

PROCEEDINGS OF THE CITY COUNCIL
Rapid City, South Dakota

February 26, 2007

Pursuant to due call and notice thereof, a special meeting of the City Council of the City of Rapid City was held at the City/School Administration Center in Rapid City, South Dakota on Monday, February 26, 2007 at 7:00 P.M.

The following members were present: Mayor Jim Shaw and the following Alderpersons: Michael Schumacher, Karen Olson, Ron Kroeger, Sam Kooiker, Malcom Chapman, Tom Johnson, Lloyd LaCroix, Bill Okrepkie, Bob Hurlbut, and Deb Hadcock; and the following Alderpersons arrived during the course of the meeting: None; and the following were absent: None.

Staff members present included Finance Officer Jim Preston, City Attorney Jason Green, Growth Management Director Marcia Elkins, Public Works Director Dirk Jablonski, and Administrative Coordinator Jackie Gerry.

Johnson moved, second by Hurlbut and carried to open the public comment period, and allow each speaker three minutes.

Questioning the cost-benefit analysis, Steven Brenden, Rapid City; questioned the number of new events, the number of people expected to attend those events, and asked how many of those are expected be local citizens. He asked about the number of major events that did not come because the arena was being used for other scheduled events. He suggested the monetary difference could be made up by pre-selling the skyboxes, naming rights for the arena, requiring the hockey team to put up \$1 Million, and expecting the business community to conduct fund raising events. He believed the cost of the expansion is the burden of the taxpayer. He suggested that there are other infrastructure needs in the City.

David Gustafsen, Heavy Constructors, Inc. indicated that they were the second lowest bidder on the project. He recommended that the Council not award the project based on a bid irregularity by the low bidder. He pointed out that the low bidder did not recognize Addendum No. 5 on their bid proposal. His point is that there are rules and regulations, and the integrity of the bid process should be followed. He suggested that if the Council waives this anomaly in the bid, the bid process is jeopardized for the City. He believed the Council had the option to award the project to the second lowest bidder or not award the project. He indicated that the economic impact of the \$300,000 of the second lowest bid comes back tri-fold in local support of the community.

Talbot Wiczorek, Attorney for Heavy Constructors indicated that the Sampson Construction Company bid proposal is a nonconforming bid and should be rejected by the Council. He believed it important to recognize the reasons for strict bidding requirements; and that is so the Council controls whether it is a legitimate bid and there is no after-the-fact negotiations. He indicated that it was his understanding that the City Attorney was forced to call the low bidder to let them know they had a nonconforming bid and ask if they were going to honor Addendum No. 5. He suggested that if the City accepts the bid, it puts Sampson in control of whether their bid is valid; and suggested that this is a terrible precedence to set. Wiczorek pointed out that Sampson Construction has not done business in the State for at least two years and they had to renew their excise tax license and file with the Secretary of State to do business in the State.

Bart Banks, Attorney for Sampson Construction Company believed that it is important to note that the Council and the people that it employs to administer the project for the Civic Center does retain control over the bidding process. He pointed out that in the bid documents, it expressly allows the Council to evaluate bids, and if there is an irregularity in a bid, to determine whether it would be in the best interest of the City to waive the irregularity and award the project to the low bidder as required by law. Banks indicated that Addendum No. 5 is a single page addressing items as deductions. He explained that the suggested irregularity is a clerical error made by Sampson Construction Company. When that error was brought to their attention, Sampson faxed or sent information to the City, identifying and confirming that they did in-fact not acknowledge Addendum No. 5 but did bid the work. Given the amount of money, the nature of the project, and the fact that the quotation was fair and accurate and included Addendum No. 5, Banks submitted to the Council that it is in the best interest of the City to award the project to the low bidder, Sampson Construction.

Diane Alberts, Rapid City asked the Council to not award the project to an out-of-state contractor and not deprive the community of good paying jobs.

