the point that Bob Meynardie ventured from Nelson Mullins to start his own law firm. Were these invoices laundered through Nelson Mullins as legal fees and not fees to Bill Noland? It's just a question. After Meynardie left Nelson Mullins, Bill Noland's invoices were sent to David Cotton at the courthouse.]

[**Editors Note:** Why at this point in time is Kirkpatrick finally starting to dump on PBC+L ?].

Dale Burris, Facilities and Maintenance Director, stated that he kept a log of the hours he worked with Mr. Noland on this project and inquired if the Board was willing to compensate him.

[**Editors Note: What the ... (expletive deleted !!!!).** Isn't Burris a county employee and he was doing that as part of his job? Why come after the fact and ask for extra compensation? Did he ever receive this extra compensation?]

3/7/2011 Vice-Chairman Kirkpatrick advised that the arbitration panel are three professional construction attorneys. Arbitration is scheduled to begin May 23rd, 2011.

6/6/2011 Attorney Meynardie expressed an opinion that the case against KMD is strong and that KMD Construction was not delayed by the identified unforeseen conditions.

[**Editors Note:** This confirms my life-long experiences. Lawyers can only express opinions, judges make the rulings.]

7/18/2011 Bob Meynardie, Attorney, shared that no decision has been made since the arbitration held with KMD Construction. Mr. Meynardie reviewed the potential outcome of the arbitration.

9/6/2011 Chip Killian, County Attorney, presented a letter that Bob Meynardie, Attorney, received from Russell Killen, Attorney with Parker Poe, regarding the Historic Courthouse. The letter, dated September 1, 2011, reviewed a potential indemnity claim against PBC+L.

End of released minutes.

Don't forget to review the findings of the Arbitration Board, now that you have read the background, also found on www.haywoodtp.net, [County Loses \\$713,057.06 in Legal Arbitration Expenses with KMD + Legal Expenses \(nearly \\$1/2 Million\), 8/02/2011. 8/10/2011...](#)].