

Council met in special session with the following persons present: Mayor Richard Zink, Safety-Service Director Ralph Holt, Council President Richard Donley, Assistant Prosecutor Kathryn Hapner and Clerk Beverly Brown.

President Richard Donley called the meeting to order at 5:00 p.m. at 130 Homestead Avenue, Justice Center, Municipal Court Room.

ROLL CALL:

Present: Mr. Lee Koogler, Mr. John Levo, Mrs. Bonnie Parr, Mr. Peter Pence, Mr. Brian Waller

Absent: Mr. Rod Daniels and Mr. Dave Shoemaker

There was a motion by Mr. Koogler to excuse Mr. Shoemaker from the meeting and Mr. Levo seconded the motion with all members present voting yea. President Donley also explained that Mr. Daniels was absent from the meeting due to a military commitment. At this time everyone stood and repeated the "Pledge of Allegiance".

The purpose of the special council meeting was

Mr. Holt was asked to explain his request for the meeting and he responded that he was requesting to go into executive session due to possible litigation. Mr. Levo made a motion to go into executive session and Mrs. Parr seconded the motion with all members present voting yea. Executive session entered into at 5:14 p.m. Council members returned from executive session at 6:13 p.m.

President Donley opened the floor to anyone present that might wish to address council. He limited this to a maximum of ten minutes.

My name is Brad Miller with Building Crafts, Inc., resident of Middletown, Ohio. First, thank you for the opportunity to speak to council tonight. Building Crafts believes that it's submitted the lowest and best bid for the Wastewater Treatment Plant Upgrade Project here in Hillsboro. We believe that our bid for the project will save the city of Hillsboro almost \$183,000 over the next best option for all of the bids that have been received. We believe that we've submitted the lowest and best bid on the basis of the bid documents that were given to all of the bidders.

We do not believe that there are any requirements in the bid documents that are cause for having our bid rejected. There has been just a use of, we believe, improper discretion in the review of the bids that has rejected our bid. The bid documents both in the advertisement and in the Instruction to Bidders both allowed for bidders to submit bids on any or all parts of the documents or of the schedules that listed in the bid documents. That being schedules being the general construction schedule, the plumbing, the HVAC or a combined schedule. All were listed in there and both of those documents said that bidders could submit bids for any or all.

We have done that. We have submitted documentation of our partial combination bid that was required on the partial combination bid form that required bidders to submit individual bids for each of the contracts that were included in the partial combination so that the city could have information for review and comparison with other bids. We believe that the second place bidder, Dugan & Meyers; their bid did not comply with that requirement. That they bid the individual parts of their partial combination and therefore that would create a situation where their bid is invalid as it's presently proposed to be awarded on their partial combination.

So again we look forward to the opportunity of being given the chance to have this contract awarded to us. We don't have a whole lot of comfort at this point that it's going that way. But I appreciate again the opportunity that you've given me to state the case of why Building Crafts should have the job.

President Donley asked Mr. Miller if he had a copy of the requirements for the bid. Mr. Miller said that on the advertisement for the bids it's page two under item two about the middle of the page where it says, "Bids are invited for the following separate schedules" and it proceeds to list the schedules; general conditions which is general construction, electrical instructions, HVAC, plumbing and then combination of any or all of the above. President Donley asked if he could have a look at the document. Mr. Miller said that he thought the following paragraph or the sentences that followed that first section that he read also say that, "Bidders at their option may submit a separate and independent bid for any or all of the separate schedules contemplated under this advertisement" which led us to believe "any or all" so we bid "any" so to speak.

The similar wording or similar allowance was found in the "Instructions to Bidders" which followed the advertisement. In paragraph 17.1.2 of the "Instructions to Bidders" where it states, "Bidders shall submit a bid on individual sections or any combination of schedules as set forth in the bid form." The next paragraph 17.1.2.1 states, "Bidders may submit a bid for any of the separate schedules or any combination of schedules as provided in the bid form." I have additional copies of this if you would like to keep them. Mr. Miller gave several copies to council members.

Mr. Koogler said, "My question would be I guess based upon that interpretation, is that why Schedule 1 according to what I have been or given Table 1 was unfilled but that is why Table 2 was filled out in entirety?" Mr. Miller responded in the affirmative. Mr. Koogler then asked, "Based upon your interpretation of that section?" Mr. Miller, "That we were allowed to bid any or all of the schedules. We chose to bid the GC schedule and the partial combination schedule which is at the bottom of Table 2 which includes a cost of plumbing, HVAC and General Construction. And then we went on to provide the separate bids required by sub-notes on Table 2 for that partial combination."

