

**Lee County Board Of County Commissioners  
Agenda Item Summary**

Blue Sheet No. 20040727

**1. REQUESTED MOTION:**

**ACTION REQUESTED:** Award Professional Services Agreement for CN-04-02, DESIGN AND ENGINEERING SERVICES FOR THE WASTE TO ENERGY EXPANSION PROJECT, to Burns & Roe Enterprises, Inc. in a not-to-exceed amount of \$5,919,000.00. Also request that the Board approve waiving of County formal procurement processes (if needed) and authorize the use of Director Material Purchase Orders based on the Engineer's competitive procurement process, which allows the County Public Works to purchase items directly from suppliers of specified equipment and/or materials as a cost/time saving measure

**WHY ACTION IS NECESSARY:** Board approval required.

**WHAT ACTION ACCOMPLISHES:** Provides Engineering, Design, and Procurement services for the complete design of the Expansion project to be constructed at the existing Lee County Waste to Energy Facility site, including the design of all equipment required, and, to integrate the Expansion Project into the existing Lee County Waste to Energy Facility.

**2. DEPARTMENTAL CATEGORY:**  
COMMISSION DISTRICT #: CW  
08 Solid Waste

*A8B*

**3. MEETING DATE:**

*06-15-2004*

**4. AGENDA:**

CONSENT  
 ADMINISTRATIVE  
APPEALS  
PUBLIC  
WALK ON  
TIME REQUIRED:

**5. REQUIREMENT/PURPOSE:**  
(Specify)

STATUTE  
ORDINANCE  
 ADMIN. CODE AC-4-4  
OTHER

**6. REQUESTOR OF INFORMATION:**

A. COMMISSIONER  
B. DEPARTMENT Solid Waste  
C. DIVISION  
BY: Lindsey Sampson, Director

*Lindsey J. Sampson*

**7. BACKGROUND:**

On March 30, 2004, the Board of County Commissioners approved the ranking of Consultants and authorized negotiations to commence with the number one ranked firm. The ranking was as follows: (1) Burns & Roe Enterprises, Inc.; (2) Washington Group International, Inc.; and (3) Black & Veatch Corporation.

Contract negotiations were successful with the number one ranked firm, Burns & Roe Enterprises, Inc. Board approval is required for the final agreement. Burns and Roe is in Chapter 11 bankruptcy as a "Debtor in Possession" as the result of asbestos claims from prior engineering projects in the last 20+ years. An analysis of the attendant risks to the County is included with the back-up materials.

Funds are available in account string: 20092340102.506510, Solid Waste Processing Equip. - SW Mgmt - Professional Services.

Attachment: 1. One (1) final draft Professional Service Agreement.

**8. MANAGEMENT RECOMMENDATIONS:**

**9. RECOMMENDED APPROVAL:**

A Department Director	B Purchasing or Contracts	C Human Resources	D Other	E County Attorney	F Budget Services <i>6/3/04</i>				G County Manager
		N/A	N/A		OA	OM	Risk	GC	
<i>Danville 6-2-04</i>	<i>[Signature]</i>		<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>	<i>Danville 6-2-04</i>

**10. COMMISSION ACTION:**

\_\_\_\_ APPROVED  
\_\_\_\_ DENIED  
\_\_\_\_ DEFERRED  
\_\_\_\_ OTHER

Rec. by CoAtty  
Date: *6/2/04*  
Time: *2:35*  
*01m*  
Forwarded To:  
*[Signature]*

