

**SPECIAL MEETING MINUTES
PUBLISHED BY THE AUTHORITY OF THE CITY COUNCIL
OF BLOOMINGTON, ILLINOIS**

The Council convened in regular Session in the Council Chambers, City Hall Building, at 5:31 p.m., Thursday, November 17, 2011.

The Meeting was opened by Pledging Allegiance to the Flag followed by moment of silent prayer.

The Meeting was called to order by the Mayor who directed the City Clerk to call the roll and the following members answered present:

Aldermen: Judy Stearns, Mboka Mwilambwe, Bernard Anderson, David Sage, Robert Fazzini, Jennifer McDade, Steven Purcell, Karen Schmidt, Jim Fruin and Mayor Stephen F. Stockton.

City Manager David Hales, City Clerk Tracey Covert, and Corporate Counsel Todd Greenburg were also present.

**NOTICE OF SPECIAL MEETING
CITY OF BLOOMINGTON
CITY COUNCIL
NOVEMBER 17, 2011**

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that there will be a Special Meeting of the City Council of the City of Bloomington, Illinois, in the Council Chambers at City Hall, 109 E. Olive Street, Bloomington, IL on THURSDAY, NOVEMBER 17, 2011 AT 5:30 PM.

SPECIAL MEETING AGENDA

1. Call to order
2. Pledge of Allegiance to the Flag
3. Remain Standing for a Moment of Silent Prayer
4. Roll Call
5. Executive Session – Pending Litigation, Section 2 (c) (11)

6. Analysis of Bids for Locust Street Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project Phase 1 Construction (Wards 4 & 8). (Recommend that the Council declare Di Paolo Co. in default.)
7. Contract Award for Locust Street Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project Phase 1 Construction (Wards 4 & 8). (Recommend that the contract be awarded to Stark Excavating, Inc., and the Mayor and City Clerk be authorized to execute the necessary documents.

8. Adjourn

Tracey Covert
City Clerk

Date: November 15, 2011

**ADDENDUM TO NOTICE OF SPECIAL MEETING
CITY OF BLOOMINGTON
CITY COUNCIL
NOVEMBER 17, 2011**

6. Recommendation to Declare Di Paolo Company in Default in its Bid for the Locust Street Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project, Phase 1. (Recommend that the City Council declare Di Paolo Company (DPC) in default in its bid, remove DPC from the project, and direct staff to cash the cashier's check posted by DPC in lieu of a bid bond.) *Attached Council memorandum.*
7. Recommendation to Award the Bid for the Locust Street Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project Phase 1 to Stark Excavating, Inc. (Recommend that the Council award the bid for the Locust Street CSO Elimination and Water Main Replacement Project Phase 1 to Stark Excavating, Inc., and the Mayor and City Clerk be authorized to execute the necessary documents.) *Attached Council memorandum with supporting documents.*

Mayor Stockton cited the purpose of this Special Meeting was to address two (2) items related to the Locust St. Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project, Phase 1. The City had given forty-eight (48) hours notice. He noted that a quorum was present.

Alderman Sage arrived at 5:33 p.m.

Mayor Stockton recognized City staff's efforts this week.

David Hales, City Manager, addressed the Council. He apologized to the Council. This Special Meeting was called to address a serious issue which impacted this important project. This was a complex construction project. He cited scheduling, time lines, financing which involved an Illinois Environmental Protection Agency (IEPA) loan, and federal stimulus money. He noted the impact upon the Bloomington Country Club, District 87, and the public/neighborhoods and roads.

Alderman McDade arrived at 5:36 p.m.

City staff had collaborated with IEPA staff. He also noted the tight schedule. The City was pleased with the low bid from an out of town contractor. This project attracted interest beyond the City. Concerns were raised regarding the dollar difference. These concerns have increased over time. The \$1.8 million cost savings did not appear to be realistic. The City was at risk of losing state funding and federal stimulus money. The City's goal was to have a successful project. This project needed to be managed well. The contractor needed to be a financially viable company.

Mr. Hales cited his professional experience with a project in North Carolina. A contractor walked off the job on a \$10 million project. He cited the importance of a performance bond. This bond insured that risks were minimized. A company demonstrated its financial viability and ability to complete a project by obtaining same. Clark Dietz, (design engineer), had prepared for the preconstruction meeting. He commended their efforts. The performance bond was not presented at this meeting. There was a lack of urgency by Di Paolo Company (DPC). DPC missed critical deadlines. Issues beyond the performance bond included available work crews, supply orders and availability of same to complete the project. DPC was currently behind schedule. Examination of the low bid lent to consideration of red flags. He requested that DPC be found in default and the Council award the bid to the next lowest responsible bidder.