Pat Devine said, "I am the attorney for Building Crafts and I just wanted to point out a few things. I just wanted to appeal to council in terms of their common sense and sense of fairness. Table 1; a bid was not submitted by Building Crafts as Mr. Miller's indicated because he felt in reading the Instructions to Bidders and advertisement that the option was given and you have the language in front of you which very specifically says in the instructions, that a bidder can bid any and all or any combination of the different schedules or contracts types of work.

Now we understand that there's been only two reasons given by Mr. Holt with respect to disqualifying Building Crafts' bid. He and the project engineer both said that Building Crafts is qualified to do this work. Brad was prepared to tell you the types of projects they've done in this county and the state of Ohio of similar size or larger size and they have done a good job of doing that. So it's not a question that I hear from the city that they're not a qualified contractor and would not do a good job. It's on this technicality with respect to Table 1 and the only language when asked where does it say in all of these bid documents that a Table 1 must be filled out; the only answer I receive is in the bid instructions there's a paragraph 5.1.3; the same language if you have the Table 1 in front of you is a footnote which says, 'Each bidder bidding on the combined construction pay items in Table 1 is required to submit a bid for the general construction pay items in Table 2. Failure to submit a bid for general construction in both tables shall be cause for rejection of the bid.'

What that means is, it doesn't say each bidder shall bid a Table 1, if a bidder does bid a Table 1 which is the combination of all four elements; that they have to do Part 1 of Table 2 which is a breakout of the general construction. As you all know, the general construction portion of this is the largest portion of the four parts of this project. So it is not.if that was the intent it does not say that and there's other contractors here who didn't read it as requiring a Table 1 either. So there was another general contractor who didn't bid a Table 1 because obviously they didn't feel it was necessary either. So, I don't thinkand this one final point on this Table 1, it is interesting that the city has a recommendation and a resolution before it to go with a Table 2 bid. So this whole issue about Table 1 is not even a complaint any more; it's moot.

I want the council to see something that is very important on this issue before you make your decision. Table 2 of Dugan and Meyers' bid which you apparently have a recommendation to award the project, this is their actual bid. (Mr. Devine passed out copies) If you look on page 2 of their bid they left blank HVAC and plumbing. They did not put a price on those two items and so we don't know, the city doesn't know what their price is based upon this bid which was what was opened on the bid date. And so if you look at footnote 3 it requires that all items in the combination be filled out; and they didn't do that. But let me add as Mr. Holt has indicated to me, is after the bids were opened; several days later, maybe a week later; Dugan & Meyers was contacted by the city and said, 'We need your numbers for those two items.' And those two items were provided after the bids were open and I would say that's something that was not an opportunity provided to any of the other bidders."

Doug Mitchell with PAE & Associates came forward and stated, "To start off with, this is very unusual anymore. I feel for the city, you're trying to move forward with getting a project underway. But as a representative of PAE I believe both of the lower contractors have made serious and very damaging problems in their bid form and the way it was presented at the time. The bid form itself is lent itself to many, many chances for errors for which I believe both contractors have made fatal errors for which they should not be awarded.

PAE has filled out every line, every indication of what's required for this project and provided you with a very fair and well under the budget project. So therefore, we believe that we should have been awarded and have the recommendation of the engineer to do this project because there is several things on those bid forms that are very cumbersome and very difficult to fill out. We took the time and effort to make that because we would really like to do this project for the city. Now, carrying that a step further with this situation; if you award to this one you're going to have this one at you; if you award to this one, this one's coming at you.

If we look at this in a whole different light gentlemen, I believe that you only have one real recourse and that's to throw this thing out and re-bid it. Talk to you city solicitor and see if you can enact a emergency act to re-bid this project in two weeks so you can still make your funding and still make this project go. Because either way you make a move, you could lose your funding with a law suit that could be drug out for a long period of time. I don't think that's in the best interest of the city.

I appreciate your time; if you have any questions for me I'd be glad to answer them. I'm looking forward to answering any questions that you may have." President Donley said that he appreciated his honesty and Mr. Mitchell responded, "An emergency react and get this thing going would be good. A lawsuit sure won't help you. Or you can award it to PAE and let them both come after you."

Marty Schirmer came to the microphone and said, "I'm with Dugan & Meryers, I'm vice-president of construction in charge of treatment plants. So I'm in charge of everything from bidding to the actual construction. I want to make a couple observations; I'll try to be quick. My first observation is to us as a bidder it's very clear that in the very first thing you read on the job; the advertisement for bids; it's typical it says when it's bidding, general nature and the very first thing you read is, 'Bids are invited for the following separate schedules, general conditions comp, (General Contractor's shall submit a combined bid an additional bid in addition to the general contract). It's unequivocal, it says it right there.

