



SPECIAL CITY COUNCIL MEETING

Saturday, December 17, 2022 at 1:00 PM

CITY COUNCIL CHAMBERS - 120 Paint Rock Street, Eden, TX

Off: 325-869-2111 | Fax: 325-869-5075

MINUTES

1. CALL TO ORDER AND ROLL CALL

PRESENT:

Agapito Torres
Priscilla Aguirre
Randy Dunaway

Jennifer Martinez
Grover Hall
Bradley Gandy

City Administrator Laura Beeson
City Attorney Jeff Betty

2. BUSINESS

Consideration and Possible Action On:

A. USDA Sanitary Sewer and South Water Projects Meeting Update

City Attorney Jeff Betty discussed Business Item "A" and provided an update on the USDA Sanitary Sewer and South Water Projects. A status meeting was just held this Tuesday with USDA officials, City Officials including the City Attorney, the City Administrator, and the Mayor, and engineers from eHT.

Mayor Torres was not sure about the procedures during this meeting or how the plan of action came about as to the City Attorney's authority to put these into motion without prior approval from City Council. Betty noted that he has the authority to act on the City's behalf as City Attorney.

Betty explained that this summer the City had received notice of non-payment from suppliers of Roberts Construction. All contractors on the USDA project were required to have a Performance Bond and a Payment Bond in place, because these are federal funds. The need for a Surety Bond is common in grant funding. There are a number of different contracts in place. The City of Eden has an agreement with the federal government to conduct the improvements laid out the project. The City contracted with eHT to do the Engineering on the project. The City bid the construction contracts out, and hired the contractors to do the work. The Surety is required by the contractors to cover the City to insure that the works gets completed, and the City meets their requirements of their contract with the federal government. If something goes wrong, the Surety steps in and will contract with other contractors to make sure the work gets done.

The City received a letter from Core and Main, one of Robert's Construction creditors, notifying of non-payment. The City also granted Roberts Construction several extensions in an effort to get the work done. Meetings were involved with each of these three extensions.

On 11/23/22, the City received a letter from the Surety to pay them instead of paying Roberts Construction going forward, so that the creditors could be paid. The City then received a letter from Robert Schillinger of default on 12/2/22. Now we know Roberts Construction will not perform all of their duties or complete the work, and none of their sub-contractors will be working the project either. As a result, we notified USDA of the default, and we now have to take on our responsibility to complete the project. The Mayor was notified, and we notified our eHT engineering partners to see what they were going to do. There is a concept called "privity of contract", meaning who has a

contract with who. Our contract is with USDA to manage the contract and pay the contractors. The Surety company is going to look for an advantage, and they are taking action to find the status of the project. We will need to provide the project materials in our possession and all of Robert's Construction equipment located on our property. We need to preserve the materials and protect them from damage. The next step is to determine who owns what. Robert's lienholders will now be looking for the equipment.

A status meeting was held this past Tuesday with City Officials including the Mayor, City Administrator, Public Works, and the City Attorney, eHT engineers, and USDA Officials. USDA's responsibility is to grant the funds. All other issues are not their problem. The engineers had to decide if they were to continue with engineering and inspection, and by all accounts, the answer seems to be "yes". Our employees have been instructed not to talk to strangers or let any equipment and/or materials out of our possession without proper permissions. Mayor Torres noted that he felt the City Attorney had already developed a plan of action without proper authority to do so, as the City Council had not directed any action. Betty explained that the Mayor and City Administrator had been involved in the meeting for just this purpose, and that no action had been taken by the City Attorney at this meeting.

Prior to this meeting, the City received a letter from the bond company's attorney which directed the City Administrator to pay all remaining funds to them. Retainage is not paid until all of the work is completed. The City contracted with USDA to distribute the grant funds once all entities sign off on the pay requests. The problem was if we paid all remaining funds to the bond company, this would violate the City's contracts with eHT and USDA.

During the joint status meeting, USDA basically told the city that it is our responsibility to complete the contract. eHT indicated they would assist, but Sage Diller was worried about how eHT would be paid for the additional services. If eHT does any work above and beyond the original contract, then a new contract would be needed. Due to the circumstances, this contract would need to be with the City Attorney to preserve attorney/client privilege. The City would pay the City Attorney, and he would in turn pay eHT. The City Attorney requested a status report from eHT, but none has been provided to date. Mayor Torres expressed concern that the City Attorney was contracting in an outside contract with eHT on behalf of the City without Council's prior notification. Betty explained that it was his job to handle the legal matters of the City. No contract had been entered into yet, and prior to entering into an actual contract, his intention was to brief City Council to discuss and obtain this approval. However, currently, a legal response is needed to the Surety company's attorney, and in order to provide this response, he had to determine if the engineers would work with the City going forward, as the engineering fees on this contract have already been paid out.

