



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Katy Allen

SUBJECT: SEE BELOW

DATE: 04-27-09

Approved

Date

4/30/09

COUNCIL DISTRICT: Citywide

**SUBJECT: PUBLIC FACILITIES ENERGY AND GREEN BUILDING
IMPROVEMENT PROJECT**

RECOMMENDATION

Report on bids and award of contract for the Public Facilities Energy and Green Building Improvement project to the lowest responsive bidder, Peterson Dean, Inc., in the amount of \$150,521 and approval of contingency in the amount of \$15,000.

OUTCOME

Award of the construction contract to Peterson Dean, Inc., will enable the Public Facilities Energy and Green Building Improvement Project to proceed. Approval of the ten percent contingency will provide funding for any unanticipated work necessary for the proper completion or construction of the project.

BACKGROUND

Environmental Services Department has identified the following six facilities as suitable for installation of solar photovoltaic systems: Alviso Library, Fire Stations No. 1 and 16, Gardner Community Center, Washington United Youth Center and the Alum Rock Youth Center. The purpose of this project is to obtain a contractor to install the solar photovoltaic systems on these six facilities.

This project will be funded by the Community Development Block Grant.

ANALYSIS

Seven bids were received on March 26, 2009 with the following results:

<u>Contractor</u>	<u>Bid Amount</u>	<u>Variance Amount</u>	<u>Over/(Under) Percent</u>
Cupertino Electric, Inc. (Cupertino)	\$1,070,492	\$820,492	43
Bass Electric, Inc. (San Francisco)	997,164	747,164	40
Comfort Zone Mechanical Air, Inc (Milpitas)	273,030	23,030	9
Engineer's Estimate	250,000	---	---
Eshone Energy (San José)	160,650	89,350	(36)
Peterson Dean Roofing and Solar Systems (Newark)	150,521	99,479	(40)
Al Fresco Concepts, Inc (Morgan Hill)	142,113	107,877	(43)

Al Fresco Concepts, Inc., is the apparent low bidder. However, the second low bidder, Peterson Dean Roofing and Solar Systems, and the fifth low bidder, Bass Electric, each protested that the bid of Al Fresco Concepts is not responsive because Al Fresco Concepts does not have the appropriate contractor's license. Copies of their respective protests are attached to this memorandum as Attachments A through C. Their protest has merit.

State Law grants the City broad discretion to determine the license classification a bidder must have to perform the work for a particular project. For this project, the notice to contractors clearly stated:

Bidders must have a California contractor's license, classification C-46 to bid this project.

Al Fresco Concepts has a "B" contractor's license. It does not have a C-46 contractor's license. Accordingly, its bid proposal is not responsive and should be rejected.

Al Fresco Concepts objects to the conclusion that its bid proposal is not responsive. Copies of the objections submitted by Al Fresco Concepts are attached to this memorandum as Attachments D through F.

Al Fresco Concepts contends its bid is responsive because the California Solar Initiative permits an A, B, C-10 or C-46 contractor to perform the kind of work required by the project. However, as just discussed, State law grants the City broad discretion to determine the license classification that a bidder must have to perform a project. Thus, while other contractors with other licenses might be able to legally perform the work, the City specified that bidders on this project needed to have a C-46 license. Public Works decided to require a C-46 license because it is a solar

contractor specialty license, and staff believed that requiring such a specialty license was more likely to result in obtaining a contractor with appropriate experience in solar power installation.

Al Fresco Concepts also contends its bid is responsive because it had orally requested clarification of the C-46 license requirement and Public Works staff told Al Fresco Concepts that listing a subcontractor with a C-46 license, which Al Fresco Concepts did, would suffice. However, Section 2-1.14 of the Department of Public Works Standard Specifications clearly states that every request for interpretation should be in writing addressed to the Director of Public Works. It goes on to provide:

No oral interpretation of the meaning of the plans, specifications or other documents will be made. If any such oral interpretation is made, it shall not be considered by the bidder in preparing its proposal.

Thus, even assuming the truth of the assertion made by Al Fresco Concepts, it was not entitled to rely upon the oral interpretation.

Peterson Dean Roofing and Solar Systems, and Bass Electric also protest the bid submitted by Al Fresco Concepts on the following grounds:

1. Al Fresco Concepts did not identify itself properly in the bid documents,
2. Al Fresco Concepts listed an unlicensed subcontractor,
3. Al Fresco Concepts does not comply with prevailing wage requirements, and
4. Al Fresco Concepts does not use licensed electricians as required by State Law.