RECEIVED BY  
COUNTY CLERK: *CW*  
*6-2-04*  
*4:30*  
COUNTY ATTORNEY  
FORWARDED TO: *PH*  
*6-3-04*  
*3PM*



WILLIAMS MULLEN

**MEMORANDUM**

TO: Lindsey Sampson  
David Owen

FROM: William H. Schwarzschild, III

DATE: May 4, 2004

RE: Burns and Roe

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**FACTS**

Lee County has been negotiating for a period of time with Burns and Roe Enterprises, Inc. ("Burns and Roe" or the "Debtor"), to perform certain engineering services (the "Contract") in connection with the design and construction of an additional boiler unit at a waste-to-energy facility owned by Lee County and operated by Covanta Lee, Inc. It recently came to Lee County's attention that Burns and Roe is a debtor-in-possession in a Chapter 11 proceeding pending in the United States Bankruptcy Court for the District of New Jersey (Case No. 00-41610 (RG)). Given the procedural requirements for certain transactions taking place during bankruptcy proceedings as well as the uncertainties that often accompany a debtor's operations while in bankruptcy, the County has expressed concerns about the ability of Burns and Roe to enter into the Contract and carry it to completion.

## ISSUES

1. Whether Burns and Roe must obtain court approval prior to entering into the contract with Lee County?
2. Whether there are any extraordinary risks associated with the Contract as a result of Burns and Roe's bankruptcy proceedings?

## SUMMARY CONCLUSION

### A. Required Approvals.

Typically, a debtor-in-possession may continue to operate its business in the ordinary course unless the court, on request of a party in interest and after notice in a hearing, orders otherwise. More specifically, Section 363 of Title 11 of the United States Code (the "Bankruptcy Code") authorizes a debtor-in-possession to "enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing and . . . use property of the estate in the ordinary course of business without notice or hearing."

If the transaction contemplated under the Contract falls within the "ordinary course" operations of Burns and Roe, Burns and Roe should be able to enter into and perform the Contract according to its terms without any special motion or proceedings before the Bankruptcy Court.

### B. Risks.

Although the Bankruptcy Code attempts to grant certain protections to parties that deal with a debtor-in-possession, those protections are not absolute. If a case under Chapter 11 fails

(i.e., the plan is not confirmed or the case is dismissed or converted to a case under Chapter 7 of the Bankruptcy Code), a debtor could find itself forced into a liquidation that might cause a termination of operations and a disposition of assets at values that may not cover administrative claims incurred during the Chapter 11 proceedings. Similarly, if a debtor-in-possession should determine that a particular contract is improvident, it could seek authority to “reject” the contract pursuant to Section 365 of the Bankruptcy Code (which permits assumption or rejection of executory contracts). From our review of the Docket, and the Debtor’s Amended Plan of Reorganization, dated December 15, 2003 (the “Plan) and the Debtor’s Disclosure Statement (the “Disclosure Statement”), it appears unlikely that such a result would occur.

## DISCUSSION

### A. Background.

Burns and Roe filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on December 4, 2000. According to various pleadings filed in the case, Burns and Roe is engaged in engineering, construction and related activities for the power generation industry. Through the early 1980’s, customers of the Debtor frequently specified asbestos or asbestos-containing materials to be installed in power generating facilities to reduce the risks to plant operators from high temperature liquids and vapors used to produce electrical power. As a result, Burns and Roe found itself named as a defendant in an increasing volume of law suits seeking damages for personal injury resulting from asbestos exposure.

In 1994, Congress added subsection (g) to Section 524 of the Bankruptcy Code to establish a specific statutory framework under which the Bankruptcy Court was authorized to confirm a plan of reorganization that provided for a discharge of asbestos-related claims and an injunction against the prosecution of such claims against the reorganized Debtor and certain

other parties. The Burns and Roe Plan is specifically designed to take advantage of the protections afforded under Section 524(g). If the Burns and Roe Plan is confirmed, Burns and Roe should emerge from bankruptcy shielded from asbestos-related claims and demands.

