

PRESCOTT CITY COUNCIL
REGULAR VOTING MEETING
TUESDAY, SEPTEMBER 14, 2010
PRESCOTT, ARIZONA

MINUTES OF THE REGULAR VOTING MEETING OF THE PRESCOTT CITY COUNCIL held on TUESDAY, SEPTEMBER 14, 2010 in the COUNCIL CHAMBERS located at CITY HALL 201 SOUTH CORTEZ STREET, Prescott, Arizona.

◆ **CALL TO ORDER**

Mayor Kuykendall called the meeting to order at 3:00 p.m.

◆ **INTRODUCTIONS**

Councilman Lamerson welcomed Past Councilmember Bob Bell and YCCA Director Sandy Griffis.

◆ **INVOCATION:** Pastor Steve Paglia, Heights Church

Pastor Steve Paglia gave the invocation.

◆ **PLEDGE OF ALLEGIANCE:** Councilman Hanna

Councilman Hanna led the Council and audience in the Pledge of Allegiance.

◆ **ROLL CALL:**

PRESENT:

Mayor Kuykendall
Councilman Blair
Councilman Hanna
Councilman Lamerson
Councilwoman Linn
Councilwoman Lopas
Councilwoman Suttles

ABSENT:

None

Liz Burke and Patti Crouse presented Citizen Ed Parry with a proclamation proclaiming September 14, 2010 to be Ed Parry Appreciation Day for his outstanding service to the community.

Mr. Parry thanked the Council said that he appreciated the proclamation.

◆ **SUMMARY OF CURRENT OR RECENT EVENTS**

City Manager Steve Norwood noted that the summer concert series was heavily attended this year. The new attraction, Prescott Idol, had their finals on Saturday at the Elk's Opera House with standing room only. Additionally, there were 700 people on the plaza watching it on a video screen.

Councilman Hanna responded to a letter to the editor in the Daily Courier regarding Constitution Week. The author said that the Council had taken a stance and said that they were endorsing the Making of America class. He said that was not the case. He had attended the class with two other Council members. He did not think that she understood the meaning of the Constitution. He said that he supported the Constitution 100%. He was speaking for himself and not the Council. He said that the Constitution allowed them freedoms that no other country had.

He noted that the author said that the Council members who endorsed the program should be voted out of office. He said that she had the opportunity to do that. In addition, she had the freedom to leave the country anytime she would like. If she needed help leaving, he thought that the people who believed in the Country would help her out.

Councilman Lamerson said that when he chose to serve his community, he never promised that he was going to change who he was. He chose to serve the community the best he could and he felt that the article was hurtful.

Mayor Kuykendall said that speaking for the Council, they had declared a policy from day one that the citizens would have input to the Council and be heard, as long as they go through the City Clerk to ask for the opportunity to speak to the Council. If anyone would like to appear before the Council, the invitation was open.

I. PROCLAMATIONS

- A. September 12-18, 2010 as *Constitution Week*.

Councilwoman Linn presented the proclamation to the Daughters of the American Revolution, General George Cook Chapter. She invited the group up to receive the proclamation.

A representative for the group thanked the Council for the proclamation and said that it was very meaningful to their chapter. She also noted that they had an exhibit in the viewery at the library.

- B. September 25, 2010 as *Prescott Healthy Living Day*.

Councilwoman Suttles presented the proclamation to Happy Oasis, Founder and CEO and Brent Walters, General Manager, from the Raw Spirit Festival.

Ms. Oasis thanked the Mayor and Council for the proclamation. She noted that it was their wish that every resident enjoy Prescott to its ultimate. The festival was not just healthy living, there would also be wholesome, inspirational music, a children's program, and free tickets to the Pow Wow.

Mr. Walters thanked the Council and said that the event was about learning how to be healthy in a fun way.

II. PUBLIC COMMENT

- A. Al Macias of the U.S. Census Bureau re recent census process.

Mr. Macias was not present.

III. CONSENT AGENDA

CONSENT ITEM A LISTED BELOW MAY BE ENACTED BY ONE MOTION. ANY ITEM MAY BE REMOVED AND DISCUSSED IF A COUNCILMEMBER SO REQUESTS.

- A. Approval of the minutes of the Prescott City Council Regular Voting Meeting of August 31, 2010.