Given staff's recommendation that the bid proposal of Al Fresco Concepts should be rejected based on the contractor not having the specified license to perform the project, there is no need to address each of the above additional protests.

Bass Electric also protests the entire bid process on the grounds that the specifications were not clear. In relevant part, the bid documents provided as follows:

These specifications are intended as guidelines for design and construction of six (6) solar photovoltaic energy generating systems (PVES). The systems are to be located on six (6) separate properties owned by the City that serve low income populations in San José. **The PVES should be sized for a total minimum peak capacity of 20 kilowatts (DC STC) and a maximum of 30 kilowatts (DC STC).**

(Emphasis added.) Bass Electric argues that the bolded language could be interpreted as meaning that the PVES for each of the 6 separate facilities had to generate 20 to 30 kilowatts,

resulting in a total minimum peak capacity of 120 kilowatts. Bass Electric appears to have bid the project based upon this interpretation.

Bass Electric's interpretation of the language is not reasonable. The language does not state that the PVES for each of the 6 separate facilities has to generate 20 to 30 kilowatts. Rather, it states that the PVES should be sized for a "total" minimum peak capacity of 20 kilowatts and a maximum of 30 kilowatts. This language is not ambiguous. Moreover, if Bass Electric believed the language was ambiguous, it could have made a written request for clarification as provided for in the Standard Specifications. Accordingly, staff recommends rejecting this bid protest.

Finally, the third low bidder, Eshone Energy protests the bid process on the ground that the City should have used a different methodology to determine the low bidder. While there might be a variety of methods that could have been used to determine the low bidder, the City used the standard method of determining the low bidder based upon lowest construction costs. This method of determining the low bidder is appropriate. Accordingly, staff recommends rejecting this bid protest.

In short, staff recommends rejecting the bid of Al Fresco Concepts as non-responsive, and awarding the construction contract for the project to the second low bidder, Peterson Dean Roofing and Solar Systems. The second low bid is 39.8 percent lower than the engineer's estimate and is considered acceptable for the work involved in this project. Council policy provides for a standard contingency of ten percent on public works projects involving underground utilities. The standard contingency is appropriate for this project.

EVALUATION AND FOLLOW-UP

The project is currently within budget and on schedule. 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 action does not meet any of the criteria above; however this memorandum will be posted on the City's website for the May 19, 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*. As per CDBG requirements, the project was also advertised in two minority language newspapers and with outreach to women-owned businesses. Bid packages for all Department of Public Works construction projects are provided to various contractor organizations and builder's exchanges.

COORDINATION

This project and memorandum have been coordinated with the Departments of Fire, Environmental Services, Parks, Recreation and Neighborhood Services, Planning, Building and Code Enforcement, the City Attorney's Office and the City Manager's Budget Office.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION/COST OF PROJECT:

Project Delivery	\$75,000
Construction	150,521
Contingency	15,000
Total Project Costs	\$240,521

2. COST ELEMENTS OF CONTRACT: Each facilities construction costs are one sixth of the total contract cost – \$25,000 each.

3. SOURCE OF FUNDING: 441 Development Block Grant

4. OPERATING COSTS: \$1,000 per fiscal year for cleaning panels and taking energy readings for the first eight to ten years.

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				\$240,521			
Remaining Funding Available							
441	6317	Green Retrofit	300315	\$500,000	\$150,521	X1-47	6/24/08, Ord. No. 28349
Total Current Funding Available				\$500,000	\$150,521		

