

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

**SUBJECT: THIRD STREET GARAGE
STAIRCASE REPLACEMENT
PROJECT**

DATE: 02-03-09

Approved

Date

2/9/09

COUNCIL DISTRICT: 3

RECOMMENDATION

Adoption of a resolution waiving the requirement that the Director of the Department of Public Works seek forfeiture of the bid bond submitted by Élan Construction as security for its bid on the Third Street Garage Staircase Replacement Project.

OUTCOME

The waiver of the forfeiture of bid bond of Élan Construction by the Council will allow the contractor to avoid extreme financial hardship, and recognize its good faith effort to meet bid obligations. The Department of Public Works intends to re-bid this project.

BACKGROUND

The Third Street Parking Garage is located at the corner of Third and St. John Streets in San José. The existing 270,000 square foot structure is a six story reinforced concrete structure with post tensioned slabs, built in 1971. Foot access to the garage is through three sets of stairs, with the main entrance on Third Street and two other stairs located on east and west sides of the structure. These stairs are Meta 1-pan construction with concrete fill in landings and stair treads. Most of the stairs are in need of repair due to age, continuous use, and corrosion. The Third Street Garage Staircase Replacement Project ("Project") makes the needed repairs.

On October 16, 2008, the Department of Public Works received six bid proposals for the Project. The low bid of \$338,800 was submitted by Élan Construction and was \$11,200 (3 percent) under the Engineer's Estimate for the Project. The next lowest bid submitted by Tucker Construction was \$488,745, which was 40 percent over the Engineer's Estimate.

On October 28, 2008, the Director of Public Works – pursuant to the authority delegated to her by the City Council awarded the construction contract for the Project to the low bidder Élan

Construction. Élan Construction has failed to execute the construction contract and has notified the City, in a letter, that it is unable to obtain the required payment and performance bonds. In the letter, Élan Construction requested that the City not seek forfeiture of its bid bond. Élan Construction's bid bond is in the amount of \$33,880.

ANALYSIS

The City requires all bidders on public works projects to submit a bid bond with their bid proposals. The purpose of the bid bond is to guarantee that each bidder honors its bid proposal and executes the construction contract if it is the low bidder. Sections 2-1.095, 3-1.04 and 3-1.05 of the City's Standard Specifications require the forfeiture of the bid bond if the bidder improperly withdraws its bid proposal or fails to execute the construction agreement within eight working days of having received it. Section 2-1.095 provides the only exception to this requirement in the Standard Specifications. It provides that – under limited circumstances – the City can relieve a bidder of its bid proposal based on a mistake in filling out the bid.

The bid bond provides the City with an effective guarantee that a bidder will enter into a contract to construct a project for the amount set forth in its bid proposal. Public Works staff believes that the requirements of the Standard Specifications set forth the appropriate practice with regard to forfeiture of a bid bond whenever a bidder improperly withdraws its bid or fails to execute the construction contract. However, Public Works staff believes that the current, unprecedented financial crisis of our economy – along with the particular facts involved here provide a unique, rare and exceptional situation that warrants deviating from the general requirement.

The Director of Public Works awarded the construction contract for the Project to Élan Construction on October 28, 2008. The following day, Public Works staff sent the construction contract documents for the Project to Élan Construction accompanied by an official award of contract notification letter. The letter notified Élan Construction that it had eight working days to execute the contract and return it – along with the payment and performance bonds and verification of insurance - to the City. The payment and performance bonds, as well as the verification of insurance, are critical requirements of every public works construction contract. The official award of contract notification letter stated that Élan Construction's failure to execute the contract and submit the necessary payment and performance bonds and verification of insurance would result in the City voiding the award and forfeiting the bid bond.

On November 22, 2008, Élan Construction sent a letter to the City stating that it was not able to obtain the payment and performance bonds because of the current economic situation. Élan Construction explained that its bonding company – Insko Dico – was reluctant to issue the bonds because of the large difference between the bid submitted by Élan Construction and the next low bidder. He asserts that Insko Dico believed Élan Construction could not complete the Project for the bid amount and required Élan Construction to obtain a bank issued letter stating that it would lend Élan Construction \$150,000. Élan Construction asserts that because it is a very small company – and given the current economic crisis – it could not obtain such a letter. The letter also states that Élan Construction and its insurance agents unsuccessfully sought to obtain bonds

from other bonding companies. Élan Construction states that forfeiture of the bid bond would cause extreme financial hardship and requests that the City not seek forfeiture of its bid bond. A copy of Élan Construction's letter is attached to this memorandum.