COUNCILWOMAN SUTTLES MOVED TO APPROVE CONSENT AGENDA III-A; SECONDED BY COUNCILWOMAN LINN; PASSED UNANIMOUSLY.

IV. REGULAR AGENDA

- A. Approval of request from Asphalt Paving & Supply, Inc. to perform night work along Miller Valley Road, Grove Avenue, and a portion of South Montezuma Street.

Mr. Nietupski noted that the original request involved Miller Valley Road and a portion of Montezuma Street. The request had been modified for Montezuma primarily. There was an issue with a scheduling conflict with a subcontractor and a water line issue that was identified just north of the Sheldon Street intersection that needed to be addressed. The item was

limited to the Montezuma Street corridor, south of Goodwin to White Spar. The work would commence on the night of September 20, 2010 and take approximately seven days to complete. That would include the mill, overlay, adjustment of valves and manholes and temporary stripping for access to the utility system. The work would be conducted between 6 pm and 6 am. There were about 18,000 vehicles per day on that section of Montezuma. The numbers decreased in the White Spar area.

Councilman Blair asked if the night work was identified in the original contract when it was bid. Mr. Nietupski said that night work was not a requirement in the contract and it was discussed after the contract was awarded. That resulted in a draft memo that was presented to Council, amending the request, because of the issues that he had identified with respect to the subcontractor and the water line.

Councilman Blair asked what the difference was between the first and second bidder. He believed that the night work should have been bid in original contract and was surprised that it was being revised. He felt that the other people who bid the job did not have the opportunity to bid for the night work. Mr. Nietupski noted that perhaps it should have been in the original contract and that the contractor said that it was in the best interest of the community. He said that the extra cost would be about \$9,500 for the lights and additional labor to facilitate the work. It was not a tremendous expense associated with going that route.

Councilwoman Suttles said that she felt it was an expense at \$13,000 more than what they had expected. Mr. Nietupski said that the \$13,000 was if they were going to do both projects. However, they were only going to do Montezuma Street. The Miller Valley project would not commence until mid October. Due to that delay, it would not be best to proceed with night construction for paving because the nighttime temperatures could get into the 30's in October.

Councilwoman Suttles said that there always seemed to be changes needed in the contracts that come to Council. The last few times that she had been in restaurants along Miller Valley, there was no way that the work could have been done in the day time. They would have lost too much business. They should know how the businesses would be affected going into the project. There may have been a second bidder that may have been less. They should be better prepared in the future.

Councilman Hanna asked how many vehicles were on Iron Springs Road when they did that project. Mr. Nietupski thought that there were approximately 18,000. Councilman Hanna asked why they were trying to do the current project at night when they did Iron Springs Road during the day. He thought that \$9500 was a lot of money and it needed to stop. He

thought that they should stick to the original contract. Mr. Nietupski noted that the contractor would proceed with day work, as the project was bid.

Councilman Lamerson was not sure that the impact on the scope of work with night versus day would not have an impact on the dollars that were bid. The fact that the contractor was willing to do the job the way it was bid seemed an appropriate response.

Councilwoman Linn said that even though Iron Springs was done during the day, she thought that they requested \$50,000 more money for flaggers. She asked if staff expected that to happen with that project.

Mr. Nietupski said that there was a combination of day and night work on Iron Springs Road. She was correct and that on that contract, they did exceed that traffic control allowance for the project. In the current project, the traffic control had been included in the \$9,500 associated with the request.

Mayor Kuykendall asked if it was the consensus of the Council to go back to the original intent of the contract and make it a day job at the original bid, disregarding the \$8,500 and the \$4,500.

Councilman Hanna said that was his intent, but that they did not have to do it in the day time. He did not think that the citizens should pay extra money for them to do the work at night. If they wanted to do it at night, it was up to them. He did not see why they could not do the work in the day time and keep the traffic flowing and business access open.

Mayor Kuykendall asked if this changed the intent of the bid by offering an opportunity to do a night job after the bid was open. He asked if they went back to the original intent of the contract and made it all day work, would that be something that they could do.

Mr. Kidd said that he would have to look at the original bid and the specifications.

Mr. Norwood noted that City Code required the vote from Council for night work. They could allow them to do the night work and stay within the existing budget.