HONORABLE MAYOR AND CITY COUNCIL

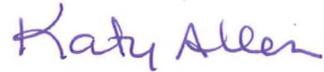
04-27-09

Subject: Public Facilities Energy and Green Building Improvement Project

Page 6

CEQA

CEQA: Exempt, PP09-010



KATY ALLEN

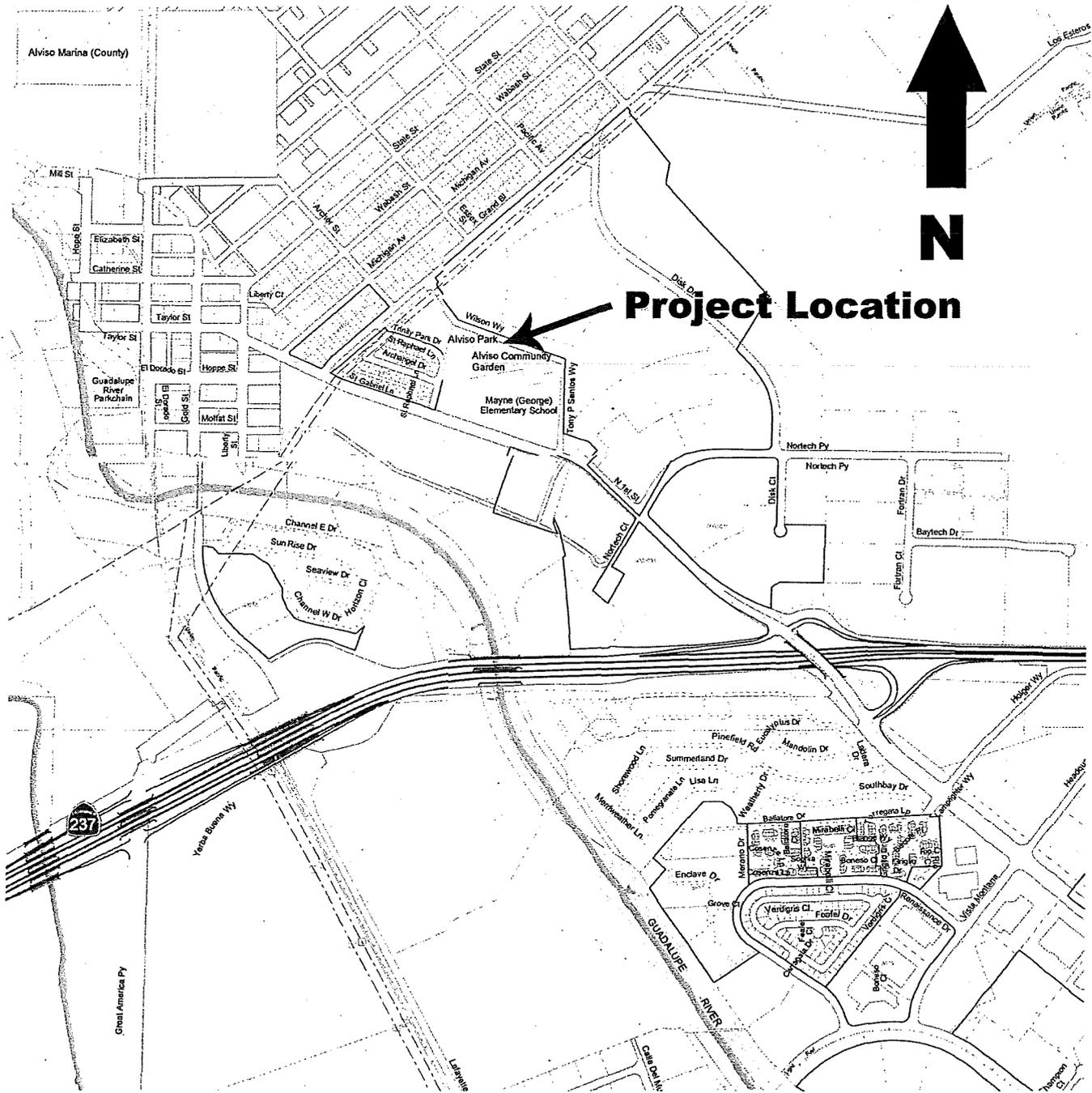
Director, Public Works Department

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

KJ: mlm

Attachments

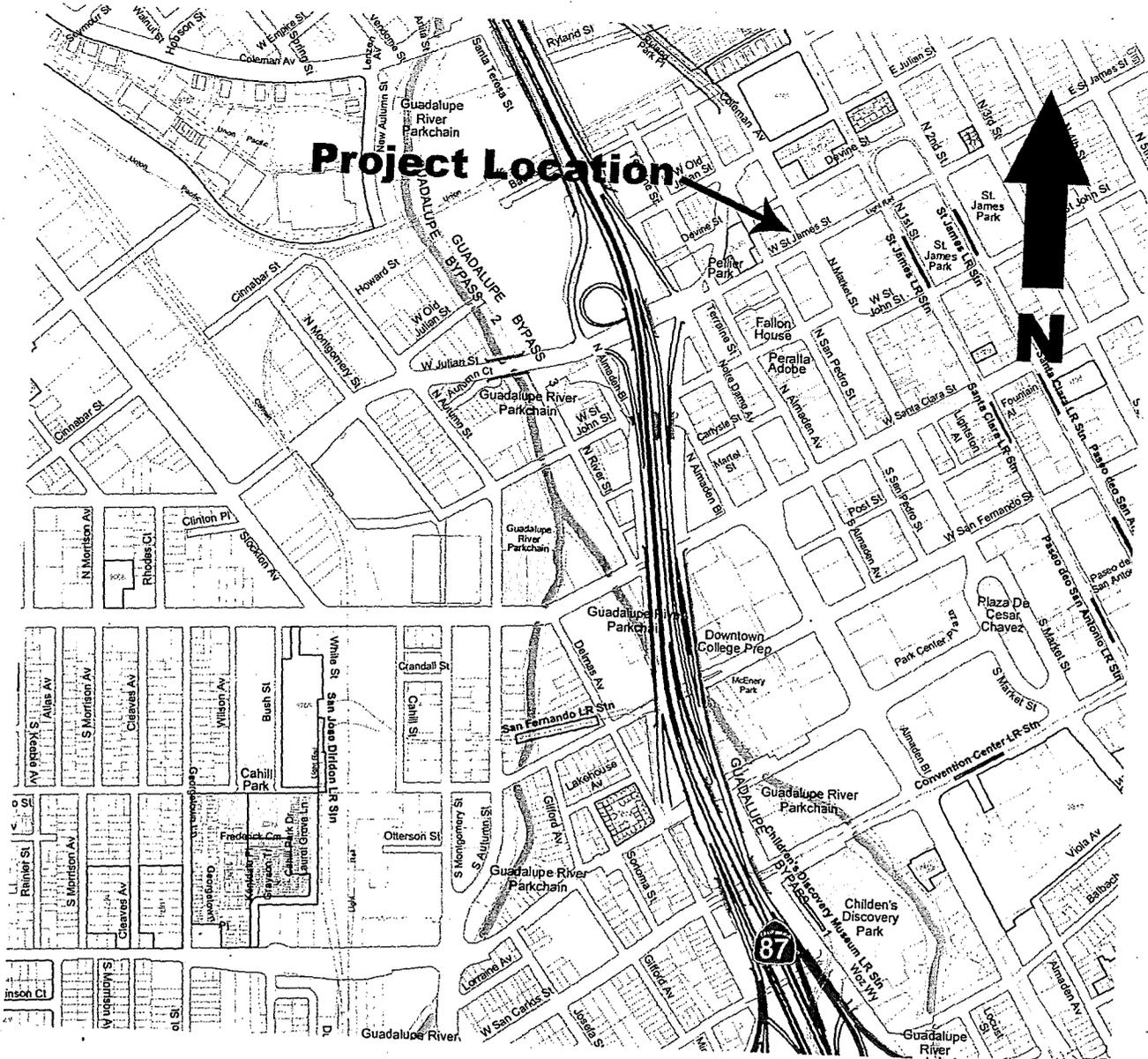
Public Facilities Energy and Green Building.doc



