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Memorandum

2007 NOV 20 A 9 23

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

SUBJECT: HAPPY HOLLOW PARK & ZOO
ZOO AND ATTRACTIONS
(PHASE IIA) PROJECT

DATE: 11-19-07

Approved

Date

11/20/07

COUNCIL DISTRICT: Citywide

REASON FOR SUPPLEMENTAL

The purpose of this supplemental memorandum is to respond to a new letter, dated November 19, 2007, from Robert A. Bothman, Inc. regarding their bid protest.

BACKGROUND

Item 5.4 on the November 20, 2007, City Council agenda is staff's recommendation to award the construction contract for the Happy Hollow Park and Zoo and Attractions project to the low bidder, West Bay Builders. The second low bidder, Robert A. Bothman, is protesting the award of the construction contract to West Bay Builders. Staff's Council Memorandum, dated November 1, 2007, carefully analyzed the bid protest and recommended rejecting it.

Robert A. Bothman submitted a second letter, dated November 13, 2007, disagreeing with Staff's recommendation. On Friday, November 16, 2007, Robert A. Bothman submitted a letter retracting the November 13, 2007, letter, explaining that it was doing so out of professional courtesy to West Bay Builders, and that it did not mean to suggest or imply that West Bay Builders had committed any act in violation of California law. Robert A. Bothman submitted a new letter, dated November 19, 2007, for the City Council to consider. This supplemental memorandum addresses the November 19, 2007, letter submitted by Robert A. Bothman.

ANALYSIS

Staff thoroughly responded to the bid protest in its November 1, 2007, Council Memorandum. The November 19, 2007 letter submitted by Robert A Bothman raises no significant new issues with regard to its bid protest. With this in mind, Staff responds to the November 19, 2007 letter as follows:

- (1) Robert A. Bothman's bid protest is based on the contention that West Bay Builders did not list subcontractors in conformance with the applicable subcontractor listing requirements and on speculation that West Bay Builders "may" violate these

requirements. Importantly, the subcontractor listing requirements were enacted to protect subcontractors, not contractors bidding on projects.

Staff believes that West Bay Builders has complied with the subcontractor listing requirements in completing its bid, and has every intention of ensuring that West Bay Builders continues to comply with the requirements throughout the project so that subcontractors are fully protected.

- (2) In the first paragraph of its letter, Robert A. Bothman states that Staff's recommendation is based on its "determination that the deficiencies are minor and, as such, within the City's discretion to waive from the face of its bid alone." This is inaccurate because it incorrectly suggests that the bid is riddled with deficiencies. Staff concluded that West Bay Builder's bid was deficient in only one, single respect. As discussed in detail in Staff's Council Memorandum, that single deficiency is minor and can be waived. In all other material respects, Staff concluded that the bid of West Bay Builders is responsive.
- (3) In Section I on page 2 of its letter, Robert A. Bothman argues that the City should conduct an inquiry into the bid of West Bay Builders. This argument is misleading and based on out-of-context quotes from Staff's Council Memorandum.

Robert A. Bothman's argument confuses the concepts of a bid being responsive and a bidder being responsible. A bid is responsive if it provides precisely the information required by the bid instructions. Responsiveness is determined objectively from the face of the bid without outside investigation or information. The bid is either responsive or it is not responsive. As discussed in Staff's Council Memorandum, the bid of West Bay Builders is, on its face, responsive. In the one instance is it not technically responsive, the irregularity is minor and can be waived.

Robert A. Bothman questions Staff's analysis by relying upon authorities discussing the "responsibility" of a contractor. "Responsibility" refers to the trustworthiness, quality, fitness and capacity of a contractor to satisfactorily perform the proposed work. This involves a discretionary determination by a public entity that can only be made after an investigation and appropriate due process. The rules regarding determining that a contractor is not responsible have no application to determining whether a bid is responsive.

- (4) Robert A. Bothman complains that West Bay Builders did not list subcontractors for certain portions of work. As stated in Staff's Council Memorandum, the subcontractor listing requirements *require* that West Bay Builders self perform **all** work involving more than 1/2 of 1 percent of its bid amount for which it did not list a subcontractor. West Bay Builders was not required to list subcontractors for work involving less than 1/2 of 1% of its bid amount.
- (5) Robert A. Bothman complains that West Bay Builders is not currently qualified to do certain of the work that it will be required to self perform. Even assuming this is true,

West Bay Builders would need to satisfy its obligation to self perform work by employing persons with the necessary qualifications and licenses to perform such work if it does not currently employ such qualified persons. Public Works staff will ensure that all work performed by West Bay Builders is performed by persons with the proper qualifications.

- (6) Robert A. Bothman complains that West Bay Builders listed three unlicensed subcontractors. However, there is no requirement that subcontractors have a contractor's license *at the time of bid opening*. Before any subcontractor performs work on the project, Public Works staff will ensure that it has the appropriate contractor's license and qualifications.
- (7) Robert A. Bothman complains that West Bay Builders will substitute new subcontractors for listed subcontractors and/or will substitute subcontractors for work that it is required to self perform. However, this is speculation. Moreover, Public Works staff will require West Bay Builders to comply with all of the subcontractor listing requirements. West Bay Builders will not be allowed to substitute any subcontractor or substitute a subcontractor for work that it is required to self perform except for those reasons permitted in the subcontractor listing requirements.

If West Bay Builders engages in prohibited conduct, the subcontractor listing requirements provide the appropriate remedy: the City may either cancel the contract or impose a penalty of up to 10 percent of the amount of the subcontract involved. The City has enforced these subcontractor requirements in the past and fully intends to do so in this case.