Councilwoman Lopas said that she saw so many businesses that would be affected by this and it should have been bid for night work. She thought it was putting them between a rock and a hard spot. She said that the Iron Springs businesses were affected drastically by the work. She did not want to impact the local businesses in this economy to save \$8500.

Councilman Lamerson suggested that if they could do the job at night for the same amount, then they should go ahead. If they needed more money, it should go out for bid again. Councilman Blair agreed and said that they approved the contract as written and night work should be on their dime.

Councilwoman Suttles said that the Council would be there when the contractor came back and said that he needed the money for the night work. It would cost more in the long run because the contractor would be back. Her biggest fear was that the contractor would come back to say that they were not able to do the job because they needed more money to do the work at night. She said that it would cost them more in the long run because the contractor would be back. She did not like the way the contract was written, but she would rather deal with what she saw at that point and hope that it was better next time.

Councilman Blair said that they should throw it out for rebid. Mr. Norwood said that they would miss the window and they would push the job into spring. Mr. Nietupski noted that they did have a contract. They were talking about an amendment to do the night work. The Council could decide to do the night work. It would be up to the contractor to do the night work without additional compensation. He did not think that the contractor would be inclined. The whole idea was to minimize the impact and shorten the duration.

Councilman Blair asked if there was a bonus for early completion. Mr. Nietupski said no. Councilman Blair asked if they were so concerned about getting the job done quickly, why there was not a bonus included.

Councilwoman Linn asked when the work would be done. Mr. Nietupski said that if it were approved, it would be complete within seven days of commencement.

Councilwoman Suttles said that her paperwork showed that it started on the 20th and lasted to two weeks. Mr. Nietupski said that those numbers were for both projects.

Mr. Norwood noted that they got those requests on other contracts. APS was an example, with the power poles. Councilman Hanna said that they did not come back and ask for more money. He would be more than happy to give them permission to work nights on the current project.

Councilwoman Linn asked if they could come back and do a change order. Mr. Nietupski said that if the amendment were approved the change order would be issued to allow the night work and to pay the \$9,500 associated with it.

Mayor Kuykendall asked Councilman Blair if he would make a motion to go back to the original bid and if they wanted to do night work on their nickel that would be included in the motion. Councilman Blair said yes; Councilman Hanna agreed.

Councilwoman Suttles said that if they went out on their nickel and they had to do night work, but then came back for a contract change, she asked if the Council was ready for that. Councilman Hanna said that it was just as easy to say no now as it would be then. Councilwoman Suttles said that it was not that cut and dry.

Councilman Hanna said that if they were willing to accept the contract and sign it, then they were willing to do the work. If not, that would not change anything when they came back and asked for more money. Mr. Nietupski said that they would take whatever Council direction provided.

Councilman Lamerson asked if the City was in any sort of violation of the contract in allowing the guys to work at night if they chose to. He did not want to pay them any more than they agreed to pay them. They had a 24 hour a day window to accomplish the job. Mr. Kidd said that the way the motion was phrased was that the Council could authorize them to do the work within a 24 hour period. They would not be changing the terms of the original contract. He would feel better if he had the contract in front of him.

Mr. Norwood said that when the City bid the project, six contractors bid it with no night work. They were not concerned about the lack of night work. He said that it was okay to say that they were not going to pay them extra for the night work, but they were allowed to work nights. It was not such a unique situation that they only had one bidder.

Councilwoman Linn said that the Legal Department should look at the contracts to see how the City could protect itself in the future. Mr. Kidd said that Mr. Lloyd was sitting through the contract specification and construction schedules. They needed to coordinate the three to four different parts of the contracts with standard forms they were using currently.

MAYOR KUYKENDALL MOVED TO APPROVE THE PRICE OF THE ORIGINAL BID AND ALLOW NIGHT WORK, IF THE CONTRACTOR SO DESIRED AT NO EXTRA COMPENSATION; SECONDED BY COUNCILMAN BLAIR; PASSED UNANIMOUSLY.

- B. Award of bid and contract for the Virginia Street Sewer Replacement Project to A. Miner Contracting, Inc., in an amount not to exceed \$1,087,737.00, requiring Davis-Bacon wages.

Item IV-B was pulled from the agenda for further discussion.