The next thing I would like to point out is earlier we did hear about paragraph 17.1.2.1 regarding that bidders may submit a bid for any of the separate schedules or an combination as provided in the bid form. And of course the bid form very clearly lines out that 'failure to submit a bid for general construction both tables shall be cause for rejection'. That was the first point that I wanted to make. That test was very clear and that was made very clear at the mandatory pre-bid meeting. This was a subject that was brought up and it was very clear to us; I was there and when I left that was the most significant point made. And of course it didn't even have to be made, it's very clear the first thing that hits you when you read the documents.

The next thing quickly I wanted to say was; we, Dugan & Meyers do believe Building Crafts or anybody who didn't bid the combination bid for the entire project did have a competitive advantage at the time of bid. Why is that? Well, putting together a complete combination bid and specifically the electrical; electrical is very detailed especially on a wastewater treatment plant remodel and the competitive advantage comes from; it takes a lot of effort to put together, to glean through all those scopes of work from the electricians, to run all the numbers, to do all the math, to keep the separate sheets; that takes effort. And we did all that effort and we think it was required, to not do that you have additional time to work on the general contract number.

Now you may ask, what does that really mean? Then why was it an advantage for the city to require the complete combination bid, which is clear? And there is a clear advantage to the owner and it's a really great idea for owners and owners' representatives to require that. Because then during the entire bidding process the general contractors know that they have to submit an entire bid; they have to put together a good bid. They've got to work with the electricians, they've got to glean through, they have to work through all the scope issues and issues come out of that; questions come out, alignment of scopes for bid day. Those questions if they're significant enough get asked to the designer. Those get ferreted out before the bid process such that on bid day you have a cleaner bid scope; cleaner bids on bid day. What does that mean? Throughout the course of the project, it doesn't guarantee but there's less likelihood for quantity or quantity or value of claims or cross-claims whether you award the job as a complete job or as separate bids. It gleans that out. That was a smart thing to do and most of the bidders complied with that process.

One other thing I did want to mention, too about this combination. To Dugan & Meyers it was very clear to us and I was the one reading it before the bid and the day of the bid about the combination bid. Earlier it was brought up that it was required in the combination bid for all items in the combination be filled out. But that isn't what it says. It says, 'Any part or combination of up to three parts, note individual parts, including alternates, must be filled out.' Dugan & Meyers complied with that. We noted the individual parts right next to the word that

says 'parts'; we noted that 1, 3 and 4; including alternates. This is a comment from the designer; they put this in here including alternates; it's a warning to the contractor, be sure you do not flub up here, include the alternates in your number; we did. And we filled it out and we put our number there. We're not a certified plumbing contractor or an HVAC contractor; we're not looking for award of a plumbing contract on the job. Another quick point on this is that regarding the major issue here with Building Crafts that the Instructions to Bidders clearly says and the bid form clearly says that 'failure to submit a bid for general construction, both tables shall be cause for rejection'. Nowhere does it say 'failure to fill out the individual plumbing and HVAC bids shall be cause for rejection'. It doesn't say in the Instructions for Bidders anything about that we have to do that. In fact the only thing it says; it hits you in the face is; 'Shall submit a combined bid'. And there was a reason for that and the city would get a benefit from that process pre-bid. And that's what Dugan & Meyers believes; we filled out the forms correctly, we reviewed it and we did it right."

Randy Drazba of CH2M Hill said, "We're consultants for the city of Hillsboro in regards to the Wastewater Treatment Plant Upgrade. It was our intent in the contract documents and throughout the bidding period to secure or procure bids for the combined table in addition to partial bids. The State of Ohio requires that contractors be allowed to bid by trade so we fulfilled Ohio law and that's part of the bid form Table 2. But we encouraged the contractors to fill Table 1 which was a combined bid because even though the project itself.....the magnitude of the project is not enormous, there's no complex processes in the project, but what does make it complex is that it's an existing facility that has to be maintained in operation so that a contractor just can't go out and start willy-nilly in any particular area of the project. They have to follow the procedure to keep the plant functioning. The city has to comply with their permit throughout the construction period.

