

SUPPLEMENTAL

COUNCIL AGENDA: 08-05-08
ITEM: 5.2

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

SUBJECT: SEE BELOW

DATE: 07-24-08

Approved

Date

8/5/08

COUNCIL DISTRICT: 6

SNI AREA: Burbank/Del Monte

**SUBJECT: REPORT ON BIDS AND AWARD A CONTRACT FOR
THE BASCOM LIBRARY AND COMMUNITY CENTER PROJECT**

REASON FOR SUPPLEMENTAL

To respond to the letter submitted on behalf of Zolman Construction & Development ("Zolman") in opposition to staff's recommendation that the City Council reject Zolman's bid on the Bascom Library and Community Center Project ("Project").

BACKGROUND

On Tuesday, July 29, 2008, staff issued its memorandum officially recommending that the City Council reject Zolman's bid on the Project ("Staff Memo"). Two days later the attorneys for Zolman – Miller Morton Caillat & Nevis – submitted a letter to the Honorable Mayor and City Council opposing staff's recommendation ("Letter"). Staff does not believe that the Letter provides a basis for changing its recommendation.

This supplemental memo responds to the Letter.

ANALYSIS

1. Staff's Recommendation Is Appropriate Given Zolman's Failure To Provide Truthful And Accurate Information On Its Prequalification Questionnaire.

Zolman concedes it provided the City with wrong information in response to Question No. 7 of the Prequalification Questionnaire. (Letter, p. 4.) Nevertheless, Zolman contends that staff's recommendation "represents an unjustified punitive response to an innocent mistake." (Letter, p. 5.) Staff disagrees.

a. Question No. 7 Is Not Ambiguous.

Zolman contends the employee answering Question No. 7 “interpreted the question to be asking about required back-pay or wage violations still unresolved or currently pending.” (Letter, p. 4.) As already discussed in the Staff Memo, Question No. 7 is not ambiguous. (Staff Memo, p. 5.) Indeed, beyond the conclusory statement that its employee misinterpreted Question No. 7, Zolman makes no specific argument that Question No. 7 is ambiguous.

Even if Zolman believed Question No. 7 were ambiguous, it should have asked for clarification during the prequalification process. The prequalification form contains a provision on making requests for information during the prequalification process. (Request for Prequalification for the Bascom and Seven Trees Projects, p. 3.) It is common for contractors to request clarifications of documents during both the prequalification and bid periods.

b. Zolman’s Executive Vice President – Who Had Actual Knowledge Of the Correct Information – Certified The Answer.

Whether one of Zolman’s employees may have misinterpreted Question No. 7 does not resolve the issue. As discussed in more detail in the Staff Memo, Zolman’s executive vice president – Reza Zolfaghari – certified that he read **all** the answers in the Prequalification Questionnaire, that he was familiar with the contents of the answers, and that the answers were true based on his knowledge. (Staff Memo, p. 6.) As also discussed in the Staff Memo, the documents obtained from the California Department of Industrial Relations establish that the executive vice president had actual knowledge of the correct answer. (Staff Memo, p. 6.) This belies Zolman’s assertion that the alleged mistake was merely “innocent.”

c. The Recommendation Promotes Important Public Interests.

Zolman complains that Staff’s recommendation is unfair given that it is otherwise qualified to perform the work¹ and that “[f]uture mistakes cannot be deterred . . .” by the recommendation. (Letter, p. 3,5.) Staff disagrees.

To be clear, staff does not make its recommendation lightly. Staff realizes that its recommendation is a strong response and carefully considered the recommendation before making it. However, staff ultimately concluded that the recommendation serves important City and public interests. As discussed in more detail in the Staff Memo, staff must be able to rely upon the truthfulness and accuracy of the information provided by a

¹ Zolman asserts that staff made its recommendation “in spite of Zolman’s **undisputed** qualifications to successfully complete the work.” (Emphasis added.) (Letter, p. 7.) This is not quite accurate. What staff said was that beyond the issue of providing the City with false information, Zolman is otherwise qualified to construct the Project. (Staff Memo, p. 7.) This is an important difference.