Public Works staff has independently investigated the assertions made in the letter of Élan Construction. Public Works staff believes that Élan Construction has made a good faith effort to obtain the necessary bonds. Public Works staff is satisfied that Élan Construction's inability to obtain the necessary bonds is due to the current economic crisis and not due to poor past performance, inexperience or any other performance-related issues. Public Works staff believes that Élan Construction would have been able to obtain the necessary bonds under normal economic conditions. Staff is also satisfied that forfeiture of the bonds would cause Élan Construction extreme financial hardship. Under these unique and exceptional circumstances, Public Works staff recommends that the City Council waive forfeiture of the bonds.

The City's Standard Specifications provide that – when the low bidder does not execute the construction contract – the City may award the construction contract to the next lowest bidder within 105 days after the opening of the proposals. In this case, the next lowest bid is almost \$150,000 higher than the low bid submitted by Élan Construction. Accordingly, the Department of Public Works intends to rebid the Project regardless of whether the City Council decides to waive the forfeiture of Élan Construction's bid bond.

EVALUATION AND FOLLOW-UP

No additional follow up action with the Council is expected at this time.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater; **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This project does not meet any of the minimum requirements as defined by Public Outreach criteria; however this memorandum will be posted on the City's website for the February 24, 2009 Council agenda.

To solicit contractors this project was listed on the City's Internet Bid Line and advertised in the *San José Post Record*. Bid packages for all Department of Public Works construction projects were provided to various contractor organizations and builder's exchanges.

COORDINATION

This memorandum has been coordinated with the Department of Transportation, the City Attorney's Office and the City Manager's Budget Office.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION/COST OF PROJECT: \$500,000

Project Delivery	\$ 97,500
Construction	350,000
Contingency	52,500
TOTAL PROJECT COSTS	\$500,000
Prior Year Expenditures	0
REMAINING PROJECT COSTS	\$500,000

2. COST ELEMENTS OF CONSTRUCTION CONTRACT:

TOTAL LUMP SUM CONTRACT AMOUNT:	\$500,000
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3. SOURCE OF FUNDING: 533 – General Purpose Parking Fund

4. OPERATING COST: The proposed operating and maintenance costs of this project have been reviewed and estimated to be approximately \$10,000 annually, beginning in December 2009.

BUDGET REFERENCE

The table below identifies the fund and appropriations proposed to fund the contract(s) recommended as part of this memo and remaining project costs, including project delivery, construction, and contingency costs.

Fund #	Appn. #	Appn. Name	RC #	Total Appn.	Amt. For Contract	2008-2009 Adopted Budget Page	Last Budget Action (Date, Ord. No.)
Remaining Project Costs				\$500,000			
Current Funding Available							
533	5992	Minor Parking Facility Improvements	152715	\$740,000	\$350,000	V-1023	NA
Total Current Funding Available:				\$740,000	\$350,000		

HONORABLE MAYOR AND CITY COUNCIL

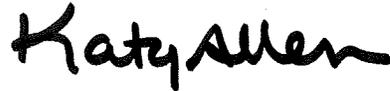
02-03-09

Subject: Third Street Garage Staircase Replacement Project

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CEQA

CEQA: Exempt, PP08-155.