The following was presented:

SUBJECT: Recommendation to Declare Di Paolo Company in Default in its Bid for the Locust Street Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project Phase 1

RECOMMENDATION: That the City Council declare Di Paolo Company (DPC) in default in its bid, remove DPC from the project, and direct staff to cash the cashier's check posted by DPC in lieu of a bid bond.

BACKGROUND: On August 22, 2011, the City Council voted to accept the bid for the Locust Street CSO Elimination and Water Main Replacement Project, Phase 1 submitted by DPC of Glenview, IL. The Council Memorandum prepared by the City staff at that time acknowledged the risk as DPC's bid might be unrealistically low. The bid award could be justified by the possibility of substantial savings to the City's taxpayers. Among the protections which would

accompany the bid award would be the posting of a performance bond as required by the bid specifications.

A “performance bond” protects an entity awarding a construction contract because a bonding company agrees in the performance bond to complete the construction project in the event the contractor is unable to do so. A performance bond typically is used by the entity awarding the contract as a type of “due diligence”. If the contractor cannot post a performance bond, it is an indicator that the bonding company has misgivings about the contractor’s ability to complete the project. There is an unacceptable risk to the bonding company and it may be called upon to complete the project.

Pursuant to the bid specifications for this project, there were a number of prerequisites to the execution of a contract between the contractor whose bid was accepted and the City. As required by the bid specifications, the formal Notice of Award was delivered to DPC on October 19, 2011. The bid specifications state that the bidder must submit an executed contract and a performance bond within fourteen (14) days of receipt of the Notice of Award, or be considered in default of the conditions of the bid. The performance bond and executed contract were due on November 2, 2011. They were not submitted at that time. On November 10, 2011, the City’s Corporation Counsel notified DPC in writing that the City was not waiving its right to declare a default because of the lack of a performance bond being posted by November 2, 2011, but was requesting that a performance bond be submitted as soon as possible.

In a letter dated November 14, 2011, and addressed to the City’s Corporation Counsel, the Vice President of DP stated that “in light of the significant spread between Di Paolo and the second bidder, Di Paolo is now being asked to provide additional collateral to the bonding company.” On November 15, 2011, the City’s Corporation Counsel sent an e-mail to DPC’s Vice President stating that the City was not waiving its right to declare a default because of the failure of DC to submit a performance bond by November 2, 2011, but requested that a performance bond be submitted within forty-eight (48) hours. No performance bond has been received. It should be noted that DPC knew that a performance bond would be required in the amount of their bid as soon as the project specifications were made available in June 2011.

The project which is the subject of this bid requires the installation of water and sewer pipes across property owned by Bloomington Country Club and District 87. Easement agreements require the work on those properties to be completed by March 1, 2012.

In light of the inability of DPC to post a performance bond as required by the bid specifications, which itself provides grounds for the City to declare a default, as well as the fact that the inability of DPC to obtain a performance bond creates an inference that bonding companies consider underwriting DPC’s involvement in this project as an unacceptable risk. It is the recommendation of the City staff that the City declare DPC to be in default, remove DPC from the project and the \$450,000 cashier’s check submitted by DPC in lieu of a bid bond be cashed. The City is then free to award a bid to the next lowest responsible bidder, Stark Excavating, Inc., Bloomington, IL.

COMMUNITY GROUPS/INTERESTED PERSONS CONTACTED: Di Paolo Company.

FINANCIAL IMPACT: This figure assumes that the Illinois Environmental Protection Agency (IEPA) will loan the City the additional amounts required for the next lowest responsible bidder, (Stark Excavating Inc.), to perform the work which is the subject of the bid. It also assumes that the alternatives which DPC agreed to perform are no longer available to the City because they are no longer eligible for the IEPA loan and are therefore not advisable to be performed at this time. It also assumes that the City will cash the \$450,000 cashier's check posted by DPC in lieu of its bid bond. In addition, City staff hopes that the IEPA will require the \$143,000 originally set aside for "contingencies" to be applied to the higher cost of the base bid submitted by Stark Excavating, Inc. It is too late to take advantage of the twenty-five percent (25%) principal forgiveness under the IEPA loan which exceeds the amount of the bid as approved by the Council in August. The City will have to repay the entire principal on the \$698,941.51.

Bid Total Stark Excavating*	\$9,026,548.51
Bid Total Di Paolo**	\$7,877,607.00
Difference between two (2) bids	\$1,802,040.51
Cashier's Check Posted by Di Paolo***	\$450,000.00
Minimum additional cost to City	\$1,352,040.51

* Bid total excludes Alternatives 1 and 2.