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contractor. (Staff Memo, p. 6.) This is true not only during the prequalification process, but throughout the entire period of construction. Accordingly, staff believes it is critical that contractors be held to the standard of providing truthful and accurate information – particularly where the contractor has actual knowledge of the correct answer and certifies the correctness of the answer.

2. The City Is Following The Proper Procedures.

Zolman's argument that the City is not following the proper procedures is without merit. Zolman's argument relies upon procedures applicable to appealing a "not qualified" determination in the context of the prequalification process. This is not the prequalification process. This is the bid/award process. At this point, a hearing on Zolman's responsibility is properly before the City Council.

In addition to having a hearing before the City Council in which Zolman can argue for why it should be awarded the contract for the Project, Zolman has had the following opportunities to address the issues:

- Three Public Works staff members met with Zolman to discuss the matter on July 1, 2008.
- The Assistant Director of Public Works met with Zolman to discuss the matter again on Monday, July 21, 2008.
- On Tuesday, July 29, 2008, staff provided Zolman with the Staff Memo.
- On Thursday, July 31, 2008, Zolman submitted its Letter responding to the Staff Memo.
- A deputy city manager and the Director of Public Works met with Zolman to discuss the matter yet again on Friday, August 1, 2008.

In each of the above situations, Zolman has provided essentially the same explanation for why it provided the false information.

CONCLUSION

In short, nothing in the Letter persuades staff to change its recommendation. Staff's recommendation to Council does not affect Zolman's ability to bid other future projects nor is it a finding related to being a responsible contractor.



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Director, Public Works Department

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July 31, 2008

Via Electronic Mail, Facsimile (408) 292-6422 & 6423 and Personal Delivery

To: Honorable Mayor Chuck Reed
and City Council

Re: Bascom Library & Community Center Project
Response to Report on Bids and Proposed Award of Contract
Council Agenda: August 5, 2008; Item 5.2
Our File No. 66403-0801

Dear Mayor Reed and Council Members:

We represent Zolman Construction & Development ("Zolman"), the lowest responsive and responsible bidder for the City of San Jose's ("City") Bascom Library & Community Center project ("Project").

It is our understanding that on July 28, 2008, City staff formally recommended that the City rescind Zolman's prequalification rating as a responsible bidder on the Project, and that a contract for the Project be awarded instead to the apparent second low bidder, John Plane Construction, Inc. ("John Plane"). Staffs' recommendation is scheduled for consideration by the City Council on August 5, 2008 as item 5.2 on the posted Council Agenda.

The purpose of this letter is to address, in detail and in advance of the August 5th Council meeting, the serious concerns raised by the staffs' recommendation to award a contract for the Project to John Plane, including most importantly (1) the unwarranted basis for rejecting Zolman as the lowest responsible bidder based on its response to the Prequalification Questionnaire; and (2) the City's apparent failure to follow its own published procedures for notifying and permitting Zolman to appeal a determination that its prequalification rating be rescinded.

A. BACKGROUND

Zolman is a California-licensed general contractor. It has been in business for twenty years, specializing in works of public improvement, and has no record of any complaints or disciplinary action with the Contractors State License Board.

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Based on its successful experience in working for the City on other public construction jobs,¹ Zolman submitted a Prequalification Questionnaire to the City for the Project on January 31, 2008. A copy of Zolman's Prequalification Questionnaire is included with the staffs' Report as Attachment A, and is also attached to this letter.

Approximately one month later, on February 26, 2008, the Department of Public Works ("DPW") approved Zolman as a pre-qualified contractor, and invited Zolman to bid the Project. As you are aware, and as further discussed below, the City's policy for prequalification of contractors is set forth in approved Resolution No. 71816 dated November 13, 2003, a copy of which is included with this letter as Attachment B. Attachment B to Resolution 71816 requires the City to deliver written notice to each contractor that it determines is not qualified to bid on a project. The notice must state the basis for the City's determination. The contractor is then afforded the right to an appeal, including a hearing, at the conclusion of which the hearing officer must render a written decision setting forth the reasons for either upholding *or reversing* the determination that the contractor is not qualified. This process has not been initiated by the City against Zolman. *In fact, at no time since submitting its Prequalification Questionnaire on January 31, 2008, has the City provided Zolman with any written notice of a determination to deny or rescind its prequalification rating.*

Bids for the Project were opened by the City on May 29, 2008. Zolman was the lowest responsive and responsible bidder with a base bid of \$17,750,000.00. Three Add Alternates were also bid. Zolman's bid for these three Add Alternates was \$110,000.00. Its total bid was thus \$17,860,000.00.

