



CITY OF SALINAS COUNCIL STAFF REPORT

DATE: OCTOBER 10, 2017

DEPARTMENT: CITY ATTORNEY'S OFFICE

FROM: CHRISTOPHER A. CALLIHAN, CITY ATTORNEY

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TITLE: APPROVE RESOLUTION TO REJECT THE BID PROTEST AND TO REJECT ALL BIDS AND REBID THE E. LAUREL DR. AND ST. EDWARDS DR. TRAFFIC SIGNAL INSTALLATION AND IMPROVEMENTS PROJECT

RECOMMENDED MOTION:

A motion to approve a Resolution to:

- 1) Reject the bid protest submitted by The Don Chapin Company, Inc. ("Chapin") and to refund to Chapin the \$1,000 bid protest fee; and
- 2) Reject all bids and to rebid the project after review and modification of the Specifications and project documents to address inconsistencies and clarify verbiage.

RECOMMENDATION:

Legal staff recommends that the City Council approve a Resolution to 1) reject the bid protest by Chapin and refund to Chapin the bid protest fee, and 2) reject all bids submitted and rebid the project after improvements, modifications, and clarifications are made to the project documents.

BACKGROUND:

The City issued a Notice to Bidders calling for bids for construction of the City's "East Laurel Drive and Saint Edwards Drive traffic signal & intersection improvements Project No. 9220" on July 22, 2017, via advertisement in the Salinas Californian, for bids to be received and opened on August 15, 2017. Two addenda were issued for the project, both answering technical questions, one of which also extended the project bid opening date to August 22, 2017. On that date bids were opened and examined.

The apparent low bidder was Monterey Peninsula Engineering ("MPE") with a bid of \$872,029.50, a bid which was \$212,029.50 (36%) above the engineer's estimate of \$660,000.00. In addition, the City's budget for the project included a shortfall of \$109,759.00 that would have to be appropriated

from Measure X Transportation Safety funds via Council approval. The second apparent low bidder was The Don Chapin Company, Inc. with a bid of \$973,111.00, and the third bidder was Granite Rock Company with a bid of \$1,114,474.00.

Subsequent to the opening Chapin submitted a bid protest regarding MPE's bid on the grounds that (1) MPE failed to register appropriately on the PlanetBIDS website, and (2) that MPE's listed electrical subcontractor, Darrel Varni Electric, Inc. ("Varni"), was not bidding on the project. Public Works reviewed the protest and found it to be invalid, determining that (1) MPE had followed the bid Specifications respecting registering as a vendor with the PlanetBIDS website even though MPE did not register on this specific project's PlanetBIDS site, (2) MPE submitted the appropriate notarized documents respecting its submission of Varni as an electrical subcontractor, and (3) Chapin had failed to appropriately file his protest with the City Clerk and did not provide the \$1,000 bid protest fee required by the project Specifications.

On September 19, 2017, City Council held a public hearing on the matter, hearing both the recommendation of Public Works to proceed to award the contract to MPE and the protest arguments from Chapin in which he asked that Council determine MPE to be non-responsive and non-responsible. Chapin also asserted that there were problems with MPE's submission of Varni's Non-Collusion Declaration of Subcontractor, particularly that Sandra Bruno is an owner of MPE and should not have served as a notary to the Declaration and that Varni signing a Non-Collusion Declaration for a job he purported to have told Chapin he did not bid is an illegal act.

Council continued the hearing to this October 10, 2017 date to receive evaluation and input from its Legal Department ("Legal").

BID PROTEST

Pursuant to City Ordinance No. 2330 (NCS), Section 1 (City Code Section 12-39), "The City Council shall only sustain a bid protest if it finds evidence that award of the bid would violate the Code or other applicable law." Legal concurs with the finding of Public Works that the protest should not be sustained because award of the bid would not violate City Code or applicable law.

Chapin protested award of the bid to MPE because MPE had failed to register on the PlanetBIDS website for this particular project. Public Works confirmed that MPE had registered generally at the PlanetBIDS website, twice, even though it had not registered on PlanetBIDS for this specific project. Public Works in making its determination relied on language in the Notice to Bidders, page 9, 2nd paragraph that states: "If bidder is not registered on the PlanetBIDS web site when submitting a bid, they shall be disqualified."