Staff's analysis and response to the bid protest are completely consistent with the way in which it has analyzed and responded in the past to similar protests. Staff still believes that the bid of West Bay Builders is responsive.

Robert A. Bothman also complains that West Bay Builders is not qualified to construct this project, i.e., it's not responsible. Based on the City's direct experience with West Bay Builders, staff does not believe that there is justification for a finding that West Bay Builders is not responsible.

The City project management team intends to thoroughly verify West Bay Builders, Inc. compliance with the Subcontractor Listing requirements throughout construction and require West Bay Builders to comply with all contract requirements.



KATY ALLEN
Director, Public Works Department

ROBERT A. BOTHMAN, INC.

General Engineering and Building Contractors

CA License 440332 • NV License 0027271 • AZ License 150057 • HI License AC-026294



November 13, 2007

Mayor Chuck Reed
San Jose City Council Members
200 E. Santa Clara St.
San Jose, CA 95113

**RE: Happy Hollow Park and Zoo- Zoo and Attractions Package,
OBJECTION TO INTENT TO AWARD TO WEST BAY BUILDERS, INC.**

To the Honorable Chuck Reed and the Distinguished Members of the City Council:

We are writing to you concerning the intent by the San Jose City Council to award the Happy Hollow Park and Zoo Project to the apparent low bidder, West Bay Builders, Inc. ("WBB"). Upon review of WBB's bid, several significant questions arose – both as to whether the bid was responsive to the call for bids and whether West Bay Builders, Inc. is a responsible bidder. RAB submitted a bid protest setting forth the law, facts, and evidence demonstrating that WBB is neither responsible nor is its bid responsive because of significant questions implicating California and City of San Jose Subletting and Subcontracting Fair Practices Act ("FPA"). It is our understanding the staff report recommends that the City award the project to WBB based on the face of its bid alone. The importance of the Happy Hollow Park and Zoo project as a flagship park for the families City of San Jose, approximately \$37,000,000+, compels the City to ensure that the contractor is responsible and the bid responsive.

The evidence against WBB is overwhelming. Due diligence by the City of San Jose compels a thorough investigation and inquiry by the City which goes beyond the face of the bid alone. Such an inquiry will show that WBB's bid is nonresponsive and WBB is not a responsible bidder. This document will address all points and the pertinent facts are highlighted in bold:

- **WBB is required by California Public Contracts Code (§4100 et. seq.) and City of San Jose Standard Specifications (2-1.15A) to list subcontractors on its bid form for all portions of work in excess of \$189,000 (1/2 of 1% of bid). Failing to list and then substituting post-bid is indicative of Bid-Shopping, which the Legislature has found detrimental to the Public.**
- **WBB did not list any subcontractors for six categories of work, which are over ½ of 1% and which WBB is not qualified to self perform. WBB intends to "Bid-Shop" post-bid.**
- **WBB did not list any subcontractor for Playground Installation, which represents \$466,682 of RAB's bid and exceeds the threshold for listing by 250%. WBB cannot self perform this work, because of bid specification section 02882 lists very specific qualifications for the installer, which WBB does not meet. WBB intends to "Bid-Shop" post-bid.**
- **WBB listed three unlicensed subcontractors (signage and exhibit ride manufacturers).**
- **After being told the Staff intends to recommend the award of the Project to WBB, WBB contacted its second-low sub-bidder for signage expressing doubt as to one of its unlicensed subcontractors.**
- **On bid day, WBB discussed a sub-bid with another subcontractor. This indicates bid peddling.**

I. Where there is an Indication that the Bidder is not Responsible and its Bid Non-responsive the City of San Jose has the Authority and Obligation to Conduct an Investigation and Hearing prior to Awarding a Construction Contract.

"An agency has discretion to determine whether a low bidder is 'responsible', that is whether the bidder has the fitness, quality, and capacity to perform the proposed work satisfactorily." *D.H. Williams Construction, Inc. vs. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 763.

"A determination that a bidder is responsible or not is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment." 146 Cal.App.4th 757, 764.

"In addition to the determination whether a bid is responsible, the agency must also determine whether the bid is responsive to the call for bids, that is whether the bid 'promises to do what the bidding instructions demand.'" 146 Cal.App.4th at 764.

"If an agency had reason to believe a bidder knowingly listed a subcontractor, whether licensed or not, with the intention of substituting a different subcontractor once the prime contract was awarded, the agency clearly would be entitled to reject the prime bidder as not responsible." *Id.* at 766.

"One purpose of the FPA is to ensure that the contracting authority-the *public agency* involved-has an opportunity to investigate and approve any subcontractor who is proposed to work on the project. This grant of power to the public agency is intended to prevent bidshopping and bid peddling, practices the Legislature has found detrimental to the public. (§4101)." *Thompson Pacific Construction, Inc. vs. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 540.

"To that end, the contracting agency has a right to investigate any proposed subcontractor, to reject the prime bid if any subcontractor is unacceptable, and to veto any proposed substitution after the bid is accepted." 155 Cal.App.4th at 540.

The above cited precedent establishes that the City of San Jose has the right to conduct an inquiry and/or hearing, which includes going beyond the face of the bid, as to whether WBB's bid implicates the Subletting and Subcontracting Fair Practices Act. "Every right implies a responsibility; every opportunity, an obligation; every possession, a duty" ~John D. Rockefeller, Jr. "No man was ever endowed with a right without being at the same time saddled with a responsibility." ~Gerald W. Johnson. However, the City's Staff Report makes its recommendation from the face of WBB's bid alone, this is not sufficient given the facts. Lowering the standard of decision criteria is a disservice to the City of San Jose and the public. Staff Report, page 7, states:

"However, responsiveness is determined from the face of the bid without outside investigation or information. On the face of the bid, there is no apparent irregularity in this regard.