B. The Burns and Roe Plan.

Burns and Roe's proposed Plan contemplates the establishment of an Asbestos Personal Injury Trust<sup>1</sup> that will be funded, in part, by payments over time by Burns and Roe and its affiliates and a transfer of Insurance Rights. From and after the Effective Date of the Plan all Asbestos Personal Injury Claims will be "channeled" to the Asbestos Personal Injury Trust. The claims of all other creditors and holders of equity interests are not "impaired." Since the holders of claims against the trust are the only claims that are impaired under the Plan, they are the only parties that will vote to accept or reject the Plan in accordance with applicable bankruptcy procedure.<sup>2</sup>

C. Disclosure Process.

Before acceptances may be solicited by a plan proponent, the proponent must circulate a court-approved disclosure statement that contains information in sufficient detail to enable a "hypothetical reasonable investor typical of holders of claims or interest of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(1). Although Burns and Roe's Disclosure Statement was filed on December 15, 2003, it has yet to be approved. According to the Debtor's counsel, the Disclosure Statement should be approved before the end of May, thereby enabling the Debtor to solicit Plan acceptance from Asbestos Personal Injury Claimants. Typically, a confirmation hearing is scheduled 30 to 45 days after the Disclosure Statement and

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<sup>1</sup> Capitalized terms not otherwise defined in this memorandum shall have the meanings ascribed to them in the Plan.

other solicitation materials are distributed to creditors. Thus, it would be reasonable to assume that a Confirmation hearing will be held prior to the middle of July, 2004.

D. Confirmation Process.

A court shall confirm a plan only if all of the requirements of Section 1129 of the Bankruptcy Code are met. In addition to finding that the plan complies with the applicable provisions of Title 11, the court must find, among other things, that the plan has been proposed in good faith; that the plan satisfies the “best interest of creditors” test;<sup>3</sup> that the confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization of the debtor or any successor to the debtor under the plan (unless such liquidation or reorganization is proposed in the plan), and that each class of claims or interests has accepted the plan (or is deemed to have accepted the plan, i.e., the class is not impaired). Generally, a class of claims has accepted the plan if the plan has been accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class. Under Section 524 (g) of the Bankruptcy Code, at least 75% of the Asbestos Personal Injury Claimants voting on the Plan must accept the Plan in order for the Court to enter the permanent channeling injunction that is fundamental to Burns and Roe’s emergence from bankruptcy free from asbestos-related claims and demands.

In addition, in order for confirmation of the Burns and Roe Plan to occur, the Plan sets forth certain conditions that must be satisfied or be waived.

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<sup>2</sup> A class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from holders of claims or interests of such class is not required. 11 USC § 1126(f).

<sup>3</sup> With respect to each impaired class of claims or interests the Court must find that (a) each holder of a claim or interest of such class (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such plan of interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

E. Risks and General Comments.

The primary risk associated with the proposed Contract flows from normal business issues. Does Burns and Roe have a proven track record in performing the kinds of services contemplated under the Contract? Does Burns and Roe have the financial resources to carry out the Contract according to its terms? Does Burns and Roe have the personnel necessary to perform the services contemplated under the Contract? These are the types of concerns that would be addressed by Lee County before entering into any contract with a third party.

Bona fide claims arising under a contract entered into during the pendency of the Chapter 11 proceedings typically is entitled to priority as an administrative claim – i.e., priority over the claims of prepetition unsecured creditors. Since Burns and Roe would provide services to Lee County under the contemplated Contract, damages for any breach occurring prior to Burns and Roe's emergence from Chapter 11 should be entitled to administrative claim treatment. The Plan provides that any executory contract that has not been otherwise assumed or rejected shall be deemed assumed as of the Effective Date. Thus a breach by Burns and Roe occurring after the Effective Date of the Plan would be dealt with under normal, non-bankruptcy procedures as provided in the Contract or under applicable state law.

CONCLUSION

Burns and Roe should not be constrained by any procedural or statutory limitation in entering into and performing the Contract. The business risks to Lee County in dealing with Burns and Roe should be analyzed and assumed (or rejected) according to typical business considerations employed by the County in other circumstances. To the extent the County relies on payment or performance bonds in circumstances of this kind, the risks could be substantially minimized.

If you have any questions, please feel free to contact me.

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