Memorandum

From: Robert Patterson, SBEMP

Re: AMG Bid Dispute

Date: May 13, 2022

On January 19th, 2022 the City published a Request for Bids for CIP 2017-028 Westside Fire Station ("Project"). On March 11, 2022 the City opened the sealed bids for the Project. The lowest bidder was AMG & Associates, Inc. with a bid of $7,437,000.00. (The bid from Dalke & Sons failed to list unit prices and total costs for 47 of 65 line items and was deemed nonresponsive.)

The City received a letter of protest to the AMG bid from the second lowest bidder Act 1 Construction dated April 24, 2022. The protest alleges that AMG's bid is non responsive for the following reasons: (1) the subcontractor National Garage Door has not subcontracted Byran Epp or Electric Power Door the two preferred vendors; (2) AMG failed to list a subcontractor who has the manufacturer's certification to apply the floor covering; (3) AMG failed to list a licensed surveyor as a subcontractor to perform the land surveying work; (4) Plymovement, the subcontractor manufacturer of vehicle exhaust removal system, is not a licensed contractor; (5) K&J Plastering has a suspended license; (6) AMG did not list all subcontractors over $500.00 in accordance with the invitation to bid.

For the following reasons, these allegations do not show non-responsiveness. However, the allegation regarding the failure to identify all bidders over $500.00 is probably nonresponsive. Therefore, it is recommended that all bids be rejected and the Project put out to bid again.

ANALYSIS

Bid contests involve the responsibility of the bidder or the responsiveness of the bid. The responsibility of the bidder has not been raised as an issue. The question has to do with the responsiveness of the bids themselves. "Generally, cities, as well as other public entities, are required to put significant contracts out for competitive bidding and to award the contract to the lowest responsible bidder. (See, e.g., Pub. Contract Code, § 20162.) A bidder is responsible if it can perform the contract as promised. (Taylor Bus Service, Inc. v. San Diego Bd. of Education, supra, 195 Cal. App. 3d at p. 1341.) A bid is responsive if it promises to do what the bidding instructions require. (Ibid.) Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. (Id. at p. 1342.)" Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432. In this regard it is noted that Act 1 brings in a great deal of information and speculation regarding matters that are not part of the invitation to bid or required under the California Public Contracts Code. For example, Act 1 states that it has contacted the vendors of the four-fold doors and has speculated that there products cannot be installed by AMG's subcontractor. This information is beyond the scope of the issues that the City

is to consider under case law which limits the review to the invitation to bid package and the bid itself. By dragging in extraneous information, Act 1 has created confusion and potential misunderstanding which does not further the purposes of competitive bidding.

"A bid is responsive if it promises to do what the bidding instructions require." (MCM Construction, Inc. v. City and County of San Francisco (1998) 66 Cal.App.4th 359, 368 [78 Cal. Rptr. 2d 44].) Thus, a responsive [***12] bid must conform to [**898] the public agency's specifications for the contract. (Bay Cities Paving & Grading, Inc. v. City of San Leandro (2014) 223 Cal.App.4th 1181, 1188 [167 Cal. Rptr. 3d 733] (Bay Cities Paving).)" DeSilva Gates Construction, LP v. Department of Transportation, 242 Cal. App. 4th 1409 DeSilva Gates Construction, LP v. Department of Transportation, 242 Cal. App. 4th 1409, 1411, 195 Cal. Rptr. 3d 891, 893, 2015.

"A bid is responsive if it conforms to the public agency's specifications for the contract. (Bay Cities Paving, supra, 223 Cal.App.4th at p. 1188.) It is well established that HN13 """a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. [Citations.]""" (Valley Crest, supra, [*1423] 41 Cal.App.4th at pp. 1440–1441, quoting Konica Business Machines U.S.A., Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, 454 [253 Cal. Rptr. 591], italics added by Konica.) DeSilva Gates Construction, LP v. Department of Transportation, 242 Cal. App. 4th 1409, 1411, 195 Cal. Rptr. 3d 891, 893, 2015. "However, it is further well established [**190] that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the [*1441] bid or given the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. [Citations.]' " (Konica Business Machines U.S.A., Inc. v. [***15] Regents of University of California (1988) 206 Cal. App. 3d 449, 454 [253 Cal. Rptr. 591], quoting 47 Ops.Cal.Atty.Gen. 129, 130-131 (1966), italics in Konica.)" Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432.

