

**Sunset City Corporation
City Council Minutes
September 25, 2014
Page 1 of 7**

Minutes of a special meeting held September 25, 2014 at Sunset City Hall, 200 West 1300 North, Sunset, Utah; Mayor Macfarlane presiding.

Mayor and Council Present:

Beverly Macfarlane	Mayor
Ryan Furniss	Council Member
Chris Hadley	Council Member
Trystal Peay	Council Member
Jake Peterson	Council Member
Kevin Snow	Council Member

City Employees Present:

Susan R. Hale (arrived 7:45)	Recorder
Linda J. Youngdell	Treasurer/Office Manager
Ken Eborn	Police Chief
Breen Lowman	Fire Chief
Felshaw King	City Attorney
Scott Nelson	CEC Engineering (City Engineer)

Excused:

Norm Noyes	Public Works Director
------------	-----------------------

Absent:

Others Present:

Chad Bangerter	Doug & Traci Garcia
Ashley & Mike Knight	Mark Braunberger

The meeting was called to order at 7:00 p.m. by Mayor Macfarlane and she expressed her appreciation for all who were in attendance. She made it known all the residents are always invited to the Council meetings, which are on the 1st and 3rd Tuesdays of each month.

Council Member Hadley gave the invocation and led the Pledge of Allegiance.

1. Discussion and possible approval of the City's options regarding the 300 West CDBG construction project: Mayor Macfarlane stated they would begin with public comment.

Council Member Furniss advised Mayor Macfarlane she was not following the agenda and said if she wants to deviate from the agenda, he would make a motion that they suspend their rules of procedure to allow comments from the public. Council Member Peterson seconded the motion. The motion passed unanimously with Council Members Furniss, Peterson, Snow, Hadley and Peay voting yes.

Mark Braunberger has spoken with members of the crew and a City employee who told him they would be blocked from their driveways for approximately a week while the curb and

gutter are done. He wondered if they would be doing the curb and gutter and the sidewalks at the same time or if they would be blocked a week for curb and gutter and another week for the sidewalks. He stated he has never seen such disorganization in all his years of construction. He is concerned about his neighbors who have some medical problems and will not be able to get to and from where their vehicle will be parked.

Mike Knight stated the whole project has been a disaster for them. The original letter stated the project would be completed near August 1, 2014. That was almost two months ago and there are several weeks of work left. He spoke with CEC Engineering Scott Nelson, who is also frustrated. They are trying to sell their house and have had offers pulled because of the work not being done. Also, people who are trying to look at the house are driving on by because they can't get to it. Another issue is the water was shut off at their house for two weeks. During that time someone who came to look at the house made a big mess and they had to purchase jugs of water to clean it up. He agreed with the disorganization statement made earlier.

Chad Bangerter said he is not familiar with this particular project, but his concern is where they are going with this. The City is trying to fix the infrastructure. He asked the Council to keep in mind that firing one company and bringing in another to complete the job will extend the project by several months. Things happen and projects have delays. He feels for the residents and asked the Council to keep their options open.

Mayor Macfarlane turned the time over to City Engineer Scott Nelson. Mr. Nelson stated the project is a Community Development Block Grant (CDBG) where the City receives money from the Federal Government so Federal guidelines must be followed, as well as City and State guidelines. If all those guidelines are not followed the City loses the Federal money. Whatever is decided tonight or in the future, it has to follow the CDBG regulations. One bid requirement is to include a certification of the contractor's information, such as owners, contacts, licensing, insurance, sub-contractors, references, experience, etc. He has heard of or worked with a majority of the contractors. He did not know Mr. Braker and his company so he verified his license and insurance. He called on the four projects he had completed in American Fork, River Heights, Midvale and Saratoga Springs and received no negative responses. He then recommended that the Council award the bid to Braker Construction. The next lowest bid was Advanced Paving and he has overseen about 25 projects with them. He wishes they had used them, but they had to follow the regulations of accepting the lowest qualified bidder. Following the award, they had a preconstruction meeting where the contractor presented his schedule and the notice to proceed was given. As the City's Engineer, Mr. Nelson has to adhere to the specifications for compaction, water line testing, etc. There was first trouble with passing the trench compaction testing, which added 2 or 3 weeks to the project before the tests passed. The next step was testing the water line. They do high level 24-hour chlorine to kill the bugs, etc. That is then flushed and a 200 psi pressure test is done for two hours, which passed. Next is a bacteriological test, which failed several times and it took almost a month until it passed. The contractor's next step is to disconnect the 35 residents' laterals from the old pipe and connect them to the new pipe. The contractor did every one of the laterals instead of bringing in several crews to get it done

