

A special meeting of the City Commission was held in the Commission Room of the City-County building, 325 Court Street, Sault Ste. Marie, Michigan on Wednesday, February 10, 2010 at 12:00 p.m.

The meeting was called to order by Mayor Bosbous

Present: Mayor Bosbous, Commissioner Bauer, Burton, Gerrie, Lynn, Munsell and Stefanski

Also Present: City Manager Nebel, City Attorney Cannello, City Clerk Robin R. Troyer, City Engineer Dave Strickland.

Review and possible action regarding performance and payment bonds for Burton Excavating for the CSO Phase C-1 and C-2:

On Thursday, February 4th, Burton Excavating delivered performance and payment bonds to C2AE as was required by contract documents prior to entering into the contract for Division D and Division E of this work. In order to proceed with this project, all bonds, contracts, and other documents must be finalized and submitted to the MDEQ SRF Program by Tuesday, February 16th or the City will lose the principal forgiveness of \$2,766,000 for the entire project.

In the prequalification phase of the bid process, Burton Excavating indicated that they could receive bonding for up to \$1,000,000 for this project. The two parts of the project awarded to Burton by the Commission were Division D for \$653,739.95 and Division E for \$298,413.83, equaling a total of \$952,153.78. In reviewing the bonds, the City Attorney has advised that Burton Excavating did not obtain one performance bond and one payment bond for the contract covering the entire project. They have instead provided evidence of two separate performance and payment bonds to meet this obligation. The City Attorney had indicated that this does not meet the specifications for the project and puts the City at risk, since enforcement of the bonds is compromised. If it is necessary to draw on the bonds for either completion of the project (performance bonds) or payment of subcontractors and material suppliers (payment bonds), then there will be ample opportunity for arguments between the two bonding companies as to who is responsible. One bonding company is requiring that all City payments for the contractor be made directly to the bonding company. This would put one bonding company in control of funds that may be needed to cover work by the second bonding company. The City Attorney has advised that the City's position would be significantly compromised in the event it is required to go to the bonding company for completion of the projects.

The City Attorney, C2AE, City Engineer, and City Manager Nebel have met to discuss alternatives for addressing this matter. The options we explored are as follows:

- 1.) City Commission waives the bonding irregularity. This will put the City at risk

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should claims have to be made on the performance or payment bonds, since the separate bonding companies will likely raise responsibility issues that will compromise the City (or subcontractor) settlement of any claims that would result from this project. If final bond forms are received, then this would meet the February 17th deadline for the SRF Program.

2.) City Commission could declare that Burton Excavating is unresponsive to the bid specifications. The City would be entitled to the bid bond provided as part of the bidding process, and would, through a change order, add this work to Bacco's bid. Bacco would need to provide evidence that his bonding company agrees to the increase in bonding limits. The added cost for the project would be \$75,000 on Division D and \$27,000 higher on Division E.

3.) Issue separate contracts for Division D & E to Burton Excavating. Burton would need to have new bonds issued and a notice to proceed by February 17th. This would require an amendment to the Engineering Agreement to reflect additional cost for administering a fourth contract for this project. Administration is very concerned about the likelihood of getting final clean commitments from the bonding companies for two new contracts prior to February 16th. If this does not occur, then the City will lose the principal forgiveness equaling \$2,766,000.

4.) Award Division E by change order to Bacco and continue with Burton Excavating on Division D provided Burton Excavating is able to provide "clean" performance and payment bonds for Division D work by noon on Monday, February 15th. If not, award Division D work as well to Bacco Construction via change order.

In addition to these options, the City will need to take action regarding keeping the bid bond or a portion of the bid bond, since Burton Excavating was low bid and if they are unable to meet the specifications as it relates to the bonding for this project. Perhaps it would be appropriate to keep only that amount equal to the City's losses as a result of this transaction.

Dave Strickland, Chuck Lawson, and City Manager Nebel met with representatives of Burton Excavating to discuss options to preserve their involvement with these projects. Burton's will be discussing these items with their bonding companies to see if modifications can be made in order to move forward with the Burton bid.

Moved by Commissioner Lynn, supported by Commissioner Stefanski

That the City Commission modify the existing notice of award with Burton Excavating to substitute separate notices of award limited to single divisions – Division D and Division E.

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Carried: Yeas: Mayor Bosbous, Commissioner Bauer, Gerrie, Lynn,
Munsell, and Stefanski
Nays: None
Abstain: Commissioner Burton

Moved by Commissioner Lynn, supported by Commissioner Stefanski

That the City Commission authorize the City Manager to execute the separate contracts with Burton Excavating for Division D and for Division E subject to receipt of final performance and payments bonds acceptable to the City Attorney and City Engineer by noon on Monday, February 15th and execution of all contract documents by Burton Excavating by noon on Tuesday, February 16th.

Carried: Yeas: Commissioner Bauer, Gerrie, Lynn, Munsell, Stefanski, and
Mayor Bosbous
Nays: None
Abstain: Commissioner Burton

Moved by Commissioner Lynn, supported by Commissioner Munsell

That the City Commission authorize the City Manager, if the Burton Excavating contracts including bonds are not executed by the time limits stated above, then the City Manager is authorized to execute, as appropriated, change orders with Bacco to assign to Bacco Construction Company Division D or Division E or both Divisions in accordance with Bacco Construction Company bids.

Carried: Yeas: Commissioner Gerrie, Lynn, Munsell, Stefanski, Mayor
Bosbous, and Commissioner Bauer
Nays: None
Abstain: Commissioner Burton

Moved by Commissioner Lynn, supported by Commissioner Stefanski

That the meeting adjourn at 12:32 p.m.

Motion carried unanimously.

ANTHONY G. BOSBOUS, MAYOR ROBIN R. TROYER, CITY CLERK

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