** Bid total excludes Alternatives 1 and 2.

*** In lieu of Bid Bond.

The total project cost, including engineering expenses, is estimated at \$10,398,589. This figure is below the \$10.8 million budget.

Respectfully submitted for Council consideration.

Prepared by:

J. Todd Greenburg
Corporation Counsel

Reviewed by:

Jim Karch
Director of Public Works

Reviewed by:

Craig Cummings
Director of Water

Financial reviewed by:

Douglas Ellsworth
Interim Director of Finance

Recommended by:

David A. Hales
City Manager

Todd Greenburg, Corporation Counsel, addressed the Council. He presented the highlights regarding this item. He noted the staff recommendation. Di Paolo Company (DPC) was in default and Council action was required. The City had provided notice to DPC via certified mail of the bid award. DPC was instructed to return the contract signed with a performance bond by November 2, 2011. The preconstruction meeting was held on November 9, 2011. Staff was informed by DPC that the failure to return the required documents was not an oversight. DPC had been unable to obtain the performance bond. If a contractor is unable to complete a project, then the bonding company must see to it that

the project is completed at its expense. A performance bond is a way for the City to exercise due diligence and address the financial viability of the contractor. A major concern for a bonding company was its ability to manage risk. DPC admitted that the bonding company had expressed concern regarding the bid spread. This admission was another red flag which caused staff concern.

The City had not waived its ability to declare DPC in default for failure to provide a bond and return a signed contract. On Tuesday, November 15, 2011, Mr. Greenburg sent DPC an email informing same of the great risk that the City might declare DPC in default. He urged DPC to file a performance bond within forty-eight (48) hours. Again, the City retained its right to declare DPC in default. He noted that the Pantagraph reported that DPC needed another week to obtain same. The performance bond requirement was listed in the project specification manual which was issued in June 2011. He noted the tight time frame involving the Bloomington Country Club and District 87 properties. He cited easement conditions which stated that the work must be completed by March 1, 2012. The clock was ticking. City staff had planned for the work to start on Monday, November 14, 2011.

Mr. Greenburg stated that City staff recommended that the Council find DPC in default, remove DPC from the project, and deposit DPC's bid surety, \$450,000 cashier's check.

David Hales, City Manager, reviewed the motion.

Alderman Fazzini questioned the next lowest responsible bidder. Mr. Hales deferred to the next item on the agenda.

Mayor Stockton expressed his regret that this action was needed. He cited the loss of \$1.8 million in savings. He added his concern that if the Council did not take action now the City would risk even higher costs. There would be consequences if the City failed to act.

Mr. Hales noted that the City would be risking the loss of state financing. City staff had held teleconferences with IEPA staff. The IEPA had expressed its willingness to work with the City. The IEPA would support the City's action which it viewed as reasonable. IEPA would expedite the processing of loan documents. Time was of the essence. The City would lose the twenty-five percent (25%) principal forgiveness on the dollar difference between the two (2) bids. The IEPA had locked in the bid award amount. The 1.25% interest rate would apply to the project's total cost. DPC's bid surety, (\$450,000 cashier's check), will be used towards the cost of this project. The IEPA had made this a requirement.

Mayor Stockton addressed the next lowest responsible bidder. Mr. Hales noted that the Illinois Department of Transportation (IDOT) was holding its bid letting on Friday, November 18, 2011. Timing was a concern. If the Council declared DPC in default, the next lowest responsible bidder was Stark Excavating, Inc. (SEI). The Council would be

asked to award the bid to SEI at the same unit prices. SEI was aware that availability was key. SEI would pull out of some of IDOT's bids. Action by the Council was urgent. He noted additional contracts.

Alderman Anderson questioned the City's exposure. Mr. Greenburg restated that DPC had not met its obligations. He cited contract law and noted that there was not a valid contract. The specifications were clear. The City has the ability to deposit DPC's cashier's check.

Alderman Purcell believed that the Council had all of the required information. The performance bond and contract were included in the specifications. Mr. Greenburg responded affirmatively.

Alderman Mwilambwe questioned the level of oversight required for the next lowest responsible bidder. He cited the financial impact upon the City. Mr. Hales was unsure of same. The Council would be provided with an update regarding this item at its November 28, 2011 meeting. The City has entered into a project management contract with Clark Dietz. If there was a potential reduction, an item would appear on the Council's December 12, 2011 meeting agenda.

Alderman Fazzini expressed his belief that project management costs would be lower as the City was familiar with SEI. Mr. Hales cited the number of work crews needed and quicker mobilization.