quicker, which took an additional two weeks. The excavation to prepare for curb and gutter, is done except for the intersections because storms are coming and when rain hits a lot of water goes down the streets. Mr. Nelson met with the contractor tonight and he was told Staker Parsons will begin putting road base in tomorrow and, due to the predicted storms over the weekend, the preparation for the curb and gutter will begin on Tuesday or Wednesday and will take two or three days. Another contractor is lined up with a curb machine that will take two days to complete. During that process the driveways will be laid out. Concrete takes 27 days to cure completely, but cures the most in 7 days for light traffic. While that is curing the contractor will have someone putting in the driveway approaches, followed by the sidewalks. Therefore, the residents may be asked to not use their driveways for 21 days. Next is installing road base and then asphalt, which will take four or five days. Following that will be the landscaping and park strips. Two days ago Mr. Nelson asked the contractor to give him a realistic construction schedule because two days ago his contract period ended and he is now in liquidated damages or delay of contract, in which he is penalized \$250 per day he is late. Mr. Nelson tries to keep the residents up to date on the project so the first letter had a tentative completion date of August 1st. Subsequently another letter went out stating the new tentative completion date was towards the end of September. The contractor's anticipated completion date is now October 24th.

Council Member Furniss asked Mr. Nelson to tell the Council how many times the contractor broke his promises. Mr. Nelson responded one of the things was saying he would bring in extra crews to speed things up putting in the laterals, which he did not do. Mr. Nelson asked the contractor to reconnect Mr. Knight's water and it took him two weeks before it happened. Last Friday as they were grading Mr. Nelson asked him to slope back up the roadway so people could get in and out of their driveways. One was not done and the contractor told Mr. Nelson he would have it done by the time he left, but he did not do it until Mr. Knight called him on Saturday. In the contractor's defense, he did clean up a safety hazard of concrete and the tree shavings when asked. Council Member Furniss believes most of the delays were caused by the contractor because it is cheaper for him to pay the \$250 per day penalty than to get extra crews in to finish the work on time. He asked Mr. Nelson if any of Braker Construction's past jobs were in residential neighborhoods where time is important. None of them were and he believes that may be why he is not concerned about being done on time. He asked why he didn't clean up the concrete debris for three days when it is in the contract that all debris will be removed immediately. It irritates him that the contractor was allowed to get away with things for so long and now they are doing their due diligence.

Council Member Peterson feels for all the home owners and hopes they can see this through and it can be done as fast as possible. He feels a nice road and concrete might help sell Mr. Knight's home faster once it's done. He does not agree with the way this contractor is operating, but he feels the way to get the project done the quickest is to allow this contractor to stay on the job.

Council Member Snow asked if Mr. Nelson feels the contractor's timeline is doable because it seems it has taken a lot longer than it should have and now he thinks he can get it done in three days. Mr. Nelson agreed and said all he can do is present what the contractor gave him.

Council Member Snow asked if Mr. Nelson believes the contractor can be finished within the timeline of one month. Mr. Nelson feels if he uses sub contractors it is doable, but if he continues to do all the work himself, there is no way. Council Member Snow asked when they should give up on the contractor. Mr. Nelson replied when the Council tells him to. He has never worked with a contractor like this in his whole career.

Council Member Hadley asked if the contractor plans to use subs and if he has recognized that he made an error in not using them previously. Mr. Nelson said his contract said he will be using subs to do the curb & gutter and the asphalt and that his crew would do the water line. Mr. Nelson only suggested he use other forces to help him get caught up. Council Member Hadley asked if any of the upcoming portions could be dovetailed to speed up the process. Mr. Nelson said that was very doable. He sees Braker Construction fixing two of the manhole covers and doing the landscaping. The concrete company will do the concrete and the asphalt company will do the asphalt.

Council Member Peay asked why Braker Construction took so long to being the project after receiving the go ahead. Mr. Nelson replied he was finishing up some other jobs. Council Member Peay asked why it took so long for the City Council to learn about the delays in this project when Mr. Nelson and Public Works Director Noyes knew of the delays beforehand. Mayor Macfarlane responded that Public Works Director Noyes has updated the Council several times with the delays, the water line problems, etc. During the course of the updates, there have been a couple Council Members not present for the updates.

Council Member Hadley asked if the bonding company would pay for another contractor to do the work if the present contractor does not progress satisfactorily. Mr. Nelson replied that is why the contractor takes out a performance bond. Council Member Hadley asked if there would be any delays if that turned out to be required. Mr. Nelson stated the performance bond company is liable for the total amount of the contract. If the contractor is unable to finish the job, the bonding company would have to hire contractors to finish the job. It may take three to four extra weeks to get another contractor set up. Two more things to look at is if the bid has the completion date set as December 1st, the contractors will bid a lot higher and pay the penalty fees on another job to get paid so much from Sunset. Or the City could hire another low bidder and get substandard work. Due to this being a CDBG project, the City couldn't just get phone bids; it would have to go through the required bidding process again or forfeit the federal money.

Mayor Macfarlane stated she has spoken with Mr. Nelson several times and has visited the site several times during the course of this project. She has been concerned because the crews haven't been there at times. She is surprised she has not really heard what the Council Members thought until just recently. The completion date in the contract was September 23, 2014 and every day going forward until completion requires the contractor to pay \$250 per day in penalty fees.