ALVISO LIBRARY

LOCATION MAP

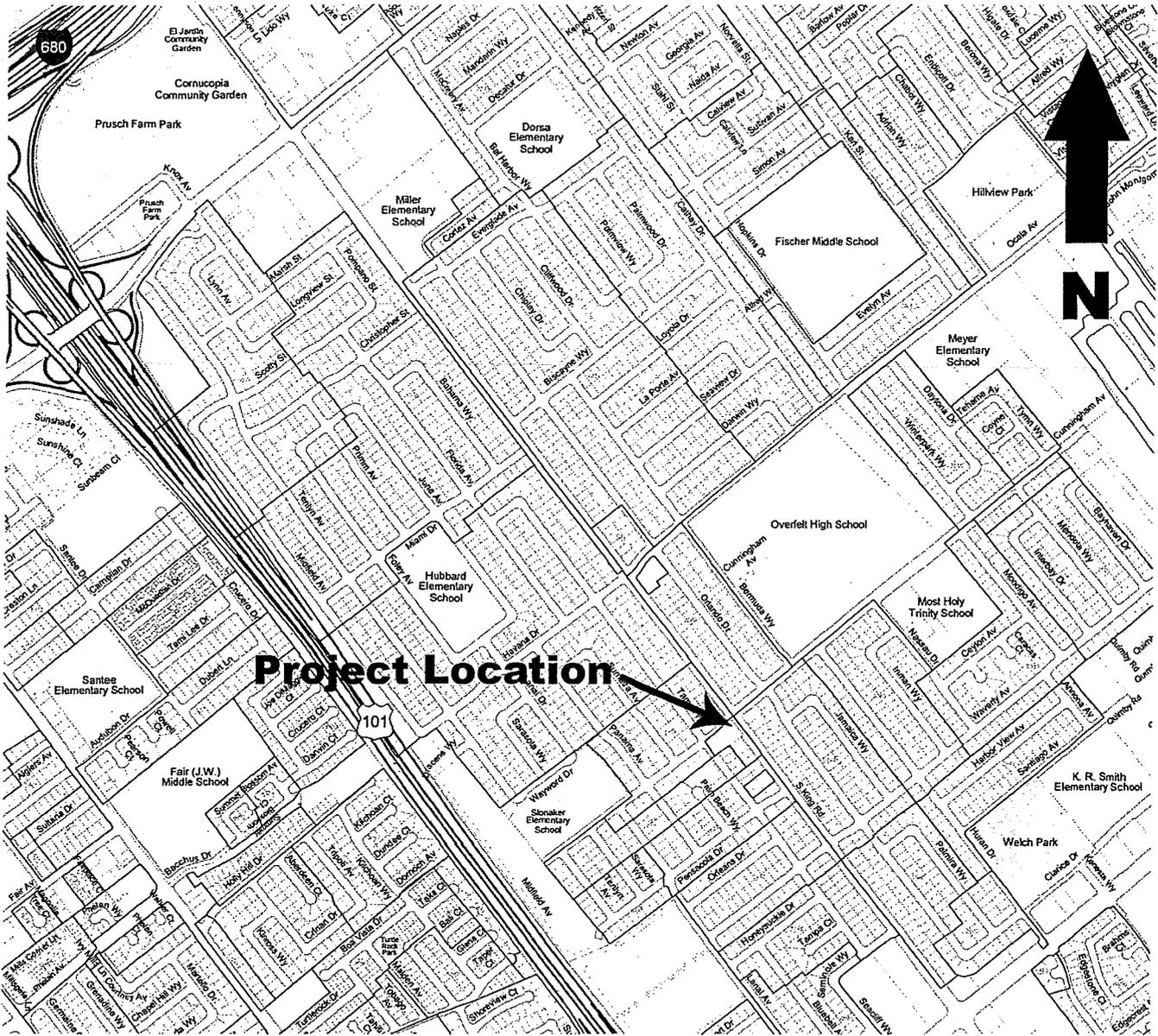
