

Memorandum

TO: HONORABLE MAYOR
CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Response to Bid Protest

DATE: May 11, 2004

Attached is a copy of the response from the City Attorney's Office to a letter from DeSilva Gates Construction protesting staff's recommendation that Council reject all bids for the North Concourse Building Site Preparation and Excavation Project at the Airport. A copy of letter from DeSilva Gates is also enclosed for your reference.

This matter is set for the City Council May 11, 2004 Agenda, Item 8.1.

Richard Doyle
City Attorney

By: 
Kevin Fisher
Sr. Deputy City Attorney

Attachment

cc: Lee Price, City Clerk
Katy Allen, Director of Public Works
Ralph Tonseth, Director of Aviation

May 10, 2004

Via Fax: (925) 803-4270 and Mail

Michael Willcoxon, Esq.
11555 Dublin Blvd.
Suite 201
Dublin, CA 94568

Re: Norman Y. Mineta San Jose International Airport
North Concourse Building – Site Preparation and Excavation Project
Your Client: DeSilva Gates Construction, L.P.

Dear Mr. Willcoxon:

This is in response to your May 7, 2004, letter to me. Contrary to the assertions in your letter, City staff is not recommending that the City Council reject all bids because of a determination that RGW's bid was non-responsive. Please find a copy of City staff's memorandum to the City Council regarding the proposed action enclosed with this letter.

Staff has concluded that the plans and specifications were unclear regarding the question of whether tieback subcontractors were required to be prequalified, because the plans and specifications were silent on this issue. Thus, in order to assure that all bidders are treated fairly and on a level playing field, staff is recommending that Council reject all bids and authorize the Director of Public Works to re-advertise the Project. In any event, as you know, pursuant to the City's Standard Specifications (Section 2-1.06), the City Council always has discretion to reject all bids and to re-advertise City public works projects.

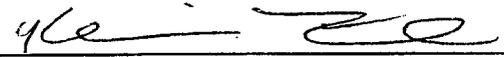
Further, to simplify bidding for all components of shoring work required for the Project, staff has deleted the requirement that shoring subcontractors be prequalified. Despite the assertions to the contrary in your letter, staff has determined that eliminating the requirement that shoring subcontractors be prequalified will not adversely impact the Project.

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Your assertions regarding the length of the re-bid period are not relevant to the issue of whether the City may reject all bids and re-advertise the Project. Notwithstanding this fact, the 15-day period for the re-advertisement of the Project meets the requirement in the San Jose City Charter that a notice inviting bids be published at least 10 days before the date set for opening of bids. Further, staff believes that 15 days is, in fact, sufficient time for all contractors and subcontractors to prepare bids for the Project.

The City Council is scheduled to consider staff's recommendation to reject all bids at its regularly scheduled meeting on May 11, 2004. You may access a copy of the agenda and procedures for public comment regarding agenda items on the internet at: <http://www.sanjoseca.gov/clerk/agenda.htm>.

RICHARD DOYLE, City Attorney

By: 

KEVIN FISHER
Sr. Deputy City Attorney

Enclosure

cc: Katy Allen
Ralph Tonseth
David Clarke
Thomas Fletcher
Craig Temple
Mara Meydbray

MICHAEL WILLCOXON, ESQ.
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May 7, 2004

VIA FACSIMILE &
U.S. MAIL

City of San Jose
City Attorney's Office
151 W. Mission St.
San Jose, CA 95110

Attn. Mr. Kevin Fisher
Sr. Deputy City Attorney

RE: Norman Y. Mineta San Jose International Airport
North Concourse Building – Site Preparation and Excavation Project (Pkg 1)
Response to City of San Jose Letter dated May 5, 2004

This is in response to your letter dated May 5, 2004. We respectfully request that the City of San Jose reconsider its position and award the Construction Contract for this project to DeSilva Gates Construction ("DGC"), the lowest responsive and responsible bidder for the contract. DGC's bid strictly complied with the requirements of the bid documents, and the integrity of the bidding process will be fostered if the City awards the contract based on the bids already submitted. DGC's bid of Eleven Million Five Hundred Four Thousand Dollars (\$11,504,000.00) was well below the Engineer's Estimate of Fifteen Million Five Hundred Thousand Dollars (\$15,500,000.00) and is within the project budget.

It is apparent that the City is contemplating rejecting all bids because the City has determined that RGW's bid proposal was non-responsive and must be rejected. (See our April 15, 2004 Letter of Protest.) Yet, it is unfair to reject all bids because RGW submitted a non-responsive bid. This unjustly punishes the bidders which followed the rules and spent considerable time and money to bid the project. Further, there can be no assurance that a re-bid will not result in another meritorious bid protest. If that occurs, further delays will certainly result.

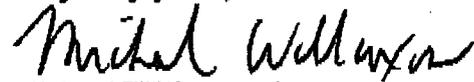
We also note that the new Notice to Contractors for the tentative May 20, 2004 re-bid of this project has eliminated the shoring subcontractor pre-qualification. This seems odd since much effort was put forth by the City and the shoring subcontractors, including the submittal and analysis of all the pre-qualification information. The shoring work was important enough earlier to require pre-qualification, and the safety, liability, financial and engineering aspects of this work have not changed.

Kevin Fisher
City of San Jose
5/7/04
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Because of the City's elimination of the pre-qualification of shoring subcontractors, the shoring work must now be made available to DBE subcontractors. With the re-bid opening date only two weeks away, however, it is unreasonable and unfair to expect that DBE shoring subcontractors will have adequate time, after receiving notice of the work, to obtain and review the Contract Documents [including the plans and specifications; four (4) Addenda; Reports on Water Sampling; Geotechnical Investigation Reports; Geotechnical Pumping Test Reports; Final Report Regarding North Concourse In-Situ Soil; SJ Airport Project Labor Agreement; PG & E Substructure Drawings; and Foundations Drawings for Terminal C, Central Plant, and FIS Buildings] and to design the shoring and submit a price for the shoring work. In addition, this two-week period is not enough time for prime contract bidders to advertise for DBE shoring subcontractors and meet to discuss scope of work with them, or for DBE shoring subcontractors to visit the site. Moreover, DBE shoring subcontractors will also not have had the advantage of attending the pre-bid conference and site visit that took place for the April 15, 2004 bid opening, and there is no new pre-bid conference and site visit scheduled by the City in the current Notice to Contractors for the re-bid of this project.

Clear and fair contract bidding and award practices, rules and regulations were detailed in the City's bid solicitation documents. The City and other bidders should not be penalized by the fact that one of the bidders, RGW, submitted a non-responsive bid. The lowest responsive and responsible bidder, DGC, submitted a bid in strict compliance with the City's bid solicitation documents and should be awarded the contract for the construction of the project.

Very truly yours,



Michael Willcoxon, Esq.
General Counsel

MW:rhc

cc: Randall W. Smith, Esq.
Client
Thomas Fletcher, Divn. Manager
Lee Price, City Clerk
Ralph Tonseth, Director of Aviation
Katy Allen, Director of Public Works
Craig Temple, Project Manager
Mara Meydbray, Project Engineer
Dan Lowry, RGW Construction, Inc.