"Nothing in the manner in which West Bay Builders completed the List of Subcontractors form suggests that West Bay Builders is not a responsible bidder on this project. Accordingly, staff recommends declining Bothman's invitation to determine that West Bay Builders is not a responsible bidder."

Based on the reasons articulated below, WBB's bid raises serious doubts which must be investigated by the City of San Jose before any award can be made.

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- II. **The Bid Form submitted by WBB is a strong indication that WBB may violate California's Subletting and Subcontracting Fair Practices Act and Requires Assurance by WBB showing due diligence Pre-bid.**

California's Subletting and Subcontracting Fair Practices Act ("FPA") (Public Contract Code §4100, et. seq.) among other provisions, requires that bidders for public works projects list in their bids, "The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid."

This same listing requirement is contained in the City of San Jose Standard Specifications Section 2-1.15A. (Throughout this document "FPA" will be used to collectively refer to City of San Jose Standard Specifications Section 2-1.15A and Public Contract Code §4100).

The purpose of the FPA is to prevent bidshopping and bid peddling. "Bidshopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling, conversely, is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job." *Thomson*, 155 Cal.App.4th 525.

"If an agency had reason to believe a bidder knowingly listed a subcontractor, whether licensed or not, with the intention of substituting a different subcontractor once the prime contract was awarded, the agency clearly would be entitled to reject the prime bidder as not responsible. Such action by a bidder would be a violation of the act". *D.H. Williams*, 146 Cal.App.4th at 766.

Here, there is clear evidence that WBB did not list subcontractors for portions of work and will substitute other contractors for those listed in its bid proposal in violation of the FPA.

WBB's bid is \$37,830,000 and WBB must list all subcontractors whose work will exceed \$189,150. If WBB failed to list a subcontractor for any category, WBB must self-perform the work and cannot subcontract the work if it would exceed \$189,150. Any change in subcontractors post-bid from the listed subcontractors would indicate that WBB intended to bid-shop the number post award. Substitution of a subcontractor for portion of work that prime contractor indicated he would self perform implicates the FPA just the same as substitution of one subcontractor for another. *Sherman v. W.R. Thomason, Inc.* (1987) 191 Cal.App.35 559.

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WBB did not list any subcontractors for the following scopes of work:

1. Structural Steel
2. Misc. Iron
3. Casework/millwork
4. Low Voltage
5. Security
6. Playground Equipment Installation

This indicates that WBB will self perform these scopes of work. However, WBB does not have a license for Structural Steel C51; nor Electrical C10. Also, WBB does not meet the qualifications required by the specifications section 02882 "Playground Equipment and Structures" in order to perform the playground equipment.

All of the above portions of work represent more than ½ of 1% of RAB's bid. WBB has not provided any facts, evidence, or proof in response to the bid protest that the above scopes of work constitute less than ½ of 1% in its bid. Given WBB's representations in its response to bid protest that it will subcontract these scopes, the failure to list any subcontractors by WBB for the above trades warrants disclosure and assurance by WBB as to the cost of the work and how the estimate was derived (e.g. whether good faith basis or "guesstimate". Guesstimate would indicate that WBB did not perform due diligence prior to bid).

WBB listed unlicensed subcontractors for the following scopes of work:

1. Signage and Retail Fixtures (ACME)
2. International Rides (for Exhibit Rides)
3. Dynamic Designs (for Dragon Ride Installation)

"It is entirely proper for a public agency to make a determination that a lapsed or nonexistent subcontractor's license, under particular circumstances, renders a low bidder not responsible." 146 Cal.App.4th at 771.

III. WBB's Bid Form, Combined with Extrinsic Evidence Demonstrates that WBB is not a Responsible Bidder.

RAB submitted extrinsic evidence with its Supplement to Bid Proposal which demonstrate that as to RAB's bid, these portions of the work exceeded the threshold of ½ of 1%, in some cases by two or three times as much. This evidence was provided to show that WBB's unsupported statement in its response to the bid protest that the portions of work are "minor in cost" and "do not exceed ½%" without providing any substantiating evidence to support this statement cannot be based upon actual pre-bid inquiry by WBB. In response WBB has provided no documents, facts, evidence, nor explanation in order to demonstrate that it performed due diligence in order to determine pre-bid that those portions of the work did not fall within the FPA.

WBB's lack of diligence pre-bid in estimating these scopes; intent to substitute these scopes to unlisted subcontractors post bid, listing of unlicensed subcontractors whom WBB has reason to doubt will be properly licensed, and disclosing of subcontractor information to other subs pre-bid all indicate that WBB lacks regard for Subcontracting Fair Practices Act and is therefore not a responsible bidder.

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A. Play Equipment Installation

WBB's bid does not list who will install the playground equipment. There are very specific requirements set forth in Specific Section 02882 as to the qualification required for playground installers. WBB's response to bid protest states:

"West Bay used quotes from several playground equipment suppliers which individually did not exceed ½%. The installation of all the playground equipment combined is also less than ½% and will be installed pursuant to section 02882."