Taking for granted that the Council will go forward with the project, Don Frankenfeld, Rapid City believed it is a mistake. He believed it was common sense to prepare a cost-benefit analysis before the City proceeds. Frankenfeld indicated that when looking at a cost-benefit equation, the cost part is the easiest one to analyze. He pointed out that the change in circumstance caused the project to go up from \$4 Million to \$22 Million. But at \$4 Million it is easy to say that the benefits will justify the \$4 Million expenditure and at \$15 Million the benefits have not changed much. Because there is not enough information, he suggested that he can not say whether the project is a failure and the Council can not say whether the project is a success. Frankenfeld indicated he spoke with the Civic Center Manager and asked for a feasibility study and was told there was no feasibility study. Frankenfeld offered three suggestions, the first being a formal plan to hold the Civic Center Board accountable; the second is holding the Civic Center Board and the Council accountable; and finally, is to take out some insurance, that insurance is to spend more money on the Convention and Visitors Bureau because they can generate the traffic needed to make the project a success.

Dave Davis, Rapid City noted that there are a lot of people questioning whether or not the project will work; and pointed out 30 years ago the same arguments were made. He reminded the Council of his challenge to the Council to be and remain visionaries.

Chapman moved, second by Johnson and carried to close the public comment period.

The Mayor presented No. LF013107-03, Civic Center cost/benefit analysis and recognized Alderman Kooiker, who related an article from the Wall Street Journal reporting skyboxes are being replaced with lounges. Kooiker also related articles from the Rapid City Journal reporting local citizens working two to three jobs to make ends meet; and House Bill 1126 referring to stormwater issues and drainage issues. Kooiker pointed out that no cost-benefit analysis was done and stressed the need to have done a complete cost-benefit analysis. He reminded the members that on December 11, 2006 a number of options to fund the Civic Center expansion were presented; and he indicated that Mayor Shaw was the first to suggest that the Civic Center could pay. He noted that this position has since changed, and the Civic Center should not be required to pay. He expressed his disappointment that skyboxes were not bid as an alternate,

there has been no serious effort to cut costs, and no cost-benefit analysis was done. He pointed out that the Civic Center provided the Profit and Loss Statements for 2006, '05, '04, and '03, and noted an income of \$518,769.82 in 2006 after the revenue from the BBB Tax is included. He indicated that he realized that what he was advocating was a shift in sales tax dollars from the BBB Tax to the 2012 Fund; but he believed that shift would have been worth considering. Kooiker indicated that his concern is that very soon the Council will be considering a significant property tax increase or a bill added to property taxes in order to fund the stormwater improvements. He suggested that it will be difficult to look people in the eye and say we as a City made a decision that skyboxes were more important.

Alderman Olson offered a clarification indicating that in terms of stormwater, nothing that is in HB1126 has anything to do with adding to the property taxes. Funding stormwater improvements is under consideration, but the property tax is not the vehicle through which this will be done.

Johnson moved, second by Okrepkie to acknowledge the discussion on No. LF013107-03 - Civic Center cost/benefit analysis by Alderman Kooiker. Alderman Chapman suggested that it not fair to say that the Council did not take the time to look a feasibility study or cost-benefit analysis. He acknowledged the fact that Mayor Shaw came forward with a PowerPoint presentation that suggested what the City could do, can do, or may do. But the Council vetted those issues, and decided as a Council, not to go in that direction. The prerogative of the Council, as a whole, was to look at some other options. He suggested it was fair of any Council member, if they have a better idea or better way to do something, to bring that forward. It is then incumbent of all the Council members to convince other members that it is a better way. Chapman believed the funding, as proposed, is appropriate. He indicated that any money that the Civic Center could pay should be used to expand the parking facilities at the Civic Center.

Upon a vote being taken on the motion to acknowledge, motion carried.

The following companies submitted bids for No. CC020507-02 -- Rushmore Plaza Civic Center Multipurpose Addition (re-bid) -- Bid Package 2, Project No. IDP06-1555 opened January 30, 2007: Scull Construction, R.C.S. Construction, Heavy Constructors dba Gustafson Builders, and Sampson Construction. Finance Officer Preston reported that staff reviewed the bids and recommends awarding the bid to Sampson Construction Company for the Base Bid of \$21,750,000, plus Bid Alternate No. 1 = \$36,780; No. 2 = \$11,700; No. 3 = \$16,900; No. 4 = \$361,800; No. 5 = \$2,800; No. 6 = minus (\$74,100); and No. 7 = \$11,500 for a total contact amount of \$22,117,380.