- C. Adoption of Ordinance No. 4761-1112 – An ordinance of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, authorizing the purchase of real property from One West Bank (Michael Pompa) for the widening of Williamson Valley Road, authorizing the Mayor and City staff to take all necessary steps to effectuate said purchases and dedication; and declaring an emergency.

Mr. Nietupski noted that the land was the last parcel of right of way the City needed in order to proceed with the utility relocation that was necessary for the Williamson Valley Road project. The acquisition had been accomplished in the past week and a half, after an extensive process with One West Bank. The value was based on an updated appraisal of \$47,800.00. The ordinance was suggested with the emergency clause to expedite the process in the escrow.

There were still four parcels that the City needed to acquire for the road work to begin. Those did not have a direct bearing on the utility relocation project. Those parcels involved a 17 foot strip of property and three different owners. The City of Prescott was in negotiations with two of the owners. There was a declaratory judgment that was before the court to determine the last owner who owns two parcels and what process they will follow. There was a potential for a stipulation on the other two. APS talked to him about their design which was two to three weeks out. Qwest and Cable One would also have to complete their design after the APS design was done. There would also be some cost to the project where there were some prior rights associated with Qwest facilities. They had been budgeted and were part of the project costs. Those were not identified yet due to the lack of the design.

Councilman Hanna asked how many square feet they were talking about. Mr. Nietupski said that the acquisition involved about 30,400 square feet.

Councilman Blair asked if there was a time frame for acquiring the other parcels. Mr. Nietupski hoped that there would be a stipulation agreement in the next 30 days, which would take care of two of the four parcels. The remaining two needed a declaratory judgment and they had not received a response from that property owner. Councilman Blair asked if they could be kept updated. Mr. Nietupski said yes.

Mr. Lloyd noted that there were some preliminary steps they had to take before declaratory judgment action. They served him with a deed to give to the City, which allowed them to recover attorney's fees if he did not give them the deed. There were a few more days before they could recover attorney's fees. Councilman Hanna confirmed that there had been contact with the owner. Mr. Lloyd said that they served him with the deed, asking him to give the city the deed. They had not had a response from him.

Councilman Blair asked if that covered all of the parcels and if that man owned two of the parcels. Mr. Nietupski noted that he did own two.

Councilman Lamerson asked if there were any impediments or liens and that Prescott was free and clear to buy or take the property. Mr. Kidd said that the plat had a dedication, at some future point in time, when the Public Works needed the dedication. They interpret the dedication as when the Director of Public Works or City Engineer asked for the dedication to occur. That happened approximately one year ago. Their position was that the City of Prescott owned the property already. The first manner of going to court was to do a quiet title. They asked the court to declare the title as vested in the City.

The next step was, if it can be converted into another form of action which was a condemnation action. They followed the Council's directive and tried to get a hold of the owner and tried to negotiate with him. In his opinion, there was no other way to get the property. Councilman Lamerson said that he wanted to make sure that there was not anything hidden that would give the City a cloud on the title.

Mayor Kuykendall asked if the project was ready for bid other than that issue. Mr. Nietupski said that plans and specifications were being final reviewed and they would be ready to advertise once they knew they did not have a utility conflict to deal with. The utility project would be completed before they built a road out there.

Councilwoman Linn asked if they were going to have the option for night work. Mr. Nietupski said that they would have to look at that.

COUNCILWOMAN LOPAS MOVED TO ADOPT ORDINANCE NO. 4761-1112; SECONDED BY COUNCILMAN HANNA; PASSED UNANIMOUSLY.

- D. Adoption of Resolution No. 4046-1116 – A resolution of the Mayor and Council of the City of Prescott, Yavapai County, Arizona, repealing Resolution No. 3637 and adopting a new Council Policy regarding a Traffic Calming Policy and Procedures.