The base bid submitted by the apparent second-lowest bidder, John Plane, was \$17,850,000.00 (*i.e.*, \$100,000.00 higher than Zolman's base bid). John Plane's bid for the three Add Alternates was \$269,000.00 (*i.e.*, \$159,000.00 higher than Zolman's bid for the same three Add Alternates).

It is our understanding that Staff is currently recommending that Council approve an award of the base contract in addition to Add Alternate Nos. 1 and 3 only. Zolman's bid for this work (*i.e.*, base bid plus Add Alternates Nos. 1 and 3 only) is \$17,830,000.00. In comparison, John Plane's bid for the equivalent scope of work was \$17,974,000.00. *Consequently, for the scope of work recommended by Staff, at this time, Zolman was the lowest responsive bidder by \$144,000.00.*²

¹ Zolman is currently the general contractor for the City's Mayfair Community Center project on which Zolman's performance has been highly praised by the city personnel as the project is 60 days ahead of schedule and on budget.

² Based on the prior staff Report to the Council dated June 3, 2008, (see Attachment C) if the City were to proceed with all 3 Add Alternates, Zolman could complete the Project at a total savings of \$259,000 compared to John Plane.

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Following the bid opening, the City received bid protests from John Plane, Zovich Construction (the apparent third-low bidder), and the Joint Electrical Industry Fund ("JEIF"), each protesting the award of a contract to Zolman. As indicated in the staff Report dated July 28, 2008, each of the bid protests was responded to by Zolman, and fully investigated by City staff. *Based on its evaluation, staff has concluded that all three bid protests against Zolman are without merit, and should not preclude the award of a contract to Zolman as the lowest responsible bidder.*

Nevertheless, staff is currently recommending, based on its own subsequent interpretation of Zolman's response to the Prequalification Questionnaire, that the City simultaneously rescind Zolman's prequalification rating and award a contract for the Project to the second-lowest bidder, John Plane. Staffs' recommendation is an inappropriate response to its own admission that Zolman is qualified and has demonstrated an ability to successfully perform the Project, contravenes the best interests of the City in recommending that the contract be let to the second-lowest bidder at an additional cost of at least \$144,000.00, and violates the City's own procedures for providing written notice and the opportunity to appeal any determination to reject or rescind a contractor's prequalification status.

**B. STAFF IS RECOMMENDING A PUNITIVE AND
INAPPROPRIATE RESPONSE TO ZOLMAN'S
PREQUALIFICATION QUESTIONNAIRE**

In response to the various bid protests, staff independently investigated the unfounded allegations by JEIF that Zolman is not a responsible contractor. As set forth in the July 28, 2008 Report, staff has concluded that the current work being performed by Zolman on the City's Mayfair Community Center project is *"progressing smoothly without any significant work issues."*

Staffs' evaluation of Zolman's proven ability to successfully complete the work was also independently confirmed by the Construction and General Laborers Union Local 389 (both Zolman and John Plane are signatories to the Union's Laborer's Master Agreement), which provided staff a letter stating that Zolman is both "responsible" and capable of delivering the current Project "in the best possible manner."

Despite Zolman's unquestioned qualifications and ability to successfully complete the Project, staffs' recommendation is that Zolman's prequalification status be rescinded. This recommendation is ostensibly based on Zolman's inadvertent, although admittedly inaccurate, response to *one* question in the Prequalification Questionnaire.

The Prequalification Questionnaire, attached both to the staff Report and this letter as Attachment A, consists of several parts. Part III consists of 8 questions generally intended to reveal the bidder's licensing status, bonding capacity, and legal eligibility to perform the work. Potential bidders are expressly warned in Part III of the Prequalification

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Questionnaire that an inappropriate response to any of these 8 questions will result in the contractor being "immediately disqualified."