WBB does not identify who the "several playground equipment suppliers" are, does not identify the amount of the bids, and does not represent that any of the bidders have the qualifications set forth in Specific Section 02882 Playground Equipment and Structures. Furthermore, pursuant to San Jose Standard Specification 2-1.15A(3), WBB may use only one subcontractor for playground installation – therefore, it is questionable as to what is meant by the statement, "West Bay used quotes from several playground equipment suppliers which individually did not exceed ½%." RAB asks the City to seek time/date-stamped and/or verifiable documentation from WBB to fully remove doubt and demonstrate WBB's due diligence.

RAB listed Community Playgrounds from Novato, CA as the play equipment installer. The bid from Community Playgrounds is \$465,682 which is nearly 250% the threshold set forth by San Jose Standard Specification 2-1.15A.

Clearly, WBB intends to bid shop the installation in violation of the FPA.

B. Low Voltage & Security

WBB did not list a subcontractor for "Low Voltage" and "Security" and crossed out these trades on its bid proposal. WBB's response to the bid protest states:

"The low voltage work, as is common in the industry, is being performed by Scott Electric, a qualified licensed and listed electrician."

Low Voltage and Security will each constitute more than ½ of one percent of WBB's bid proposal. RAB listed Intermountain Electric Company from San Carlos for this scope of work. Intermountain Electric's bid for Low Voltage is \$528,000 (nearly 3 times the threshold) and for Security is \$282,000, which is over \$100k beyond the threshold required for listing subcontracts on this project.

However, Scott Electric was not identified on WBB's List of Subcontractors for Low Voltage and/or Security. WBB must self perform the work. WBB's response to bid protest that Scott Electric will perform the work, an unlisted subcontractor, on its face demonstrates that WBB is bidshopping. WBB cannot subcontract this work without violating the FPA.

C. Exhibit Rides Equipment

WBB listed unlicensed contractors, International Rides for the "Exhibit Rides Equipment", and Dynamic Designs for the "Danny the Dragon" portion of work. In response to RAB's bid protest, WBB responds:

International Rides was specially listed by the City in the specifications section 02885 as an approved manufacturer. Dynamic Designs is the appointed supplier of the Danny the Dragon ride by International Rides. The amount of installation needed for

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these rides is relatively minor in scope and price. West Bay will verify that the installation portion of the work, however minor, will be performed by properly licensed contractors in strict compliance with the experience requirements of the City's specifications.

Based on this response, at this time WBB does not know who it will use for installation of the Exhibit Rides Equipment and Danny the Dragon ride and does not know how much the installation will cost.

RAB listed Community Playgrounds for Exhibit Rides Equipment. RAB estimated the cost of installation of the rides work at \$277,277, which is \$90,000 over the threshold of ½ of one percent of the bid price. Therefore, the installation subcontractor should have been identified by WBB pursuant to San Jose Standard Specification 2-1.15A (accord Pub. Cont. Code §4100 et. seq.) rather than the supplier.

D. Signage

WBB listed unlicensed subcontractor ACME to perform signage work. RAB has already expressed its concern that ACME is an unlicensed subcontractor. After receiving the City staff recommendation of intent to award to WBB, WBB immediately contacted its second low sub-bidder, Thomas-Swan Sign Company, Inc., ("TSSCI") expressing doubt as to whether ACME (its unlicensed subcontractor) would be able to obtain a California Contractors License and attempting to verify TSSCI's bid price. WBB also stated that on bid day "WBB went over TSSCI's bid with ACME". Below is the email from WBB to TSSCI:

On 11/12/07 11:09 AM, "Clayton Fraser" <ClaytonF@westbaybuilders.com> wrote:

- 1) If ACME doesn't get their license issue resolved or sorted out I would like to have somebody else in line.
- 2) Yes, on bid day one of our employee's working on your scope of work was trying to compare your price with ACME's price to make sure they were looking at similar scopes. Apparently, they went over your bid with ACME, who sounds like they gave our guy some mis-information on what they thought was apples to apples and our guy believed him(which is our fault). So, I am trying to figure out a few things. 1) Was ACME not being truthful? 2) Did you really have a similar scope because I need to teach my younger guy a lesson on what to do and not to do on bid day. 3) If I need to replace ACME in regards to their license issue, do I have a legitimate second price with everything included.

Revealing one subcontractor's bid to another subcontractor on bid day leads to "bid peddling" which is, "an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job." *Thompson Pacific Construction, Inc.* 155 Cal.App.4th at 188 fn.3. This is exactly the kind of act that the California Legislature sought to prevent in enacting the FPA. *Id.* WBB's conduct in contacting TSSCI is indicative of bid-shopping and casts further doubt on that WBB is not a responsible bidder for listing an unlicensed subcontractor, whom WBB may have to replace.

IV. Based on the Deficiencies in the Bid, the Extrinsic Evidence, and WBB's conduct post- bid, the City of San Jose should find that WBB is not a responsible bidder.

San Jose Standard Specification 2-1.10 allows the City, in its sole discretion, to disqualify a bidder and reject its bid due to the "Failure of the bidder to provide prices for all items in the proposal, including alternatives, or submitting an incomplete or otherwise non-responsive proposal."

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In addition, per San Jose Standard Specification 2-1.06, "Proposals submitted which are not in strict compliance with the directions in the Notice to Contractors, may in the City's sole discretion, be deemed non-responsive and rejected on that basis."

When the City of San Jose considers not only WBB's bid form, as addressed by the Staff Report, but considers the facts, evidence, implications, and WBB's conduct pre and post bid, the City is absolutely justified in having serious concerns whether WBB is a responsible bidder. Irregularities cannot be waived if they would give the bidder an unfair advantage. Simply waiving the irregularities raised in RAB's bid protest would allow WBB to shop for low subcontractor bids after award, which should have been received and disclosed by listing on the bid form pre-bid.