Ian Mattingly said that the item was an update to the Traffic Calming Policy and Procedures adopted in November 2004. The policy was the guidance document for all traffic calming installations within the City. During the past six years, Staff had monitored the adequacy of the policy in balancing the need to calm traffic for residents while still meeting the policy directives of Council and allowing traffic to move efficiently throughout the transportation system. Staff had proposed changes and additions to the policy. They included:

- ◆ REQUIRING A PETITION PROCESS FOR ALL TRAFFIC CALMING REQUESTS
- ◆ ADOPTING THE 2010 FUNCTIONAL CLASSIFICATION MAP AND PROVIDING A PROCESS BY WHICH IT WAS UPDATED
- ◆ IMPLEMENTING NEW GENERAL INSTALLATION CRITERIA, INCLUDING CONSIDERATIONS OF LAND ZONING, LAND USE, SITE DISTANCE AND RESTRICTION ON CALMING INSTALLATIONS THAT DIVERT TRAFFIC TO OTHER NEIGHBORHOOD STREETS
- ◆ IMPLEMENTING THRESHOLD FOR SPEED AND VOLUME
- ◆ PROVIDING THAT ALL TRAFFIC CALMING REQUESTS HAVE A PUBLIC MEETING
- ◆ INSURING THAT ALL TRAFFIC CALMING ACTION PLANS APPROVED BY THE TRANSPORTATION COORDINATING COMMITTEE ARE PRESENTED TO CITY COUNCIL AT A REGULARLY SCHEDULED MEETING

Changes were done because of past experiences. Staff recommended that the changes be implemented through the adoption of Option A, amended as shown.

Councilwoman Suttles asked how they came up with the changes and if there was a committee. Mr. Mattingly said that it was done mostly at the staff level and at the committee meetings; however the committee had not formally adopted any recommendations. The current recommendations were from the staff and had been reviewed by the committee. The staff surveyed 28 communities of similar size and 25 of them had volume

thresholds and 27 had thresholds for speed. The City of Prescott was, unofficially, asking everyone to do a petition. The 2004 Policy did not include that.

Councilwoman Suttles said that it was brought to her attention that the wording on page 9 was confusing and may need to be cleaned up, concerning notification being determined on a case by case basis and “may” included letters to property owners. Below that it said that all requests for traffic calming measures “shall” have a public meeting.

Mr. Mattingly noted that they were trying to say that they were intending to notify all affected property owners by letter. If there were more people than those on the block who were affected, they wanted the option of not having to do a large quantity of mailers and use other options instead. They left it vague so that it could be a public service announcement, something in a billing statement or signs. It could get costly if there were too many people involved. Councilwoman Suttles said that she had read through it and thought that it had been cleaned up quite a bit and she had no issues with it.

Mr. Norwood said that the intent was that if they were painting a curb, that would be one thing but the Traffic Coordinating Committee (TCC) should not have responsibility for large projects. Councilman Blair said that he respected the TCC a lot. The prior process left the Council and community out of the reasoning. By stating it in the resolution, the public had a way to hear about it. He was glad to see it come back.

COUNCILWOMAN LOPAS MADE A MOTION TO ADOPT RESOLUTION NO. 4046-1116 VERSION A; SECONDED BY COUNCILWOMAN SUTTLES; PASSED UNANIMOUSLY.

- E. Approval of contract in the amount of \$70,000.00 for expert witness services to be provided by PMA Consultants, LLC.

Mayor Kuykendall noted that the correct amount should be \$72,500. Mr. Kidd noted the item concerned the Demerse Avenue project. The contractor filed a claim against the City. The claim was for \$991,788.31. The contract required the City to go to arbitration and provided for good faith negotiations which were conducted by the Public Works Department with the contractor to try to resolve some of the issues. They did not succeed so there was a claim filed against the City with a request for arbitration. Arbitration was currently scheduled for January with an abbreviated discovery schedule.

The contractor filed a disclosure statement and also filed an expert witness report. As a result, the City of Prescott sought to obtain their own

expert witness report to evaluate the contractor's report and to prepare the City for the arbitration. The legal department had worked with PMA Consultants before. They were an engineering firm that had experience in looking at contracts like the one in question. They were very good at what they did and their knowledge would assist the City in presenting their legal defense to the arbitrators. They were needed to contradict the contractor's experts.

Mayor Kuykendall asked if each side picked an arbiter and then they picked a third person. Mr. Kidd said yes. He noted that there were some initial issues because some of the arbitrators were familiar with one side or the other, so they had to get other experts.

Mayor Kuykendall said that the City admitted that they owed Spire about \$112,000, which had been withheld. Mr. Nietupski said that the City was withholding retention in the amount of \$112,632.21, which was 5% of the amount that they calculated that Spire earned under the contract.

Mayor Kuykendall asked if they were arguing over approximately \$871,000.