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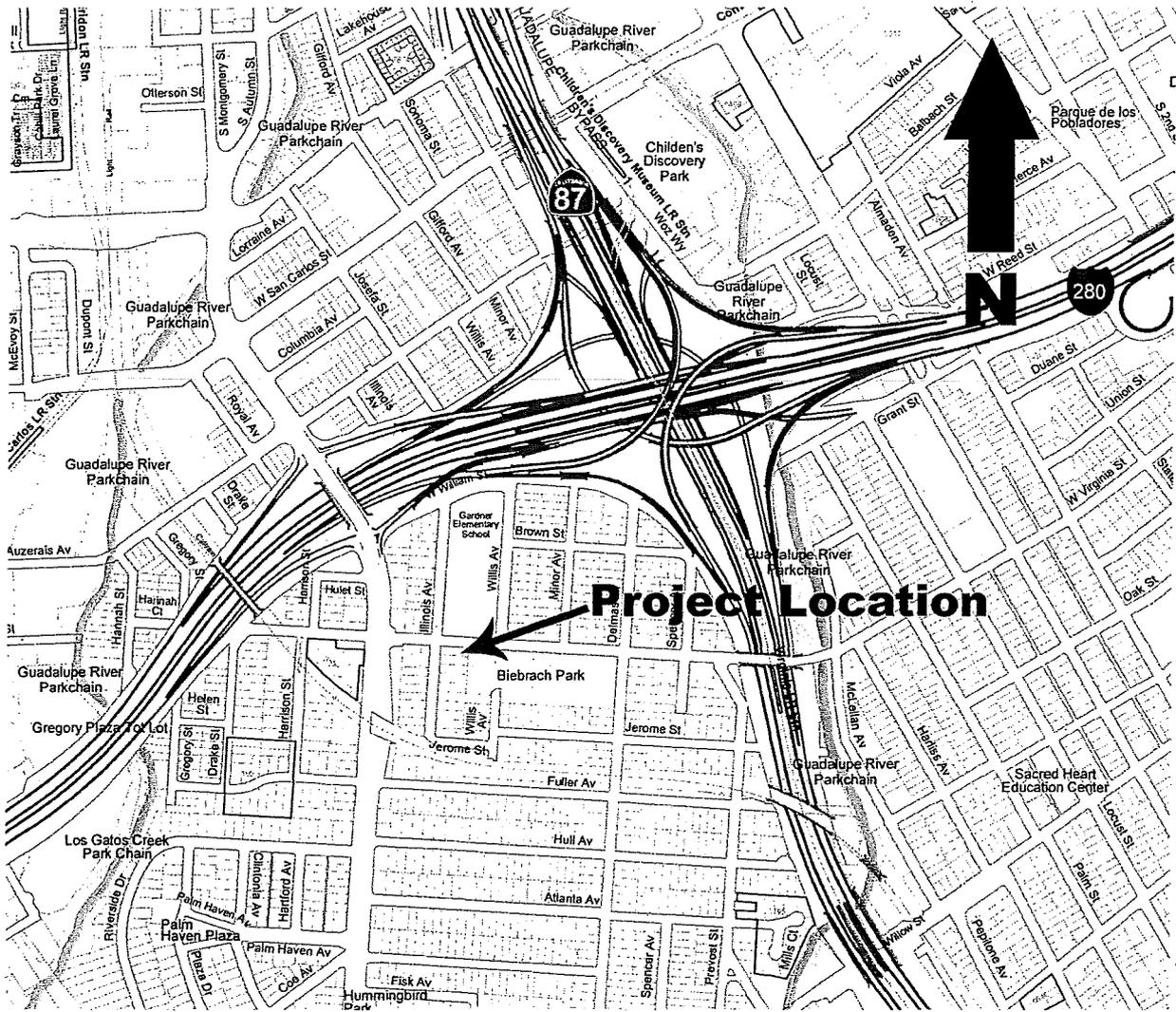
FIRE STATION #1