Note, however that the City has received several complaints and at least two other bid protests respecting the PlanetBIDS website registration requirements contained in its Specifications. For example, in a February 7, 2017 Report to the City Council respecting "Job Order Contracting for Miscellaneous Type B Building / Building Maintenance Work" City staff wrote that two contractors, Federal Solutions Group and William A. Thayer Construction Inc., were disqualified as non-responsive due to the fact that "30 minutes prior and 30 minutes post bid opening, City staff opened the project on PlanetBIDS website, and noted that only 3 prime contractors had

registered for the project, Staples ... Ausonio...and Newton.” Those 3 contractors won award of contracts with the City, the two disqualified did not. Later in the same Report, language references failure to register at the PlanetBIDS website and failure to register for the project on the PlanetBIDS website intermittently, so it is difficult to determine if the disqualification was based on the failure to register at PlanetBIDS or failure to register at PlanetBIDS within the specific project (Job Order Contracting Miscellaneous Type B).

Public Works staff has discretion to waive inconsequential irregularities. However, the Specifications as written include mandatory “shall” language respecting PlanetBIDS. To make for a cleaner process, it is recommended that the City, prior to issuing or re-issuing any Specifications:

- determine why it is mandating registration at PlanetBIDS,
- include its intention within the Specifications,
- elucidate if the PlanetBIDS website registration is the most important criteria (as staff indicated at the September 19 hearing) or if registration at the City’s specific project within PlanetBIDS is most important,
- specify how to register via the City’s portal to PlanetBIDS, which results in a price difference from registering direct at PlanetBids – so as to make bidder costs for registration transparent and consistent for all bidders, and
- consistently handle bids for all City projects from those bidders failing to comply.

Secondly, Chapin protested award of the project to MPE by asserting that Varni had not bid on the project even though listed as a subcontractor to MPE. Public Works found no merit to Chapin’s protest despite Chapin’s references to communications by and between Varni and Chapin. This issue is not a City protocol issue and not an issue of MPE, rather it does appear to be an issue between Chapin and Varni.

California case law provides that usually, responsiveness of bids submitted on public construction projects must be determined from the face of the bid, without outside investigation or information. (See Valley Crest Landscape v. City Council of Davis (1996) 41 Cal. App. 4th 1432, 1438). From the face of MPE’s bid it looks clear that Varni submitted a bid to MPE for the subcontractor electrical work. However, to further address Chapin’s allegations, Legal inquired with MPE as to whether it had any reason to suspect that Varni would not be honoring the bid he submitted or not be serving as the electrical subcontractor on the project, and MPE replied “no.” Next Legal spoke with Varni to ask about the bid protest assertions and Varni specified that he did not give a bid to Chapin but did give one to MPE because MPE continued contacting him, repeatedly, the day of the bid opening and he was comfortable giving a rougher bid to MPE than to Chapin as he had more experience working with MPE. Varni expressed remorse that this situation could be damaging his business relationship with Chapin.

In additional protest, Chapin, at the September 19, 2017 public hearing before Council, took issue with Varni’s Non-Collusion Declaration of Subcontractor being notarized by Sandra Bruno, an alleged owner of MPE. Notary conflict of interest law is addressed within California Government Code Section 8224, Financial or beneficial interest in transactions, which provides:

A notary public who has a direct financial or beneficial interest in a transaction shall not perform any notarial act in connection with such transaction.

For purposes of this section, a notary public has a direct financial or beneficial interest in a transaction if the notary public:

- (a) With respect to a financial transaction, is named, individually, as a principal to the transaction.
- (b) With respect to real property, is named, individually, as a grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, or lessee, to the transaction.

For purposes of this section, a notary public has no direct financial or beneficial interest in a transaction where the notary public acts in the capacity of an agent, employee, insurer, attorney, escrow, or lender for a person having a direct financial or beneficial interest in the transaction.