There is approximately \$1.5 million left on this project, and these funds need to cover all remaining work yet to be completed. The Surety company will hire a contractor to complete the work. This contractor will want a premium to certify and warranty all of the work, even the work that has already been completed to date. eHT has indicated that all work completed to date meets standards; however, the Surety company has already hired an engineer to look at the project. If someone finds something that is not right, there is a cost exposure there. There should not be any unauthorized communications. If eHT has a contract with the City Attorney, then there is attorney/client privilege.

We need to keep track of staff hours on the USDA project. Legal services required due to the default are reimburseable. There are several ways this project can end: 1) All entities can end up in court - the contractor and sub-contractors, the material providers, the lienholders, etc. This is beyond our control, and it would come down to security interests (who has a right to what, and who has superior interests). Many are looking to get their money back from Robert's Construction.; 2) The Surety

company can determine the status of the project and where the materials are and make a cash offer. If this happens, we will need the help of eHT engineers to determine the project status.

We now need to determine how to respond to the Surety company's attorney, and this is the City Attorney's job to do so. The Mayor and City Council asked to have copies of the Surety company's letter so all could read it for themselves. Council Member Hall asked if the Surety company had the right to make these demands. Betty explained that the Surety company has a contract with Robert's Construction, but the City has not seen this contract. We would have to see this contract to know what the rights of the Surety company actually are. If they have the authority, then Betty will recommend that the City pay the proceeds of the last pay requests from Robert's Construction to the Surety company. The Surety company can offer a settlement to the city, or they can choose to hire another contractor themselves to complete the project. More common than not, the Surety will offer a settlement.

Currently, the status of the project and what exactly is needed to finish can only be provided by eHT engineers, and the status will determine the amount of money needed to complete the project. Any new contractor has to be willing to warranty the work. If the Surety company hires a new contractor to complete the project, this does not have to be bid out. It would be helpful if eHT would take on the responsibility to hire the contractors. No matter which action is taken, we need the status information from eHT.

Mayor Torres asked who needed to respond to the letter from the Surety company's attorney. Betty stated that it should be legal counsel who responds, but the Mayor can respond if that is the City's decision. The City can decide to use Mr. Betty, or they can hire someone else if they so choose. Primarily, the City has contractual obligations. The advice would be the same from any legal counsel, as the requirements of the contract do not change. Mayor Torres asked if Betty had asked for any clarifications from the Surety company's attorney. Betty noted that he hasn't reached that point yet.

Mayor Torres noted that the letter states they are requesting all monies and retainage, and it actually says "when they come due". Mayor Torres questioned why Betty previously stated that they were asking for all monies and retainage now, as he felt the previous statement had been misleading.

Betty felt his advice and integrity were being questioned, and noted that as the attorney he had the right to determine how he works. If the information came across differently, he was unable to help how it came through. Betty noted that the Mayor had been involved in Tuesday's meeting and had the opportunity to respond or ask questions at any point. It was noted during that meeting that we need to get a letter back to the attorney and report the status of the project.

Mayor Torres noted that the way he operates is by having the City Council involved through all parts of the process from the very beginning.

Council Member Hall agreed that the City Council should have been involved from the very beginning.

Betty explained that he did not have the information at that point to provide to the City Council, and that was part of the reason for the status meeting. If there is a problem that needs to be resolved, we are all here at this meeting. Betty has some concerns that we have not had a response back from eHT yet as to the status of this project, and eHT was provided a list of materials on hand at Tuesday's meeting. Betty noted that there is a time when the City Council needs to be informed, but that is not necessarily during every step of the process.

Mayor Torres noted that Betty should have asked the Surety company's attorney about their rights to the funds. Betty noted that the Mayor was involved in the meetings, and he could have asked if that was the information he wanted to know. Mayor Torres noted that he did not understand that this was what the meeting was about.

Clearly there was a misunderstanding as to the starting point. Mayor Torres noted that this was not communicated, and he will have to look at things differently at each meeting going forward. He has the right to ask questions, and he is just asking for clarifications.