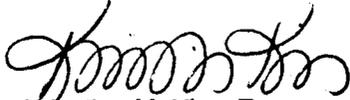
On a flagship project like Happy Hollow Park and Zoo, \$37,000,000+, the City should expect that a responsible bidder will (1) use due diligence prior to bid to determine the cost of performing each portion of the work; (2) will identify all subcontractors who it will use on the project for the portions of the work; (3) will use subcontractors who are qualified and licensed to perform the work; and (4) will refrain from violating California Law as to Bid Shopping and Bid Peddling pre and post bid. WBB's bid and conduct pre and post bid demonstrates serious questions as to each of the foregoing indicating that it is not a responsible bidder and its bid is not responsive to the call for bids.

Based upon the information presented herein, we ask the City to find the bid submitted by West Bay Builders, Inc. is non-responsive and/or West Bay Builders, Inc. is not a responsible bidder. There is clear indication that WBB intends to substitute different subcontractors once the contract is awarded in violation of the FPA. We request that the City of San Jose maintain the integrity of its' bid process and support our letter of protest. Robert A Bothman, Inc. feels strongly that the contract should be awarded to Robert A. Bothman, Inc. the apparent second low bidder. As second low bidder we have standing to object the award to WBB before the Council and to seek redress to the Courts, which we would like to avoid if the City of San Jose so long as the City of San Jose allows the law and fairness to prevail.

Thank you in advance for the courtesy of reviewing this bid protest. We look forward to your decision on this matter.

Very truly yours

Robert A. Bothman, Inc.



Krisztina M. Kiss, Esq.
Contracts Manager

Robert A. Bothman, Inc.



Brian L. Bothman
Vice President

cc: David Sykes, Assistant Director of Public Works
Katy Allen, Director of Public Works
Phil Varni, Associated General Contractors
Mark Breslin, Engineering and Utility Contractors Association

ROBERT A. BOTHMAN, INC.

General Engineering and Building Contractors

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November 16, 2007



Major Chuck Reed
San Jose City Council Member
200 E. Santa Clara Street
San Jose, CA 95113

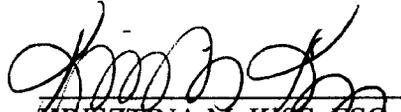
Re: Happy Hollow Park and Zoo – Zoo and Attractions Package

To the Honorable Chuck Reed and the Distinguished Members of the City Council:

On November 13, 2007, Robert A. Bothman, Inc. (“RAB”) submitted a written Objection to Intent to Award to West Bay Builders, Inc. (“WBB”) in connection with the above-referenced Project.

The Objection we sent contained opinion statements by RAB based on the WBB’s bid proposal. As a point of clarification, RAB did not mean to suggest or imply that WBB has committed any act at in violation of California Law. Rather, RAB believes that there are questions concerning WBB’s bid proposal and WBB’s intent post-award in light of the Subcontracting and Fair Practices Act, which are for the City Council to investigate and determine. We do not feel that our letter accused WBB of any wrongdoing; however WBB has expressed concern regarding our objection. Out of professional courtesy for WBB, we are formally retracting our letter of November 13, 2007, which we will revise in order to make our intent more clear. However, please be advised that RAB still objects to the intent by the San Jose City Council to award the Happy Hollow Park and Zoo project to WBB and we will provide the City with revised objection by Monday, November 19 at 12:00 noon.

Thank you.


KRISZTINA M. KISS, ESQ.,
Contracts Manager

cc: David Sykes, Assistant Director of Public Works
Katy Allen, Director of Public Works
Phil Varni, AGCC
Mark Breslin, Engineering and Utility Contractors Association

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ROBERT A. BOTHMAN, INC.

General Engineering and Building Contractors

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November 19, 2007

Mayor Chuck Reed
San Jose City Council Members
200 E. Santa Clara St.
San Jose, CA 95113

**RE: Happy Hollow Park and Zoo- Zoo and Attractions Package,
OBJECTION TO INTENT TO AWARD TO WEST BAY BUILDERS, INC.**

To the Honorable Chuck Reed and the Distinguished Members of the City Council:

We are writing concerning the intent by the San Jose City Council to award the Happy Hollow Park and Zoo Project to the apparent low bidder, West Bay Builders, Inc. ("WBB"). Upon review of WBB's bid, several significant questions arose – both as to whether the bid was responsive to the call for bids and whether WBB is a responsible bidder. Robert A. Bothman, Inc. ("RAB") submitted a bid protest setting forth the law, facts, and evidence demonstrating that WBB is neither responsible nor is its bid responsive based on significant questions surrounding compliance with the California and City of San Jose Subletting and Subcontracting Fair Practices Act ("FPA"). It is our understanding the staff report recommends that the City of San Jose ("City") award the project to WBB based on the staff's determination that the deficiencies are minor and, as such, within the City's discretion to waive from the face of its bid alone. The importance of the Happy Hollow Park and Zoo project as a flagship park for the families City of San Jose, the estimated cost and complexity of the Project (approximately \$37,000,000+), compels the City to take all measures required to ensure that the contractor award the Project is responsible and the bid responsive.