Sandra Bruno is not named individually as a principal of MPE in the bid documents submitted by MPE. Consequently, there does not appear to be a facial violation of the Gov. Code Section. Of note, however, is that fact that the Non-Collusion Declaration of Subcontractor submitted by Darrel Varni and accompanying Notary Acknowledgement signed by Sandra Bruno are both dated September 5, 2017. The 5-day deadline for submission of these documents to the City had expired at the close of business on August 29, 2017. On August 29, 2017 the City was in receipt of a Non-Collusion Declaration of Subcontractor signed by Kaley Varni, Office Manager of Darrel Varni Electric, Inc., but that Declaration was missing the required Notary Acknowledgement.

Upon inquiry, Public Works staff opined to Legal that Public Works has a practice of allowing 5-day documents to be received within 5 days and deeming them sufficient so long as the Notary Acknowledgement comes in on a subsequent date. In short, Public Works deems the 5-day document requirements by MPE to have been met with Kaley Varni's submission of an un-notarized Non-Collusion Declaration of Subcontractor since Darrel Varni signed and submitted a notarized one at a later date.

Another noteworthy point is that Chapin's 5-day documents contained two un-notarized Non-Collusion Declarations of Subcontractors, namely that of Graham Contractors ("Graham") for slurry seal work and KCI Environmental, Inc. ("KCI") for landscape and irrigation work. Language on the bottom of the City's form of Non-Collusion Declaration of Subcontractor provides this instruction: "Attach Notary Acknowledgement if signature is not the same as the Proposal signature(s)."

Upon questioning Public Works as to how Chapin's 5-day documents were deemed timely submitted and sufficient when they failed to include Notary Acknowledgements for two subcontractor Non-Collusion Declarations, Public Works responded that it has a long practice of allowing the Proposal signature of the bidder to suffice as verification of the subcontractor's signature on the Non-Collusion Declaration of Subcontractor, in lieu of a Notary Acknowledgement. This practice likely emanates from the fact that the language is confusing.

In this instance, the Proposal signatory on the proposal/bid was Chapin as the general contractor, and he would not be submitting a Non-Collusion Affidavit of Subcontractor so the instruction is inapplicable, nonsensical, and likely boilerplate language that was inadvertently held over from the form of Non-Collusion Declaration of Contractor which provides the same instruction that a Notary Acknowledgement is required if signature to the Non-Collusion Declaration of Contractor form is not the same as the Proposal signature(s). Thus, the language makes sense on the Contractor's Declaration but not the Subcontractor's Declaration and appears to not be enforced by Public Works as respects the Subcontractor's Declaration.

If MPE had followed the same approach as Chapin, Peter Taormina, Manager, signatory to MPE's proposal/bid could have signed Kaley or Darell Varni's Non-Collusion Declarations of Subcontractor in lieu of Sandra Bruno having notarized Darell Varni's. Legal fails to see how Sandra Bruno's Notary Acknowledgement has any more conflict of interest or self-interest to MPE than Peter Taormina's to MPE or any more than Chapin's signature that he submitted in lieu of a notarization on behalf of the Non-Collusion Declarations of Subcontractors Graham and KCI. Neither MPE's nor Chapin's submission of 5-day documents followed the precise language of the Specifications respecting timing and notarization.

As pointed out by Public Works, an additional issue with the Chapin-submitted bid protest is that it was not directed to the City Clerk as required by the City Code and Specifications and did not include a \$1,000 bid protest fee in the manner prescribed by the Specifications. Public Works, acknowledging both, extended a courtesy to Chapin and investigated the protest anyway. Then, at the public hearing on the matter, with Chapin still protesting, City Council agreed to further consider the protest, but to keep a fair playing field and to accord with protocol and written requirements, only if the required \$1,000 bid protest fee was submitted. Chapin then did tender the fee (which resulted in the bid protest fee being, ultimately, a month late).

Bid protest fees are administrative fees that can be refundable or non-refundable and are intended to deter frivolous protests and to help defray the costs of processing protests. In California, in order to pass State constitutional muster, such fees must be based on the City's estimated reasonable costs to process bid protests. (Cal. Const. XIII C Section 1e). Several governmental agencies have bid protest fees such as the Federal Government Accounting Office ("GAO") and California cities like Monterey, San Diego, and Temecula.