The allegedly non-responsive issues are addressed as follows. The allegation that Plymovement is not licensed is incorrect as Plymovement is a dba for Air Movement which is a licensed contractor. AMG has submitted evidence establishing this. The standard of proof in a bid contest is that of substantial evidence. This is the same standard used in land use and CEQA proceedings so it is familiar to city staff. It is requires that the evidence be reasonably probative of the matter in question. However, it is not the strict standard required in a civil trial under the California Evidence Code. In the event of litigation, a court is required to give deference to the determinations of the City in a bid contest. Judicial review is limited to an examination of the proceedings to determine whether the public agency's actions were arbitrary, capricious, entirely lacking in evidentiary support, or inconsistent with proper procedure. There is a presumption that the public agency's actions were supported by substantial evidence. The court may not reweigh the evidence and must view it in the light most favorable to the public agency's actions, indulging all reasonable inferences in support of those actions. The City is not required to conduct a public hearing regarding the outcome of a bid contest. In fact, such determinations are made at the staff level and then a recommendation is presented to the City Council for consideration.

Act 1's allegation that AMG failed to identify the surveyor as a subcontractor is not well founded. Public Contracts Code Section 4113 and the Business and Professions Code do not define surveyors as contractors or subcontractors. Therefore, AMG is not required to list a surveyor as a subcontractor. Act 1 alleged that the stucco contractor has a suspended license, while this may have been true more recent information from the Contractors State License Board shows the stucco contractor as having an active license.

The allegations regarding the steel trellis construction and the floor coating are similar in nature. They allege that the subcontractors and/or AMG do not have an industry or manufacturer certification. The specifications do require these certifications. However, nothing on the Invitation to Bid or in the Public Contracts Code contains a requirement that the contractor provide substantial evidence that it has the ability to perform every specification at the time of the award of bid. These are standards of performance under the contract to be measured and determined at the time the work is performed. The contractor by signing the contract is representing that it will perform the installation in accordance with the plans and specifications. As a practical matter, bid specifications can and do run on for hundreds of pages referencing numerous manufacturer certifications, industry certifications and so forth. It would be nearly impossible for a city to prove that the contractor has every one of these certifications at the time of the bid for a complex project like a fire station. Furthermore, these certifications can be obtained by contractors and subcontractors through seminars and training sometimes on line given by the organizations and manufacturers. This is not the same thing as a contractor or a subcontractor who does not have the class of license that is required to perform the work in question. Failure to have the license required by California law to perform the work in questions most certainly would be non-responsive and non-waivable. However, Act 1 has not alleged that AMG and its subcontractors lack any license required by California law.

Act 1's allegation concerning the four fold doors is similar to the certification issue, but more complicated. Act 1 has provided evidence from third parties to support its claim that AMG cannot as a practical matter install a fourfold door meeting the specifications of the Project. The specifications require a Byron Epp, Electric Power Door or a qualified equivalent. AMG presents a letter from Byron Epp that it does not subtier to install its doors. As mentioned above, the determination of a City regarding responsiveness is to be made from the Bid Package, Bid and related documents – not from outside evidence submitted by protesting bidders. If City's were required to review and consider every piece of evidence that a disgruntled bidder were to submit to the City, it could become an impossible task to award a contract as every bid award would become a speculative and far reaching investigation beyond the scope and time constraints of the public bidding process. However, even if the evidence submitted by Act One regarding the fourfold door manufacturers were to be considered, it does not establish that AMG cannot install a compliant four fold door. Other doors and other sources for doors may be available and it is simply not within the ability of staff to make a determination that it will be impossible for AMG to install a compliant door. If AMG is unable to install a compliant fourfold door at the time of contracting, it would be in breach of contract and the City would have a number of remedies for breach of contract and filing a claim on the performance bond for the non-performance. This issue like the other discussed is an issue of contract performance and not an issue of responsiveness. Nowhere in the Public Contracts Code or in the Bid Package does it require that the bidder prove it has the ability to source the material and systems required by the plans and specifications. If the

City were required to speculate as to whether the contractor has the ability to obtain wood, steel, nails and nuts and bolts the public contracting system would become nearly impossible to administer.