The evidence in support of the contention that WBB's bid is non-responsive and WBB is not responsible is overwhelming. Due diligence by the City of San Jose compels a complete and thorough investigation by the City which goes well beyond simply reviewing the face of the bid alone. Such a diligent examination will show that WBB's bid is nonresponsive and WBB is not a responsible bidder. RAB's contention that the WBB bid is non-responsive and/or WBB is not a responsible bidder is based on the following:

WBB is required by California Public Contracts Code (§4100 et. seq.) and City of San Jose Standard Specifications (2-1.15A) to list subcontractors on its bid form for all portions of work in excess of \$189,000 (1/2 of 1% of bid). If WBB does not list a subcontractor, it must self-perform the work in issue. If instead, WBB has the work performed by a subcontractor, it is a violation of the Subcontractor's Listing Law.

- **WBB did not list any subcontractors for six (6) categories of work, each of which is clearly over ½ of 1% of the WBB bid and which WBB is not qualified to self perform. The City must inquire how this work will be performed without violating the Subcontractor's Listing Law**
- **WBB did not list any subcontractor for Playground Installation, which represents \$465,682 of RAB's bid and exceeds the threshold for listing by 250%. WBB cannot self perform this work, because the bid specification (see, Section 02882, attached hereto) lists very specific qualifications for the installer, which WBB does not and cannot satisfy. The City must inquire how this critical element of the work can be performed without violating the specifications and/or the Subcontractor's Listing Law.**
- **WBB listed three unlicensed subcontractors (signage and exhibit ride manufacturers).**

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- **After the bid WBB explored the possibilities with another one of its Subcontractors (see Subsection III.D below).**

- I. **Where there is an Indication that the Bidder is not Responsible and its Bid Non-responsive the City of San Jose has the Authority and Obligation to Conduct an Investigation and Hearing prior to Awarding a Construction Contract.**

"An agency has discretion to determine whether a low bidder is 'responsible', that is whether the bidder has the fitness, quality, and capacity to perform the proposed work satisfactorily." *D.H. Williams Construction, Inc. vs. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 763.

"A determination that a bidder is responsible or not is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment." 146 Cal.App.4th 757, 764.

"In addition to the determination whether a bid is responsible, the agency must also determine whether the bid is responsive to the call for bids, that is whether the bid 'promises to do what the bidding instructions demand.'" 146 Cal.App.4th at 764.

"If an agency had reason to believe a bidder knowingly listed a subcontractor, whether licensed or not, with the intention of substituting a different subcontractor once the prime contract was awarded, the agency clearly would be entitled to reject the prime bidder as not responsible." *Id.* at 766.

"One purpose of the FPA is to ensure that the contracting authority-the *public agency* involved-has an opportunity to investigate and approve any subcontractor who is proposed to work on the project. This grant of power to the public agency is intended to prevent bidshopping and bid peddling, practices the Legislature has found detrimental to the public. (§4101)." *Thompson Pacific Construction, Inc. vs. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 540.

"To that end, the contracting agency has a right to investigate any proposed subcontractor, to reject the prime bid if any subcontractor is unacceptable, and to veto any proposed substitution after the bid is accepted." 155 Cal.App.4th at 540.

The above cited precedent establishes that the City of San Jose has the right to conduct an inquiry and/or hearing, which includes going beyond the face of the bid, as to whether WBB's bid implicates the Subletting and Subcontracting Fair Practices Act. "Every right implies a responsibility; every opportunity, an obligation; every possession, a duty" ~John D. Rockefeller, Jr. "No man was ever endowed with a right without being at the same time saddled with a responsibility." ~Gerald W. Johnson. However, the City's Staff Report makes its recommendation from the face of WBB's bid alone, this is not sufficient given the facts. Lowering the standard of decision criteria is a disservice to the City of San Jose and the public. Staff Report, page 7, states:

"However, responsiveness is determined from the face of the bid without outside investigation or information. On the face of the bid, there is no apparent irregularity in this regard.

"Nothing in the manner in which West Bay Builders completed the List of Subcontractors form suggests that West Bay Builders is not a responsible bidder on this project. Accordingly, staff recommends declining Bothman's invitation to determine that West Bay Builders is not a responsible bidder."

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Based on the reasons articulated below, WBB's bid raises serious doubts which must be investigated by the City before any award can be made.

- II. The Bid Form submitted by WBB creates a reasonable inference that WBB may violate California's Subletting and Subcontracting Fair Practices Act in order to perform the work.**

California's Subletting and Subcontracting Fair Practices Act ("FPA") (Public Contract Code §4100, et. seq.) among other provisions, requires that bidders for public works projects list in their bids, "The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid."

This same listing requirement is contained in the City of San Jose Standard Specifications Section 2-1.15A. (Throughout this document "FPA" will be used to collectively refer to City of San Jose Standard Specifications Section 2-1.15A and California Public Contract Code §4100).

The purpose of the FPA is to prevent bid shopping and bid peddling. "Bid shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling, conversely, is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job." *Thomson*, 155 Cal.App.4th 525.

"If an agency had reason to believe a bidder knowingly listed a subcontractor, whether licensed or not, with the intention of substituting a different subcontractor once the prime contract was awarded, the agency clearly would be entitled to reject the prime bidder as not responsible. Such action by a bidder would be a violation of the act". *D.H. Williams*, 146 Cal.App.4th at 766.

Here, there is clear evidence that WBB did not list subcontractors for portions of work which WBB is not qualified to self-perform. Additionally, it is likely WBB will probably attempt to substitute other contractors for those listed in its bid proposal in violation of the FPA.