Salinas's bid protest fee was not adopted via Ordinance as is customary, rather it took some time and exploration to locate as it was embedded within the Specifications under Part D, Section 3, Award and Execution of Contract. Section 3 is one of the few sections within the Table of Contents that does not include subsections or additional identifiable topics so as to readily assist a reader in locating the bid protest fee requirement via the Table. The Public Works Department Bid Protest Form at Part C also does not cross-reference the fee or Section 3 and is an old form that was updated in January 2017 but missed for inclusion in these project Specifications. The project Specifications at hand may have originated from a former project set of Specifications (pre-January 2017) rather than the master form of Specifications. To remedy this situation, for the project at hand, adding the bid protest fee to the Table of Contents under Section 3 would be ideal and for future projects, being careful to start with the master specification forms is an important step for staff to undertake.

In light of the myriad of issues respecting timing, potentially inconsistent practices, and City-issued documentation that could use improvement, many of which were discovered upon review of the bid protest filed by Chapin, Legal recommends that the City, as a courtesy, refund to Chapin the \$1,000 bid protest fee he filed.

REBID RECOMMENDED

Upon evaluation of the bid protest, a few additional issues unique to these Specifications and/or this project were spotted that warrant attention by the City:

- The Report to the City Council dated September 19, 2017 repeatedly references the Project as Project No. 9268 and also references “Measure X funds CIP 9220” whereas the Notice to Bidders, Specifications, Addenda, Contract documents, and protest correspondence reference the Project No. as 9220. All documentation, including without limitation, the Specifications, should be cleaned up to consistently reference the correct project number.
- Table of Contents of Specifications lists “Section 7 (Blank),” “Section 6 Safety and Health,” and “Section 8 Materials.” Substantively, however, as shown at page 86 and forward, Section 6 is (Blank); Section 7 is Materials; and Section 8 is Safety and Health.
- And “Part F Quality Assurance Program” is missing from the Table of Contents as the Table skips from Part E to Part G.

Upon rejecting the bid protest filed by Chapin, the Council could award the project to MPE as was previously recommended by Public Works staff.

However, Council could also reject all bids and rebid the project. “In its discretion, the legislative body may reject any bids presented and readvertise.” (California Public Contracts Code Section 20166). Also, City Ordinance No. 2576 (NCS), Section 8 provides that “The Council, city manager, and/or the purchasing agent shall have authority to reject any and all bids.” (Municipal Code Section 12-21).

Council’s decision is a balancing one, whether to move forward with contract award immediately to get a safety project started or to enhance the integrity of the public purchase process and contract documentation by rebidding the project after the Specifications have been modified to remove ambiguity and to address issues aforementioned within this report. The proposed project is an important one with regard to the safety of the drivers and the pedestrians in this area. To that end, the modifications to the Specifications will be done efficiently so that the project can move forward toward completion as quickly as possible, being mindful of the potential for inclement weather as the seasons change to winter.

Legal recommends that the latter.

CEQA CONSIDERATION:

Categorical Exemptions. This City of Salinas has determined that the project is exempt from the California Environmental Quality Act (CEQA) Guidelines Section 15301, Class 1 (c) and Section

15302 (c) because the project proposes a modification to an existing facility at the intersection of East Laurel Dr. and St. Edwards Dr., adjacent median island, sidewalks, and street and pedestrian lighting, of which it involves negligible or no expansion of an existing use.

STRATEGIC PLAN INITIATIVE:

This item relates to the Council's Strategic Goal of "Excellent Infrastructure," and enhances "Quality of Life" by allowing pedestrian and vehicles to safely cross E. Laurel Drive to access bus stops, local parks, and medication facilities within the neighborhood.

FISCAL AND SUSTAINABILITY IMPACT:

As indicated on the Council report dated September 19, 2017, a shortfall of \$109,759 exists for the project and if pricing remains the same or increases, it will require that Council authorizes the transfer of that amount (plus a small cushion) from the Measure X Transportation Safety funds.

ATTACHMENTS:

Resolution