LOCATION MAP

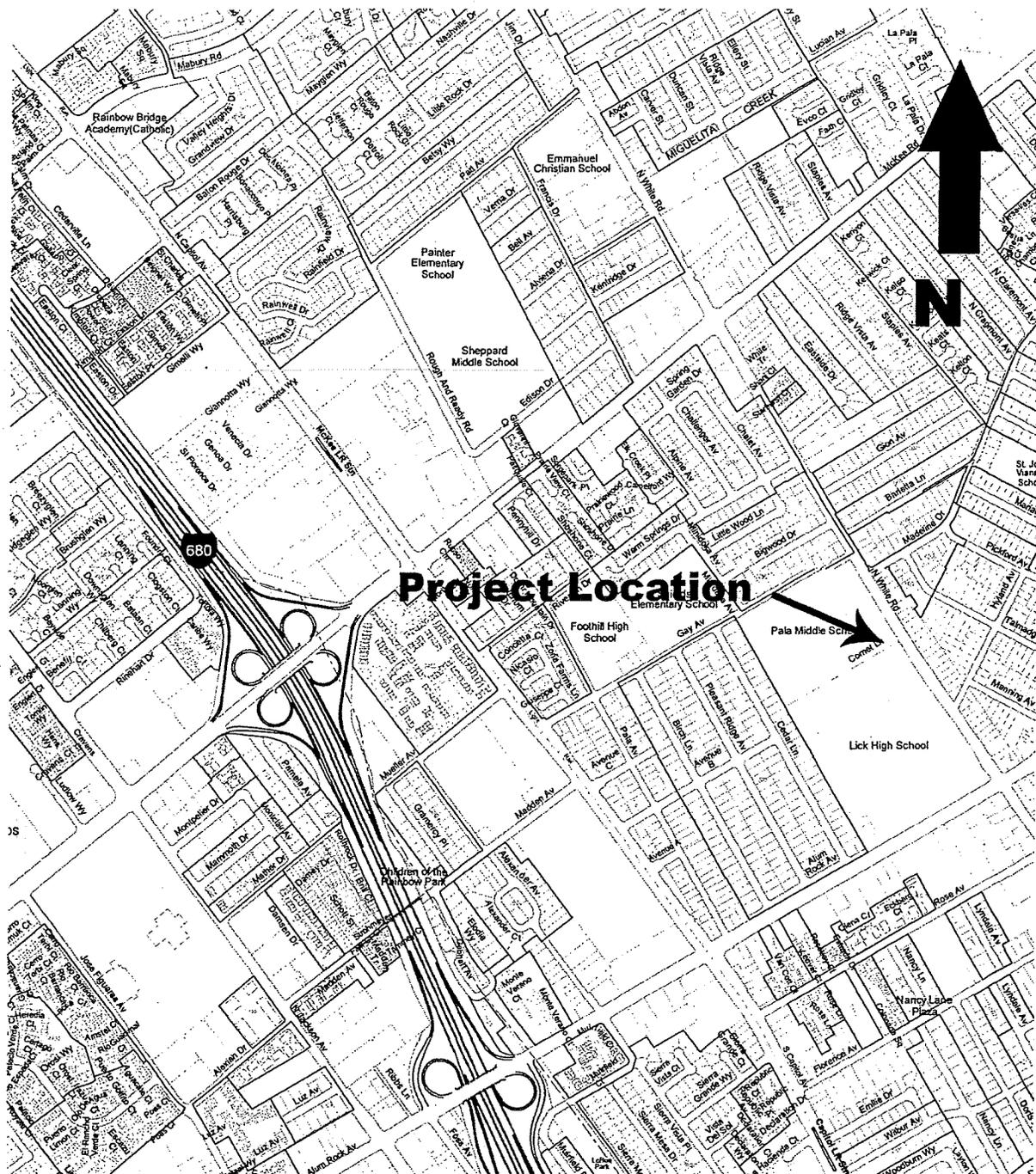
NOT TO SCALE



FIRE STATION #16
LOCATION MAP
NOT TO SCALE



GARDNER COMMUNITY CENTER LOCATION MAP NOT TO SCALE



ALUM ROCK YOUTH CENTER

LOCATION MAP

NOT TO SCALE

March 31, 2009

Michael McCullough
Project Manager
City of San Jose
Department of Public Works
City Facilities Architectural Services
200 East Santa Clara, 6th Floor
San Jose, CA 95113

Re: *City of San Jose*
Public Facilities Energy and Green Building Improvement Project

Dear Mr. McCullough:

Petersen-Dean, Inc. dba Petersendean Roofing and Solar Systems ("Petersendean") hereby protests the City's proposed award of a contract for the Public Facilities Energy & Green Building Improvement project to Fresco Solar. Our protest is based upon the failure of the listed low bidder, Fresco Solar, to comply with the licensing requirement for the project. The bid requirements for the project state: "Bidders must have a California contractor's license, classification **C-46** to bid this project." As detailed below, Fresco Solar does not comply with this requirement.

1. **Fresco Solar does not hold a contractor's license** issued by the State of California Contractors License Board.
2. **Al Fresco Concepts Inc.**, which holds a B classification and may be associated with Fresco Solar, **does not hold a valid C-46 classification** issued by the State of California Contractors License Board.
3. **Sunburst Energy Systems**, 1812 Polk Street, San Francisco, CA, the company listed by Fresco Solar as a subcontractor on the project, **does not hold a valid contractor's license** issued by the State of California Contractors License Board.

Petersendean respectfully requests the City to disqualify Fresco Solar from the project due to its failure to comply with the bid requirements. The City should award the contract to the lowest qualifying bidder. Thank you for your cooperation.

Very truly yours,



James P. Petersen
Chief Executive Officer
PETERSEN-DEAN, INC.



Bay Area Systems & Solution
856 Folsom Street, San Francisco, CA 94107
VOICE: (415) 295-1600; FAX: (415) 856-0381
www.basselectric.net

April 3, 2009
3:47PM

Department of Public Works
City Facilities Architectural Service Division
200 East Santa Clara Street, 6th Floor
San Jose, CA 95113-1905
ATTNL Michael McCullough

Subject: BID PROTEST, PUBLIC FACILITIES ENERGY AND GREEN BUILDING IMPROVEMENT PROJECT

Dear Mr. Michael McCullough:

Thank you for the opportunity to bid your project. We are writing in protest to the award of the Public Facilities Energy and Green Building Improvement Project.