WBB's bid is \$37,830,000 and WBB must list all subcontractors whose work will exceed \$189,150. If WBB failed to list a subcontractor for any category, WBB must self-perform the work and cannot subcontract the work if it would exceed \$189,150. Any attempt to substitute a subcontractor to perform the work WBB is required to self-perform would constitute a violation of the FPA. Substitution of a subcontractor for portion of work that prime contractor indicated he would self perform implicates the FPA just the same as substitution of one subcontractor for another. *Sherman v. W.R. Thomason, Inc.* (1987) 191 Cal.App.35 559.

WBB did not list any subcontractors for the following scopes of work:

1. Structural Steel
2. Misc. Iron
3. Casework/millwork
4. Low Voltage
5. Security
6. Playground Equipment Installation

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By failing to list any subcontractors for these scopes of work, WBB is representing that it intends to self perform these scopes of work. However, WBB does not have a license for Structural Steel C51; nor Electrical C10. More importantly, WBB does not meet the qualifications expressly required by specifications section 02882 "Playground Equipment and Structures" in order to install the playground equipment.

All of the above portions of work represent more than ½ of 1% of RAB's bid. WBB has not provided any facts, evidence, or proof in response to the bid protest that the above scopes of work constitute less than ½ of 1% in its bid. Given WBB's representations in its response to the bid protest that it will subcontract these scopes, the failure to list any subcontractors by WBB for the above trades warrants disclosure and assurance by WBB as to the cost of the work and how the estimate was derived. Given the serious issues raised by the failure of WBB to list subcontractors for critical aspects of the work, the City should require WBB to prove that that these scopes of work do not exceed ½ of 1% of its bid.

WBB listed unlicensed subcontractors for the following scopes of work:

1. Signage and Retail Fixtures (ACME)
2. International Rides (for Exhibit Rides)
3. Dynamic Designs (for Dragon Ride Installation)

"It is entirely proper for a public agency to make a determination that a lapsed or nonexistent subcontractor's license, under particular circumstances, renders a low bidder not responsible." 146 Cal.App.4th at 771.

III. WBB's Bid Form, Combined with Extrinsic Evidence Demonstrates that WBB is not a Responsible Bidder and its Bid is Non-responsive.

RAB submitted extrinsic evidence with its Supplement to Bid Proposal which demonstrate that as to RAB's bid, these portions of the work exceeded the threshold of ½ of 1%, in some cases by two or three times as much. This evidence was provided to show that WBB's unsupported statement in its response to the bid protest that the portions of work are "minor in cost" and "do not exceed ½%" without providing any substantiating evidence to support this statement cannot be based upon actual pre-bid inquiry by WBB. In response, WBB has provided no documents, facts, evidence, nor reasonable explanation to demonstrate that it performed due diligence in order to determine pre-bid whether those portions of the work fell within the the requirements of the FPA.

WBB's apparent lack of diligence pre-bid in estimating these scopes of work; listing of unlicensed subcontractors, and disclosing of subcontractor information to other subs pre-bid all demonstrate that WBB lacks regard for FPA and is therefore not a responsible bidder.

A. Play Equipment Installation

WBB's bid does not list who will install the playground equipment. There are very specific requirements set forth in Specific Section 02882 as to the qualification required for playground installers. WBB's response to bid protest states:

"West Bay used quotes from several playground equipment suppliers which individually did not exceed ½%. The installation of all the playground equipment combined is also less than ½% and will be installed pursuant to section 02882."

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WBB does not identify who the "several playground equipment suppliers" are, does not identify the amount of the bids, and does not represent that any of the bidders have the qualifications set forth in Specific Section 02882 Playground Equipment and Structures. Furthermore, pursuant to San Jose Standard Specification 2-1.15A(3), WBB may use only one subcontractor for playground installation – therefore, it is questionable as to what is meant by the statement, "West Bay used quotes from several playground equipment suppliers which individually did not exceed ½%." RAB requests that the City seek time/date-stamped and/or verifiable documentation from WBB to fully remove doubt and demonstrate WBB's due diligence.

RAB listed Community Playgrounds from Novato, CA as the play equipment installer. The bid from Community Playgrounds is \$465,682 which is nearly 250% the threshold set forth by San Jose Standard Specification 2-1.15A.

Based on the failure of WBB to list an equipment installer and the suspicious manner in which WBB addressed the issue in its response to the bid protest, it is reasonable to conclude that WBB will violate the specifications by self-performing the work or violate the FPA by contracting to have the installation performed by an unlisted subcontractor.

B. Low Voltage & Security

WBB did not list a subcontractor for "Low Voltage" and "Security" and crossed out these trades on its bid proposal. WBB's response to the bid protest states:

"The low voltage work, as is common in the industry, is being performed by Scott Electric, a qualified licensed and listed electrician."

Low Voltage and Security will each constitute more than ½ of one percent of WBB's bid proposal. RAB listed Intermountain Electric Company from San Carlos for this scope of work. Intermountain Electric's bid for Low Voltage is \$528,000 (nearly 3 times the threshold) and for Security is \$282,000, which is over \$100k beyond the threshold required for listing subcontracts on this project.

However, Scott Electric was not identified on WBB's List of Subcontractors for Low Voltage and/or Security. Again, these scopes clearly must be in excess of ½ of 1% of WBB's bid. Therefore, WBB must self perform the work. In its response to the bid protest, WBB represented that Scott Electric will perform the Low Voltage and/or Security scopes of work. The fact that these scopes of work clearly exceed ½ of 1% of the WBB bid, WBB did not list Scott Electric (or any electrical subcontractor) and now represents Scott will perform the work should cause the City to closely investigate this issue in order to eliminate the suspicion that WBB is playing fast and loose with the FPA requirements.