KATY ALLEN

Director, Public Works Department

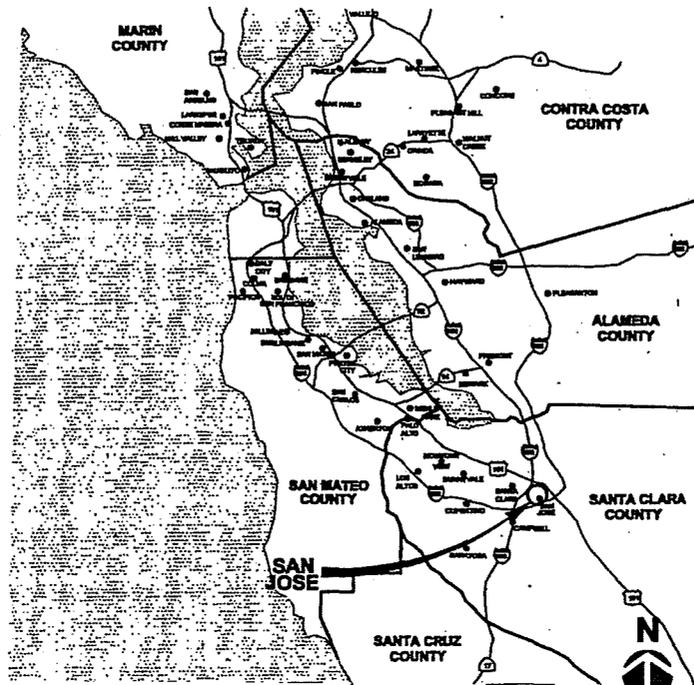
For questions, please contact DAVID SYKES, ASSISTANT DIRECTOR, at 408- 535-8300.

KJ:fs:rv

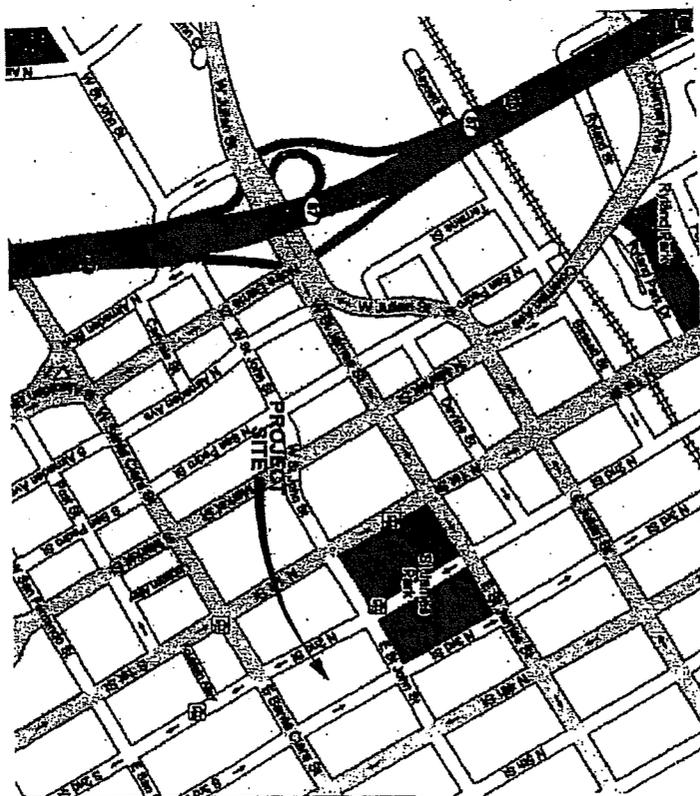
Attachments:

Third Street Garage

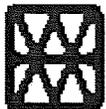
THIRD STREET GARAGE STAIRCASE REPLACEMENT PROJECT



VICINITY / LOCATION MAP



PROJECT SITE



ELAN CONSTRUCTION

327 ADA DRIVE PACHECO CA 94553

TEL: (925) 4371874 FAX: 6915503

LICENSE NO. 876165

EMAIL: elanconstruction@sbcglobal.net

PROJECT: CITY OF SAN JOSE THIRD STREET GARAGE STAIRCASE REPLACEMENT

Subject: Request for disqualifying Elan Construction instead of claiming the 10% bidder's bond

Date: 11-26-2008

To the city council of San Jose

Due to the depreciation of real estate value, my bank reduced my line of credit to the current balance that I owed. I then applied for credit card, which was denied. My home is now worth less than I owed. At this point, it is clear that my bank is not able or willing to support my business because there is no equity in the house for the bank to use as collateral. This period of time, it is common that small businesses, which use their home equity as collateral to do business, are facing the same situation. The value of my house today does not provide the equity for any bank to loan me the amount that bonding companies ask for.

My subcontractors and I expected to do this job to survive this national, or global economic crisis. Losing this job has a big impact on my company and my subcontractors. The future may be better and brighter. Please help me to survive today by not claiming the bid bond. Thank you all.

Sincerely
Cheng Su