Alderman Fazzini noted public comment regarding this item. Questions had been raised regarding valid reasons for Council action and the \$1.8 million cost increase. He did not believe that the City was giving up this amount. Mayor Stockton stated that the City tried.

Motion by Alderman Fazzini, seconded by Alderman Purcell that Di Paolo Company be declared in default in the bid submitted for the Locust Street CSO Elimination and Water Main Replacement Project Phase 1, remove Di Paolo Company from the project and staff be instructed to cash the \$450,000 cashier's check submitted by same in lieu of a bid bond.

The Mayor directed the clerk to call the roll which resulted in the following:

Ayes: Aldermen Stearns, Mwilambwe, Schmidt, McDade, Anderson, Fazzini, Sage, Fruin and Purcell.

Nays: None.

Motion carried.

The following was presented:

SUBJECT: Recommendation to Award the Bid for the Locust Street Combined Sewer Overflow (CSO) Elimination and Water Main Replacement Project Phase 1 to Stark Excavating, Inc.

RECOMMENDATION: That the Council award the bid for the Locust Street CSO Elimination and Water Main Replacement Project Phase 1 to Stark Excavating, Inc., and the Mayor and City Clerk be authorized to execute the necessary documents.

BACKGROUND: The background to this action is summarized in the Council memorandum regarding declaring Di Paolo Company (DPC) in default for the Locust Street CSO Elimination and Water Main Replacement Project Phase 1 bid. With the assumption that the Council has defaulted DPC's bid award for this project, it would be appropriate for the Council to award the bid to Stark Excavating, Inc., the next lowest responsible bidder.

The City staff has prepared an agreement in which Stark Excavating, Inc., (SEI), agrees that it will honor the unit prices set forth in its bid submitted on August 15, 2011. The Project Manual for is incorporated by reference. SEI acknowledges that the staging schedule and time frames set forth in the original specifications may need to be revised. The City retains the right to eliminate portions of the bid which were listed in the specifications as alternatives.

Earlier today, representatives of the Illinois Environmental Protection Agency (IEPA) informed City staff that it would continue to set aside funds for this project. However, the original alternatives would not be available for the IEPA's low interest loan and the \$450,000 bid deposit submitted by DPC would be deducted from any loan amounts. The \$143,000 set aside for "contingencies" would be eliminated and the increment of the bid award to SEI which exceeds the amount of DPC's bid is not eligible for the twenty-five percent (25%) principal forgiveness which was part of the original IEPA loan. However, the 1.25% interest rate will be available for the entire principal amount.

SEI has requested that the City indemnify it in the event it is sued by DPC. City staff believes this is a reasonable request by SEI. The likelihood of a successful lawsuit by DPC is extremely low if nonexistent.

COMMUNITY GROUPS/INTERESTED PERSONS CONTACTED: Representatives of SEI and the IEPA.

FINANCIAL IMPACT: \$1,352,040. This figure assumes that the IEPA will loan the City the additional amounts required for the next lowest responsible bidder, (SEI), to perform the work which is the subject of the bid. It also assumes that the alternatives which DPC agreed to perform are no longer available to the City because they are no longer eligible for the IEPA loan and therefore are not advisable to perform at this time. It also assumes that the City will cash the \$450,000 cashier's check posted by DPC in lieu of its bid. It is too late to take advantage of the twenty-five percent (25%) principal forgiveness under the IEPA loan which exceeds the bid amount approved by the Council in August. The City will repay the entire principal on the \$698,941.51.

Bid Total Stark Excavating*	\$9,026,548.51
Bid Total Di Paolo**	\$7,877,607.00
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The total project cost, including engineering expenses, is estimated at \$10,398,589, which is still below the \$10.8 million budget.

Respectfully submitted for Council consideration.

Prepared by:

Reviewed by:

Reviewed by:

J. Todd Greenburg
Corporation Counsel

Jim Karch
Director of Public Works

Craig Cummings
Director of Water

Financial review by:

Recommended by:

Douglas Ellsworth
Interim Director of Finance

David A. Hales
City Manager

**CONTRACT BETWEEN
STARK EXCAVATING, INC. AND CITY OF BLOOMINGTON
FOR THE LOCUST STREET CSO ELIMINATION
WATER MAIN REPLACEMENT PHASE I**

Stark Excavating, Inc. (hereafter "Stark") and the City of Bloomington (hereafter "City") make the following mutual promises:

1. This contract incorporates by reference the Project Manual for the "Locust Street CSO Elimination/Water Main Replacement Phase I, City of Bloomington, Illinois, City Project No. 50-03-33144-07-01" dated June 2011 (hereafter "Project" or "Project Manual").
2. Stark agrees that in consideration of being awarded the Project, it will charge the City for work performed for said Project the unit prices submitted by Stark and opened by City staff on August 15, 2011.
3. Stark acknowledges that the staging schedule and timeline for work on various phases of the Project as set forth in the Project Manual will need to be revised in light of the Easement Agreement between the City of Bloomington and Bloomington Country Club Realty Trust and

Bloomington Country Club, approved by the City on November 14, 2011, and the Easement Agreement between the City of Bloomington and District 87, approved November 14, 2011. Both parties to this Contract will work with each other in good faith to revise such timeline.