City Attorney Green indicated that throughout the correspondence in this matter, three issues have been raised. The first issue is the question about whether Sampson Construction Company has a valid Excise Tax license. He indicated that they have provided information that they have the license and staff confirmed with the Department of Revenue that the license is active. Based on that determination, they are eligible to the award of the contract under the statute that requires Excise Tax licensing. The second question is their registration to do business in the State of South Dakota. They have provided information and staff has confirmed that as of today they are eligible to do business in the State of South Dakota and they have been properly registered with the Secretary of State. That brought up another issue related to registration, and that was whether or not they were eligible to submit the bid when their registration with the Secretary of State was not current. It is his opinion, based on the statutes

that were cited by counsel for Sampson Construction; they did not have to be registered with the Secretary of State at the time they submitted the bid. Therefore, their submission to the Council is valid. Finally, the legal question that has been presented to the Council is failure to acknowledge Addendum No. 5 on the face of Sampson's bid. He indicated that he has reviewed the material submitted by Sampson; the material submitted by Gunderson, Palmer; and conducted a research on the matter. He believed it was important to point out that the first four addendums, issued by the City's consultant to the specifications, totaled 54 pages. Addendum No. 5 is a single page. He indicated that the South Dakota Supreme Court has addressed issues of corrections to bids, specifically in the cases of unit price bidding; and read the ruling. It indicated that the purpose of bidding is the protection of the public treasury. Green indicated that it is his opinion, that the court would apply the doctrine of substantial compliance when reviewing this bid, and find that the bid submitted by Sampson does substantially comply with the specifications. He explained that Sampson acknowledge 54 pages of addendum; they did not acknowledge one on its face. They have since provided information to the City that the subcontractors that would be affected by that addendum, considered it when putting their bid together. So, their bid does in-fact address the issues raised in Addendum No. 5. In regard to the construction of the statutes, Green read what the courts had to say. Based on that authority, Green indicated that it is his opinion that the Sampson bid conforms substantially to the requirements of the bidding application; and therefore, they are the lowest responsible bidder. In response to a question from Alderman Okrepkie, Green indicated that the law requires the Council award the bid to the lowest responsible bidder. The law also provides the Council with some discretion in determining who in-fact is the lowest responsible bidder. However, the discretion is not unlimited. It is incumbent upon the Council to keep in mind the obligation to protect the public treasury. In response to a question from Alderman Hurlbut, Green indicated that one of the purposes of the bid law is to protect the public treasury against favoritism. There is a statute in South Dakota that provides favoritism to South Dakota bidders, if an out-of-state bidder has that same statute in their home-state. In South Dakota, preference is given to in-state bidders when the out-of-state bidder would get preference in their home-state. Nebraska does not offer an advantage to in-state bidders, so South Dakota does not offer one to South Dakota bidders in this instance. Responding to a question from Alderman Johnson, an enVision Design representative explained that Alternate No. 6 allows aluminum for primary feeders from the transformer in lieu of copper. He indicated that new alloys in aluminum have improved and has circumvented problems, experienced in the past; and also indicated that Alternate No. 6 is a cost savings measure.

Johnson moved, second by Hadcock to approve the bid award for the Rushmore Plaza Civic Center Multipurpose Addition (re-bid) -- Bid Package 2, Project No. IDP06-1555 to the lowest responsible bidder meeting specifications, Sampson Construction Company, for the low unit prices bid for the Base Bid, Alternate Nos. 1, 2, 3, 4, 5, and 7 and excluding Alternate No. 6, for a total contract amount of \$22,191,480. Alderman LaCroix explained he had compared the line item costs and noted differences among the contractors bidding the project; and indicated concern specifically about the concrete.

Upon a roll call vote on the motion to approve, motion carried with the following voting AYE: Olson, Kroeger, Chapman, Johnson, Okrepkie, Hurlbut, and Hadcock; NO: Schumacher, Kooiker, and LaCroix.

EXECUTIVE SESSION

Chapman moved, second by Olson and carried to go into Executive Session at 7:58 P.M. for the purpose of discussing potential litigation, contractual and personnel matters. The Council came out of Executive Session at 8:37 P.M. with all members present.

Olson moved, second by Okrepkie and carried to direct the staff to continue discussions with the State of South Dakota regarding land acquisition issues.

ADJOURN

As there was no further business to come before the Council at this time, the meeting adjourned at 8:38 P.M.

CITY OF RAPID CITY

ATTEST:

Finance Office

Mayor

(SEAL)