Some of the hidden aspects of that is the coordination from various factions of the project and that's where it gets complex. It's temporary wiring and you already have wiring out in the field so you have to.....in certain areas it's confining such as between the administration building and the aeration tanks which are called vertical-loop reactors. The existing duct-bank has to be demolished and pipelines constructed beneath the duct-bank. Temporary wiring has to be installed to allow for that to happen. We as consultants feel that it's easier to have a combined construction.....a single point of responsibility; throw it all on to one contractor and make him responsible to make everything happen.

That was our intent in the project; unfortunately there was some confusion in the documents, however; six out of the eight general contractors bid it correctly. I'm not sure I have anything else to say about the bidding of the project."

Mr. Koogler said, "If it was the intent to have one contractor to be our single point to have to deal with and be accountable for in terms of the project; why did we go ahead and bid the other tabulations on each individual item?" Mr. Drazba responded, "Because the state of Ohio law requires that we bid a project by trades; by separate trades. Anything above, I believe a certain value which I believe is \$5,000; the Ohio Revised Code requires that you allow the separate trades bid as a prime contractor."

Mr. Koogler said, "But obviously we're not bound to.....but we can choose one in general if we feel that is best interest of the city." Mr. Drazba answered, "That is correct. The city can choose from the different collination (sp) of bids to go with a combined contractor, however; the contract documents have to allow for bids by separate trade contractors." Mr. Koogler continued, "The letter that I saw which I believe that you prepared to the safety-service director dated September 22nd of this year indicated that we were looking at apparent low-bidders. It stated that Dugan & Meyers Construction partial-combination 1, 3 and 4 at \$12, 961,974.00; RJ Smith Controls Consulting at \$1,640,982.00 for a total on the apparent low-bidders based upon what you believe were conforming bids at \$14,602,956.00; is that correct?" Mr. Drazba answered in the affirmative.

Mr. Koogler continued, "However, in terms of the overall bids where everything would be combined into one, I believe Dugan & Meyers was \$14,726,000.00, PAE was \$14,888,000.....sorry the typing is so small it's kind of hard to read all the names. The third one is Kokosing Construction Company (this company name was read by Mr. Drazba), they were at \$15,998,000. So if I get down to the next one that's here this evening; I'm trying to find Building Crafts.....ah, they were not listed in that category as being a complete bid on the overall project; is that correct?"

Mr. Drazba said, "That's correct. As they pointed out earlier, they did not submit a combined construction contract bid." Mr. Koogler continued, "In all the city can save a few dollars in terms of doing a combined project where we have various contractors. Is it your.....I'm guessing by

what you've said that it's your recommendation that we use if at all possible; if it's not worth the cost saving; use one firm to do everything as our one source?" Mr. Drazba responded, "We think that there are.....going with a combined construction under a single contract I think would give the city a lot of comfort. The fact that you have one contractor totally responsible for procuring all of the equipment and coordinating all the sub-contractors. We need to point out another complexity dealing with the stimulus funding that it will apply to this project is; the contractors must use a number of sub-contractors, disadvantaged business enterprises, there's certain criteria; a certain percentage of work that has to be delegated to those types of sub-contractors. That will add complexity to the project. There are additional accounting procedures that must be complied with as a part of this particular project. I think that again having a single contractor responsible for everything, the whole total performance out in the field. That's not to say that there are not going to be issues come up during construction even with a single contractor. We deal with this everyday and even on jobs where we have a single contractor point of responsibility we have issues come up and the most common issue is temporary wiring, temporary controls.

Like I said earlier; that facility has to operate; its performance cannot be reduced throughout the two plus years of construction. So that adds complexity to the overall project and having a single point of responsibility I think would give the city great comfort."

1. RES. 09-47 – A RESOLUTION APPROVING THE BID OF DUGAN & MEYERS CONSTRUCTION COMPANY AND AUTHORIZING THE SAFETY AND SERVICE DIRECTOR CONTRACT FOR CONSTRUCTION OF THE WASTEWATER TREATMENT PLANT BY-PASS ELIMINATION AND EXPANSION PROJECT AND TO DECLARE AN EMERGENCY- The clerk read the resolution in full for a first reading. A motion to amend the resolution to include the words “, EDA funding” following (ARRA) in Section One was made by Mr. Koogler and seconded by Mr. Levo. All members present voted yea. Mr. Levo made a motion to suspend the three-reading rule and Mrs. Parr seconded the motion with all members present voting yea. Mr. Levo made a motion to adopt the resolution and Mr. Waller seconded the motion. All members present voted yea; resolution adopted.

With no further items to come before the assembly Mr. Koogler made a motion to adjourn and Mrs. Parr seconded the motion; meeting adjourned.

Richard Donley, President

Beverly Brown, Clerk