In contrast, Part IV-B of the Prequalification Questionnaire consists of 8 separate questions generally related to the bidder's compliance with safety, workers compensation, and prevailing wage laws. These 8 questions are scored, with a maximum total of 38 points available. In order to prequalify, the bidder must obtain a minimum of 27 points.

Question 7 of Part IV-B asks whether there has been any occasion during the last 5 years on which the bidder was required to pay either back wages or penalties for the bidder's own failure to comply with any state or local prevailing wage law. The maximum number of points awardable for this question is 5 points, which are obtained if the bidder's response is either "NO" or if the bidder responds "YES" but indicates only 1 or 2 such instances. *Thus, a bidder of Zolman's size still obtains the maximum number of points despite identifying two instances within the last 5 years when it was required to pay back wages or penalties.*

Zolman's response to Question 7 was "NO." As explained to staff during a meeting with Zolman's representatives on July 21, 2008, this response was inadvertent. Zolman's employee, who filled out the pre-qualification application, interpreted the question to be asking about required back-pay or wage violations still unresolved or currently pending. The Questionnaire was certified by Zolman's executive vice president, Reza Zolfaghari, with the same understanding. In completing the Prequalification Questionnaire, therefore, Zolman did not consider the *one* instance in the past 5 years when it was required by the Department of Industrial Relations ("DIR") to make back-payments. In December 2005, a complaint was filed against Zolman regarding an alleged prevailing wage violation on the City of Santa Clara fire station project. In August 2006, Zolman resolved this complaint by paying back wages and penalties of approximately \$27,783.00. The matter was thus concluded to the satisfaction of the DIR, and the case was closed in March 2007. Copies of the DIR documents were included by staff as Attachment B to its Report. As Attachment D to this letter, we are re-attaching the document from the DIR dated August 24, 2006 titled "Notice of Complaint Closed."

Zolman's admitted inadvertence in failing to identify this fully resolved situation was not deliberate. Staffs' investigation of this issue, including its direct conversations with representatives from Zolman—including Reza Zolfaghari, its executive vice president—has not revealed any intent to conceal information from the City. Nor was there any motive to conceal or any advantage gained by Zolman in the prequalification process.

Specifically, had Zolman not misinterpreted the intent of the question, and had it therefore responded by identifying this single complaint, it would nevertheless have received all 5 points available in response to Question 7. In fact, even if staff had awarded Zolman zero points in response to Question 7, Zolman still would have satisfied the minimum prequalification requirements by obtaining 33 of the available 38 points. Consequently, there is no evidence to suggest, nor is there any basis to conclude that Zolman was

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motivated to conceal information about its qualifications from the City in response to the Prequalification Questionnaire.

Neither should there be any concern that Zolman previously concealed information from the City to obtain the Mayfair Community Center project. Zolman was successfully prequalified by DPW to bid that project, the questionnaire for which did *not* include any question about prior back-pay or prevailing wage violations. For your reference, a copy of Zolman's truthful response to the prequalification questionnaire for the Mayfair Community Center project is included with this letter as Attachment E.

Staffs' recommendation that the City rescind Zolman's prequalification rating is thus an inappropriate and unwarranted response to Zolman's inadvertence. In its Report, staff emphasizes that, "It is true that Zolman would have qualified if it has answered Question No. 7 accurately. Given the weighted score applicable to Question No. 7, a contractor of Zolman's size could have had up to two prevailing wage violations and still obtained the full number of points for the answer."

The recommendation to nevertheless rescind Zolman's prequalification rating is therefore based purely on policy concerns. Specifically,

"Because of the enormous staff resources and time that would be needed to independently verify all of the information provided in the Prequalification Questionnaires, staff is able to perform only limited verification of the answers. For this reason, it is critical for staff to be able to rely upon the truthfulness and accuracy of the information provided by contractors in the Prequalification Questionnaires, and for contractors to understand that they must provide truthful and accurate answers."