Councilwoman Suttles said that she needed support, and asked if they were going to an arbitrator to come up with a dollar amount because Spire Engineering had submitted a claim for additional compensation for the work on Demerse Avenue. She asked how a company would come up with that amount and asked where the City dropped the ball. Mr. Nietupski said that he did not think that the City dropped the ball. He noted that it was two parties that could not agree on the terms of the contract. They represented that they had incurred additional costs and had continued to press for additional compensation, under the contract, due to unforeseen circumstances. The experts that they were talking about were of significant specialty. These people could provide expert testimony to say that the City should not have to pay or that Spire should have been paid. He felt that their involvement was needed in order for the City to resolve the claim.

Councilwoman Suttles noted that Spire was not local, but they were the low bidder. The City was now up to almost one million dollars more than what they had originally asked for. She felt it was a blatant throw at a City government to see how far they could push the City of Prescott. She resented the courts and the arbitrator. She was beside herself that they had to spend the money to defend the City.

Councilman Hanna said that he hated paying the money for the expert when they were going to split the difference and suggest that the City pay

half of what was owed. He asked if the City had paid them everything but the \$112,600.

Mr. Nietupski said that the original contract amount was \$2,548,000. They had earned \$2,252,644. There was about \$239,000 difference between what the City had calculated that Spire had earned versus the total contract that was authorized and awarded by the Council. The City had withheld 5% on the amount that was earned.

Councilman Hanna asked if they had paid Spire the difference between the \$112,600 and the \$239,000. Mr. Nietupski said that they were holding the retention and holding everything else. Councilman Hanna said that it looked like they were talking about a difference of \$880,000. He said that the City was going to pay an expert witness \$72,500 to go in and split the total in half and tell the City that they owed \$439,000, which was what happened 95% of the time. The legal department agreed that the contracts needed to be changed to protect the City and the citizens. He would rather go to court and take his chances with a jury. He thought the citizens would say that the money was way out of line. He thought that it will end up in court anyway. He could not vote for it.

He thought that the City and Council had to take a look at the legal department saying they needed an expert witness because the topic was not within their expertise. If they were not going to have expertise in certain areas, maybe the whole legal department needed to go away and the City should outsource everything. He was not trying to be degrading, but was looking out for the dollars and cents of the citizens of Prescott.

Councilwoman Linn agreed that they were in a horrible situation. She had a similar experience with arbitration. If they were going to end up going to court, they should just go to court. Prescott residents would have felt the mess. She was not willing to spend the money. This was not about legal or engineering, they would learn from this. She could not support it. She would rather go to court and have the chips fall where they may.

Councilman Lamerson said that there seemed to be some consistencies in some of the problems. He noted that Mr. Nietupski said that the contractor had not contemplated the problems. He said that it may have been because he did not live here. That may have also affected their bid amount. By State law the Council could not pick the people they wanted to do the work. He had a problem with the bid specifications. They do not include specifications in their bidding process that lay out what type of people they were looking for to do the job. It may be in the way they were asking for the job to be done and who was going to do it. He understood that they could not cut their nose to spite their face. He had heard from legal that they were not prepared to defend their position because they

were not adequately trained. He was going to have trouble looking at new contracts. He was not willing to risk the loss on the taxpayer's behalf because the City was a nickel short. They had already spent approximately \$20,000. So they were now going to supplement the \$20,000 with approximately \$50,000 and have better than what they currently had to support the City's position.

Councilwoman Lopas said that the staff knew that the Council did not like how the contracts had been handled in the past. She said that they had to go to arbitration well prepared. She did not see a way around it. The research that they were going to do would not be money wasted if they could take it to court. She did not want to spend the money but did not see another way.

Councilman Blair said that when there was a contract difficulty they acted like they were hiding from a jury trial. The Council always seemed to be willing to give away the ranch. He would not support the \$72,500. They needed to fix the problem that was broken. He agreed with Councilman Hanna that maybe they did not need to have two to three legal people if they were not qualified to handle the contracts. Maybe they should contract all of those services. He said that it was very frustrating that the community could be beaten down for \$800,000 based upon a contract that the City let out. He asked his fellow Council people if they were willing to accept the arbitration if they owe one half of the total requested. If they were not willing to accept that, they would be going to court anyway, so why would they spend the money for arbitration.