City Attorney Felshaw King clarified the role of the Engineer. The contractor is independent, which means they have the right to choose the manner in which the project gets

carried out. The Engineer can suggest ways to do a project better, but he does not have the authority to dictate how the work will be done. Attorney King said he was asked to address three areas; retained payments, penalties for failure to meet the deadline and the option for obtaining another contractor to complete the project. A retained payment is part of the payment for work done that is retained by the City and governed by a State statute stating no more than 5% may be withheld. The retained payments can be used to help cover a breached contract. Out of the \$383,000 contract, over \$306,000 still has not been paid out. Penalties, called liquidated damages, are \$250 per day and up to October 21st it is \$7,500. Attorney King explained the City's options. As has been mentioned, the City can replace the contractor, but the ramifications could be a lawsuit, a more expensive project than budgeted for and more delays. If they choose to terminate the contract, a 10 day notice has to be provided to the contractor and the performance bond company. He did not recommend that option at this time. The contractor has provided a new schedule with a completion date of October 24th. He recommended giving the contractor a letter advising him he has been declared in default and this is his 10 day notice, but the City is willing to hold the effect of that in abeyance as long as the contractor is in compliance with the new schedule and the City has the right to remove his company from the job any time he fails to comply with the timeline he provided. If the Council chooses to adopt that approach he would like to work with Mr. Nelson to draft the letter and get it out tomorrow.

Mayor Macfarlane asked if the Council had any questions for Attorney King. Council Member Hadley asked, if it comes to terminating this contractor, if the bonding company could bypass the RFP, etc. and if the company would have to pay the full cost of the project if the City hired another contractor to finish it. Attorney King replied the bonding company would have the option to either pay the City the money as stated in the contract or they could hire a company itself to complete the project and it would have to pay whatever the cost ended up being. He believes if the bonding company chose to hire their own company they may not have to go through the bidding process.

Council Member Snow asked if the City still had to give the contractor the 10 day notice even though it is now past the contract expiration date. Attorney King said yes. Council Member Snow asked if State statute specified the contract always has to be awarded to the lowest bidder. Attorney King replied it has to go to the lowest responsible and responsive bidder. He explained if a low bid is received from a contractor who is incompetent, they don't have the necessary workforce or some other legitimate reason, then the bid can be awarded to the next lowest responsible bidder. Braker Construction met all the requirements on paper so the City didn't have any legal basis for not awarding the contract to them.

Mayor Macfarlane asked if the City terminated the contractor if the contractor would be able to sue the City. Attorney King does not believe he would have any grounds, but that does not mean he wouldn't try. The City should continue to pay for work the contractor has completed, withholding no more than the 5% allowed because the contractor has to pay his employees and sub-contractors to keep going.

Council Member Furniss asked Attorney King to explore an emergency option, if the City would have to go out for an RFP and asked at what point the City can say they've had enough and terminate the contract. Attorney King responded the letter they send would state the City can declare they contractor is off the job any time after the 10 days if the Engineer determines they've failed to comply with the time schedule and he will explore Council Member Furniss' other inquiries. Council Member Furniss asked to see the draft letter when they get it ready.

Mayor Macfarlane asked for any last comments. Council Member Furniss said the citizens have been complaining and Public Works Director Noyes has been taking the brunt of it. He has also seen complaints from the citizens. For him termination of the contractor is still not off the table. He appreciated Mr. Nelson for riding the contractor and for the talks they've had. He asked the residents to contact the Mayor and/or Council Members with their complaints. He thanked Attorney King for being here and answering their questions. He is disappointed the contractor was not here to answer questions.

Council Member Peterson hopes the project will get done in a timely manner from here on. He has worked with Staker Parsons and knows they will do a good job. He has not been able to find anyone who has worked with the concrete company so he hopes they do a good job.

Council Member Snow feels the timeline seems sketchy, but is willing to follow Attorney King's recommendation and allow the contractor to go forward, with sending out the aforementioned letter. He also hopes is gets finished so they don't have to delay the project even longer.

Council Member Hadley is in favor of the letter going out in case things don't go as planned.

Council Member Peay agreed with the 10 day notice. She does not believe the contractor is taking the City seriously, so they will have to hold him to each of the timeline dates and implement consequences if he does not.

Mayor Macfarlane agreed with the Council Members and thanked Mr. Nelson and Attorney King for their help tonight.

Council Member Furniss made a motion to have Attorney King draft a letter declaring the contractor in default or breach of the contract, but the City will hold enforcement in abeyance as long as he complies with the new schedule. Council Member Peay seconded the motion. The motion passed unanimously with Council Members Furniss, Peterson, Snow, Hadley and Peay voting yes.

Council Member Peterson made a motion to adjourn. Council Member Peterson seconded the motion. The motion passed unanimously.

**Sunset City Corporation
City Council Minutes
September 25, 2014
Page 7 of 7**

The meeting adjourned at 8:50 p.m.

Approved – October 21, 2014

/s/Beverly K. Macfarlane, Mayor

/s/Susan R. Hale, Recorder