The final issue is whether the fact that AMG did not list every subcontractor for $500.00 or more is non responsive. It should be noted that contrary to the assertion of AMG's attorneys, this requirement is not permissive. The language uses the word "shall" and this assertion is misleading as it is plainly untrue. The next argument made by AMG's attorney is that the $500.00 threshold is invalid. While it does not articulate why the $500.00 threshold is invalid, it seems to be arguing that the state legislature has preempted the field of public contracting and that therefore any additional requirement imposed by the City such as a $500.00 threshold is invalid. That fact is that cities impose all types of additional requirements in bid packages and AMG does not articulate why or cite case law for their assertion. In fact, it is telling that they make this assertion with such a dubious basis and hiding it as a mere citation to the California Constitution in a foot note to their letter. The AMG Bid Sheet only shows bidder performing over ½ of 1% of the Project. Taken together it is a reasonable inference that bidders over $500.00 but below ½ or 1% are not listed by AMG.

The fact that AMG did not list all subcontractors performing over $500.00 in work is non-responsive. The question then is whether the City may waive the non-responsiveness. A bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. (supra). The first relevant question is why the City imposed the requirement that all subcontractors over $500.00 be listed. According to staff, the City does impose this requirement in other projects and it does enforce this requirement on other contractors. The reason for doing so is to identify all of the subcontractors. The City can determine the ability of the subcontractors to perform this way. Listing subcontractors also has the function of discouraging bid peddling or bid shopping which includes the practice of identifying one subcontractor and then negotiating with other subcontractors after the award of the bid. Since the contractor does have the ability to negotiate with subcontractors that it would not have if it had listed all of them, this could lead to bid peddling or shopping or at least the same type of squeezing of subcontractors.

"In enacting the Subletting and Subcontracting Fair Practices Act (the Act), the Legislature found the practices of bid shopping and bid peddling resulted in poor quality of materials and workmanship, deprived the public of the benefits of fair competition, and led to insolvencies, loss of wages, and other evils. (Pub. Contract Code, § 4101.) HN3 Bid shopping occurs where the general contractor uses the lowest bid received to pressure other subcontractors to submit even lower bids. (Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co. (1976) 56 [***9] Cal. App. 3d 361, 365 [128 Cal. Rptr. 632].) The Act requires bidders for public contracts to list the names of all subcontractors who will perform work in an amount in excess of one-half of 1 percent of the prime contractor's bid. (Pub. Contract Code, § 4104, subd. (a).) The bidder must also set forth: "The portion of the work which will be done by each subcontractor under this act. The prime contractor shall list only one subcontractor for each portion as is defined by the prime contractor in his or her bid." (Pub. Contract Code, § 4104, subd. (b).)"

The City's $500.00 requirement is similar to the Public Contracting Code requirement of listing all subcontractors over a certain amount. There is ample support for such a requirement as it does allow the City to combat poor workmanship, uncompleted projects, change orders, disputes and other issues. If this bid were accepted it would favor AMG because compliant bidders would have less flexibility to negotiate or change small subcontractors. Therefore the requirement is not a trivial one like a typographical error. The failure to list the required subcontractors should be treated as a material variance from the bid requirements.

While the City may consider awarding the bid to the next lowest bidder, it is not required to do so. Rather than appear to have taken sides in an emotional dispute between two competitors, it can reject all bids and put the matter out to bod again. This will reduce the likelihood of a lawsuit and may result in better and more compliant bids.