4. Stark acknowledges that the City retains the ability to eliminate certain aspects of the Project which were designated as alternatives in said Project Manual.

5. City agrees to indemnify and hold harmless Stark in the event Stark is sued by Di Paolo Company for interference with contract or other legal action regarding the circumstances involving the awarding of this contract by the City to Stark.

Dated this 15th day of November, 2011.

STARK EXCAVATING, INC.

By: Joseph J. Weishaar

Approved this 17th day of November, 2011.

CITY OF BLOOMINGTON

By: Stephen F. Stockton, Mayor

ATTEST:

Tracey Covert, City Clerk

(PROJECT SPECIFICATIONS MANUAL AND SEI BID SUBMITTAL ON FILE IN CLERK'S OFFICE)

Mayor Stockton noted that this item addressed the replacement of Di Paolo Company (DPC) with Stark Excavating, Inc. (SEI).

David Hales, City Manager, addressed the Council. He had spoken with David Stark, SEI's President. Mr. Stark had expressed his willingness and desired to be considered for this project. He addressed availability and noted the Illinois Department of Transportation's November 18, 2011 bid letting.

Mr. Hales reviewed the project's specifications. He noted mobilization and the potential to value engineer this project. It was possible that this project might be completed sooner. SEI planned to address staging in order to reduce the impact of same. The City would have the performance bond immediately.

Todd Greenburg, Corporation Counsel, addressed the Council. He noted the assurances provided by the Illinois Environmental Protection Agency's (IEPA) staff. There would be no impact upon the low interest rate loan. It would be available for the project's entire cost. The IEPA recognized the performance bond issue. The City has the IEPA's support. This project involves the health, safety and welfare of the citizens.

Mr. Greenburg noted that the IEPA was unable to finance the project's two (2) alternatives. City staff recommended that the two (2) alternatives not be included. He addressed the time that had lapsed between August and November. The twenty-five percent (25%) principal forgiveness would only apply to the original bid award amount. The City would be responsible for \$698,941.51. He restated that the City would be changing contractors. He addressed the short length of the contract which had been provided to the Council. This document included the specification manual and SEI bid submittal by reference. SEI had agreed to honor its bid's unit prices. The time frames for Bloomington Country Club and District 87 may need to be adjusted. He restated that Alternates 1 and 2 would be eliminated. The City would indemnify SEI in case of suit by DPC. He expressed his opinion that the ability to sue was negligible to nonexistent.

Mayor Stockton noted any suit might be limited to the amount of interference of contract. Mr. Greenburg believed it would be limited to loss of profit. He had been unable to research same. He restated that there was not a contract between the City and DPC. He did not believe DPC could bring a successful suit against the City and SEI.

Alderman Sage questioned the process. He cited telephone calls, emails, paper trail, etc. Mr. Greenburg responded affirmatively. He had received an email from an IEPA staff member which confirmed the City and IEPA conversations.

Alderman Fazzini requested that Jim Karch, Director – Public Works, address the Council regarding the City's working relationship with SEI.

Jim Karch, Director – Public Works, addressed the Council. He noted the City's long history with SEI. SEI had been the contractor on a variety of projects going back decades. There were no outstanding issues with same. SEI work was of acceptable quality.

Motion by Alderman Schmidt, seconded by Alderman Fazzini that the bid for the Locust Street CSO Elimination and Water Main Replacement Project Phase 1 be awarded to Stark Excavating, Inc., and the Mayor and City Clerk be authorized to execute the necessary documents.

The Mayor directed the clerk to call the roll which resulted in the following:

Ayes: Aldermen Stearns, Mwilambwe, Schmidt, McDade, Anderson, Fazzini, Sage, Fruin and Purcell.

Nays: None.

Motion carried.

Mayor Stockton noted that the Council's business had been concluded.

Motion by Alderman Anderson, seconded by Alderman Schmidt, that the meeting be adjourned. Time: 6:15 p.m.

Motion carried.

**Tracey Covert
City Clerk**