C. Exhibit Rides Equipment

WBB listed unlicensed contractors, International Rides for the "Exhibit Rides Equipment", and Dynamic Designs for the "Danny the Dragon" portion of work. In response to RAB's bid protest, WBB responds:

International Rides was specially listed by the City in the specifications section 02885 as an approved manufacturer. Dynamic Designs is the appointed supplier of the Danny the Dragon ride by International Rides. The amount of installation needed for these rides is relatively minor in scope and price. West Bay will verify that the installation portion of the work, however minor, will be performed by properly licensed

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contractors in strict compliance with the experience requirements of the City's specifications.

Based on this response, one can only conclude that WBB does not know who it will use for installation of the Exhibit Rides Equipment and Danny the Dragon ride and does apparently not know how much the installation portion of the work will cost.

RAB listed Community Playgrounds for Exhibit Rides Equipment. RAB estimated the cost of installation of the rides work at \$277,277, which is \$90,000 over the threshold of ½ of one percent of the bid price. Therefore, the installation subcontractor should have been identified by WBB pursuant to San Jose Standard Specification 2-1.15A (accord Pub. Cont. Code §4100 et. seq.) rather than the supplier.

D. Signage

WBB listed unlicensed subcontractor ACME to perform signage work. RAB has already expressed its concern that ACME is an unlicensed subcontractor. It is known fact, that WBB contacted its second low sub-bidder, Thomas-Swan Sign Company, Inc., ("TSSCI") post-bid and explored the possibilities. Below is the email from WBB to TSSCI:

On 11/12/07 11:09 AM, "Clayton Fraser" <ClaytonF@westbaybuilders.com> wrote:

- 1) If ACME doesn't get their license issue resolved or sorted out I would like to have somebody else in line.
- 2) Yes, on bid day one of our employee's working on your scope of work was trying to compare your price with ACME's price to make sure they were looking at similar scopes. Apparently, they went over your bid with ACME, who sounds like they gave our guy some mis-information on what they thought was apples to apples and our guy believed him(which is our fault). So, I am trying to figure out a few things. 1) Was ACME not being truthful? 2) Did you really have a similar scope because I need to teach my younger guy a lesson on what to do and not to do on bid day. 3) If I need to replace ACME in regards to their license issue, do I have a legitimate second price with everything included.

This is further indication of a lack of due diligence prior to the bid (ie: listing unlicensed subcontractor, who "may not get their license issue resolved"; problems with scope discovered three (3) months post-bid).

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IV. Based on the Deficiencies in the Bid, the Extrinsic Evidence, and WBB's failure to adequately address the deficiencies in its Bid, the City of San Jose should find that WBB Bid is non-responsive.

San Jose Standard Specification 2-1.10 allows the City, in its sole discretion, to disqualify a bidder and reject its bid due to the "Failure of the bidder to provide prices for all items in the proposal, including alternatives, or submitting an incomplete or otherwise non-responsive proposal."

In addition, per San Jose Standard Specification 2-1.06, "Proposals submitted which are not in strict compliance with the directions in the Notice to Contractors, may in the City's sole discretion, be deemed non-responsive and rejected on that basis."

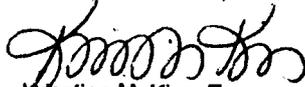
When the City of San Jose considers not only WBB's bid form, as addressed by the Staff Report, but considers the facts, evidence, reasonable inferences, and WBB's conduct pre and post bid, the City should have serious concerns whether WBB is a responsible and responsive bidder. Irregularities cannot be waived if they would give the bidder an unfair advantage. In the face of the substantial and legitimate issues created by the WBB bid, the City's decision characterize the deficiencies as minor and waive the same is puzzling at best. The City must conduct a thorough, substantive investigation of the issues raised by the WBB bid in order to maintain the credibility and integrity of the competitive bid process.

On a flagship project like Happy Hollow Park and Zoo, \$37,000,000+, the City should expect that a responsible bidder will (1) use due diligence prior to bid to determine the cost of performing each portion of the work; (2) will identify all subcontractors who it will use on the project for the portions of the work; (3) will use subcontractors who are qualified and licensed to perform the work; and (4) strictly adhere to aa of the requirements of the FPA. WBB's bid and conduct pre and post bid raises serious questions as to each of the foregoing and, taken together, compels a finding that WBB is not a responsible bidder and its bid is not responsive to the call for bids.

Based upon the information presented herein, we respectfully request that the City find the bid submitted by West Bay Builders, Inc. is non-responsive and/or West Bay Builders, Inc. is not a responsible bidder. We request that the City of San Jose maintain the integrity of its' bid process and support our letter of protest. Robert A Bothman, Inc. feels strongly that the contract should be awarded to Robert A. Bothman, Inc. the apparent second low bidder. At the very least, the City must defer the award in order to conduct a thorough and complete investigation of the numerous and significant deficiencies contained in the WBB bid.

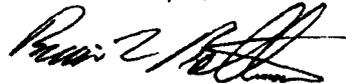
Thank you in advance for the courtesy of reviewing this bid protest. We look forward to your decision on this matter.

Robert A. Bothman, Inc.



Krsztina M. Kiss, Esq.
Contracts Manager

Robert A. Bothman, Inc.



Brian L. Bothman
Vice President

cc: David Sykes, Assistant Director of Public Works
Katy Allen, Director of Public Works
Phil Varni, Associated General Contractors
Mark Breslin, Engineering and Utility Contractors Association
Glenn Schwarzbach, Assistant City Attorney