Betty stated that maybe he needs to communicate better; however, he will not have his integrity questioned. In regards to how to respond to the Surety company's attorney, the City Attorney does not determine tone, City Council does. Betty suggested that the tone of the letter be polite, professional, and cooperative, as he feels the Surety company's attorney letter was in that tone. Betty will need to determine the legal rights of the surety company; however, he will need eHT to respond with the status. In order to determine what is the Surety company's legal obligation dollar-wise, he will need to know the costs left to finish the remaining work.

Council Member Aguirre suggested that we confirm our relationship with the engineers and let Sage know that we need the information now.

Betty agreed and noted that we need to acknowledge the attorney letter, and that we are glad that they are taking steps to discuss the legal issues. When this contact with the attorney is made, Betty wanted to be able to provide the status of the projects. It was noted in the joint status meeting that the City is required to complete the USDA project within 5 years of the date it was obligated. The City knows which materials are on hand. We now just need to know the associated costs to complete the project. We will need a general contractor who will accept the project and the funds available to complete that work. Betty will set up a meeting with Sage to obtain the information needed.

Mayor Torres noted that when the City first heard about the default that the Surety company had reached out to the City Administrator and explained that they were willing to work with the City to get the project completed. They were very cooperative. Then he received information from the City Administrator that she had contacted the City Attorney. In determining the reason, the City Administrator relayed that the City had received the letter from the Surety company's attorney, and the tone had seemed to change. The City needed to know who to pay the grant funds to for the work that had been completed for the last pay requests.

Betty stated the he will work on his communication going forward, and that clarification is the best method. He will get with the City Administrator if he needs to get with the Mayor, or he will let the City know if he needs to speak with the City Council.

Mayor Torres noted that he had just felt that the City Attorney was obligating the City by making an engagement with eHT and Sage Diller. Betty noted that he was trying to determine if eHT was willing to assist the City.

If the Surety company wants to review materials or work done to date, then a City employee will need to be present. Betty will write a letter to the attorney for the Surety company. He will work on a contract with eHT, and he will notify the City of there is no cooperation in this.

Mayor Torres reiterated that he felt the City Attorney was obligating the City before a discussion was held with the City Council. He just needed clarification as to this. Betty noted that if the Mayor ever has any questions, he can just call Mr. Betty. He does have concerns that the City knows who to pay the funds to, and he will work to determine this answer. The Mayor, Council, or City Administrator can

call him at any time. Betty requested a meeting with the Mayor to clear the air, and Mayor Torres stated that Betty can meet with the Mayor here during this meeting. Betty felt he was being dealt with hostilely. No further action was taken on this matter.

B. Approval of November 2022 Bills

Motion to approve Business Item "B", November Bills, was made by Council Member Hall, seconded by Council Member Gandy. Motion carried 5-0.

Motion made by Hall, Seconded by Gandy.

Voting Yea: Martinez, Aguirre, Hall, Dunaway, Gandy

C. Consideration of Golf Course Club House Lease Agreement three year renewal and monthly rental rate increase from \$811.28 to \$939.47

Council discussed Business Item "C", a three-year extension of the Golf Course Club House Lease. Mayor Torres noted that, if approved, the City would be bound by this lease for the entire three years. If Council is going forward with the Golf Course, then we need to renew the lease. If Council ends up not going forward with the Golf Course, the the City will be spending the money and getting nothing from it.

Council Member Aguirre asked Council Member Gandy if the Golf Course Association was willing to work the Club House should the lease be extended.

Council Member Gandy noted that only about 5 members out of 25 from the Golf Course Association are attending meetings. Gandy was willing to work the Club House to do his part.

Mayor Torres noted that some towns have an honor system in regards to how to pay fees instead of manning the Club House.

Council Member Hall thinks Council should go forward with the lease extension, as he feels we are trying to make the Golf Course work.

Mayor Torres noted that he was not in favor of just throwing money at the Golf Course without checks in place or caps on expenditures. We are still negotiating with Core Civic, but we are unsure as to whether these negotiations will bring in more funding. We are trying to determine how the per diem dollar figure is determined as to how the rates are set. No further action was taken.

D. Consideration of approval of Golf Course Check Valve Replacement quote

City Administrator Laura Beeson discussed Business Item "D", estimates for the costs of a new Golf Course Check Valve. The only estimate we have obtained is for the check valve only. Morrison Supply provided and estimate of \$8,000 for the check valve only. We are still waiting to hear from All American Pump as to the costs for installation and electrical work. A meeting was set for Wednesday, December 28, 2022, to discuss these matters further once all of the estimates for the check valve have been determined.

3. ADJOURN

The meeting was adjourned at 3:26 PM.