Although reasonably expressed, in this case Staffs' recommendation represents an unjustified punitive response to an innocent mistake. A bidder's misinterpretation of prequalification questions will not, and cannot, be deterred by the subsequent rescinding of that contractor's prequalification rating. Further, as the current situation amply demonstrates, the City's procedures for receiving and evaluating both the prequalification questionnaires and subsequent bid protests already requires staff's verification of bidder-supplied information, and serves as a check upon actual cases of deception. In this case, staff admits that Zolman is qualified to perform the Project. The recommendation to promote truthfulness in *future* responses to prequalification questionnaires by rescinding Zolman's prequalification rating for this Project is thus punitive and ill-served to address staffs' concerns. Future mistakes cannot be deterred, and the City will not have the Project completed by the admitted lowest, responsible contractor.

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**C. STAFF'S RECOMMENDATION TO RESCIND ZOLMAN'S
PREQUALIFICATION RATING AND TO
SIMULTANEOUSLY APPROVE AN AWARD OF THE
CONTRACT TO JOHN PLANE VIOLATES CITY
PROCEDURES**

The staffs' Report dated July 28, 2008 contravenes established City procedures for rejecting and/or rescinding a contractor's prequalification rating. Staff recommends that the City conduct a hearing to determine whether the low bid submitted by Zolman should be rejected on the ground that Zolman was not qualified to submit a bid, but simultaneously recommends that the City Council approve an award of the contract for the Project to John Plane *prior to the conclusion of that hearing*.

These competing recommendations are inconsistent and violative of City procedures as established by Resolution 71816. As set forth in Resolution 71816, the City is required to notify a contractor in writing of the basis for any such determination. The contractor is then permitted the right to appeal that determination in the form of a hearing, at the conclusion of which the hearing officer must provide a written explanation for either upholding or reversing the initial determination. In this case, staffs' recommendation presupposes the outcome of that hearing, and denies Zolman any opportunity to appeal the initial determination.

To date, Zolman has never received any written notification that the City has made a determination to either reject or rescind its prequalification rating. In fact, Staff's recommends that if the City Council rejects the suggestion to rescind Zolman's prequalification status, that the Project be awarded to Zolman as the lowest responsive, and responsible bidder. Implied in this recommendation is that no decision has yet been made by DPW. Awarding the contract to the second-lowest bidder, John Plane, at the Council meeting on August 5th would therefore denies Zolman the opportunity to appeal any such determination, and presupposes that the hearing officer (who is to be determined by the City Manager) will not find Zolman qualified.

As indicated, Zolman has never been informed of any determination by DPW or City staff to reject Zolman's prequalification rating. If in fact such a determination has been made, or City Council intends to follow such a recommendation at the meeting on August 5, 2008, Zolman demands the opportunity to appeal that decision through a hearing conducted by a hearing officer appointed by the City Manager. Any decision to award the contract must be postponed until that process is complete and Zolman is afforded the opportunity to further address DPW's concerns.

D. CONCLUSION

Zolman is disappointed and obviously concerned with the recommendation by staff to ignore City procedures and to award a contract for the Project to the second-lowest bidder

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at the expense of taxpayer dollars and in spite of Zolman's undisputed qualifications to successfully complete the work.

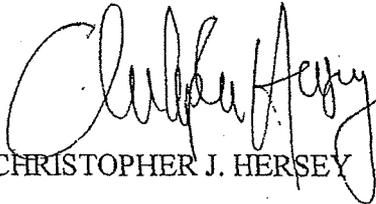
Representatives from Zolman and our office will be present at the Council meeting on August 5, 2008 to voice these serious concerns and to hopefully persuade the Council to reject staffs' recommendation. If, in the interim, you require any further information or would like to discuss this matter further, please do not hesitate to contact either me, or Zolman's executive vice president, Reza Zolfaghari, directly at (650) 642-4880.

On behalf of Zolman, I look forward to speaking with you at the Counsel meeting on August 5th and thank you in advance for your serious consideration of the staff Report dated July 28, 2008.

Very truly yours,

MILLER, MORTON, CAILLAT & NEVIS, LLP

By:


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