Councilwoman Lopas said that they were legally bound to arbitration. Councilman Hanna said that she was correct, but they did not need to accept arbitration.

Councilwoman Lopas said that they would have to spend the money for the expert witness for a court hearing anyway. Councilman Hanna said that if they paid the expert witness then, that would not be all he needed to go to Court with the City. He would have to be paid additional money. He asked why they would waste the \$72,500 and also have to go to court.

Mayor Kuykendall noted that when the project started, there were questions. He remembered when a representative from Spire talked about some of the things that were going on. The Council asked why they did not stop the project at that point. The City could not do that without assuming some liability. The Public Works worked their way through it the best they could. They had paid \$20,000, which left \$52,000. He said that the question was whether they would pay \$52,000 to take them to the next level or would they pay the \$20,000 and not have an expert witness for the arbitration.

Councilman Blair said that they were blindfolded because they had no idea what was accomplished with the \$20,000. The Mayor agreed.

Mr. Kidd said that there was an overhead cost that they were trying to access against the City. Based on the preliminary report of expert witness, they were not entitled to any of that. Out of the gate the City had saved \$250,000. Mr. Kidd would be negligent if he did not bring the expert to the Council's attention because it was a standard of care. If they were going to be representing the City in arbitration or court and the other side had a qualified expert who had a lot of testimony, they would have to go outside for the expertise. The City would not have a strong way to refute without the expert. It was always a good idea to have some tools to refute the opposition's expert report.

Mayor Kuykendall noted that they were going to arbitration. Either they would go with a pea shooter or a manila folder with some information.

Councilman Lamerson asked why he would choose to go to court with people that he knew had said that they could not give the community the best service there was. He noted that the City had done some things that they could do differently. From his standpoint, he would choose to go to court with the best case he had. He did not know why they would step into a courtroom knowing full well that common sense was not as common as it used to be.

Councilwoman Suttles noted that they had an attorney who worked for the City that said he would do whatever the Council wanted. She said that they should send him out with the best they could do. This was not because they wanted to be there, but they had to be here. She would rather not give them a dime but she did want to do the best for the community. She did not want to be embarrassed by not having the expert witness.

Councilman Hanna thought that they better have an expert when they went to court. However, he did not think that they needed one when they went to arbitration. If the Council voted to give Spire the money, the arbitration fee would be on top of that. Councilwoman Suttles noted that his vote would show that.

Councilman Lamerson asked Mr. Kidd if he thought they would split the difference if they went to arbitration, or would they would look at all of the facts. Mr. Kidd said that the arbitrators would look at all of the facts. Arbitration was different from mediation because, in this situation, there was a professional panel. The theory was that they tried to resolve the case before they went to court. If they went to court, both sides would pay

their own attorney's fees. There was not a jury trial right in the contract. There can be an abbreviated court proceeding with no attorney's fees. It could be as cheap as long term arbitration.

Councilman Lamerson asked him if he said that there was no guarantee of a jury trial. Mr. Kidd said yes. He said that the City's expert witness could look at their expert report and reveal his findings to the arbitrator.

Daniel Matson said that the low bidder bids a low amount and now wants one-third more. He thought that there may be fraudulent activity.

COUNCILWOMAN SUTTLES MOVED TO APPROVE A CONTRACT IN THE AMOUNT OF \$72,500.00 FOR EXPERT WITNESS SERVICES TO BE PROVIDED BY PMA CONSULTANTS, LLC; SECONDED BY COUNCILWOMAN LINN; PASSED 4-3 WITH COUNCILWOMAN LINN AND COUNCILMEN BLAIR AND HANNA CASTING THE DISSENTING VOTES.

V. ADJOURNMENT

There being no further business to be discussed, the Regular Voting Meeting of the Prescott City Council held on September 14, 2010, adjourned at 4:30 p.m.

MARLIN D. KUYKENDALL, Mayor

ATTEST:

ELIZABETH A. BURKE, City Clerk

CERTIFICATION

I hereby certify that the foregoing minutes are a true and correct copy of the minutes of the Regular Voting Meeting of the City Council of the City of Prescott, Arizona held on the 14th day of September, 2010. I further certify the meeting was duly called and held and that a quorum was present.

Dated this ____ day of _____, 2010.

AFFIX
CITY SEAL

ELIZABETH A. BURKE, City Clerk