Reasons for protest

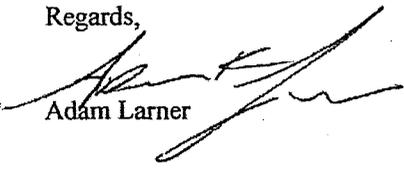
1. The bid requested PVES (Photovoltaic Energy Systems) on 6 facilities. The specified System Sizes of 20-30kW with 6 total PVES (Photovoltaic Energy Systems) locations totals between 120kW and 180kW of projects implied in the bid.
 - a. The bid price of AL FRESCO CONCEPTS INC at \$114,000 is not enough funds to purchase the low end (120kW) of photovoltaic material requested.
 - b. This discrepancy in the bid is evident by the wide range of bids received that varied nearly 500% with a Standard Deviation of ~\$200,000 on a winning bid of only \$114,000
2. The qualifications of AL FRESCO CONCEPTS INC are not verifiable experience in Electrical Work, or photovoltaic work, as required by the proposal.
3. AL FRESCO CONCEPTS INC., does not comply with Prevailing Wage agreements in place with the City of San Jose. This is direct conflict with City of San Jose Municipal Code
4. AL FRESCO CONCEPTS INC does not utilize CA Licensed Electricians to perform this electrical work as required by California State Law

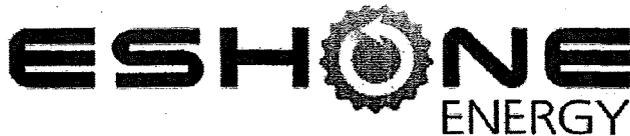
Also please note, The City of San Jose is at risk for any and all accidents if properly licensed and trained electricians are not utilized to perform this 600 Volt-DC electrical work

We request an audit of all bids be made public and recommendations be based upon the entire proposal meeting the qualifications and pricing goals defined in the proposal.

Thank you for your time.

Regards,


Adam Larner



2334 Walsh Ave
Santa Clara , CA 95051
Tel 408 565 0200 Fax 408 565 0201
www.eshone-energy.com

Power & Solar Power Design & Integration Company

Mr. Michael McCullough
City Of San Jose
Department of Public Works
City Facilities Architectural Services
200 East Santa Clara , 6th floor
San Jose , CA 95113

Date 4/1/09

Re: Public Facilities Energy and Green Building Improvement Project Bid 3/26/09 3PM

Dear Mike,

I most delighted on the fact that City of San Jose is moving forward with implementing renewable energy projects, yet I found this bid unfair.

In my humble opinion the bid forms as they were presented to public do not allow the city to accurately judge which is the best bid to the city.

Strictly going by the lowest bid is not accurate but wrong.

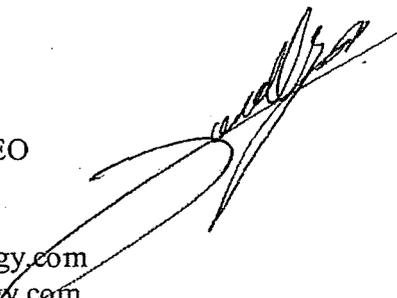
The city must evaluate how much energy it will harvest in the life of the system for the dollar cost it spends on the project.

Recognizing that the bid documents were flawed, I took the initiative and added to my doc how big of a system I am going to install at the 6 sites. I enclosed it here for your reference.

In conclusion, I ask the city reject all bids and put this project to rebid ASAP.

Sincerely,

Yoel Hanegbi,
Eshone Energy, CEO
Tel 408 565 0200
Fax 408 565 0201
yoel@eshone-energy.com
www.eshone-energy.com
Office: 2334B Walsh Avenue,
Santa Clara , CA 95051-1301





17415 Monterey Rd, Suite 201, Morgan Hill, CA 95037. April 16th, 2009

**Richard Doyle,
City Attorney
Office of the City Attorney
City of San Jose
200 East Santa Clara Street, 16th Floor
San Jose, CA 95113- 1905**

**Public Facilities Energy and Green Building Improvement
Project Formal Protest**

Dear Mister Doyle,

We wish to inform you that we are herewith protesting the award of the above project to a higher priced competitor. In the absence of any transparent, accessible process by which to make this known we are making your office aware of this by means of this letter.

It is clear to my company from the city's actions in recent days that the public bidding process in which we participated is no more than a meaningless ruse to cover up for non-competitive and unethical business transactions. Here is clear wording in state law that we are qualified to undertake this contract using a C46 subcontractor:

*B - General Building Contractor
Business & Professions Code
Division 3, Chapter 9. Contractors, Article 4. Classifications*

7057. (a) Except as provided in this section, a general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

This does not include anyone who merely furnishes materials or supplies under Section

7045 without fabricating them into, or consuming them in the performance of the work of the general building contractor.

(b) A general building contractor may take a prime contract or a subcontract for a framing or carpentry project. However, a general building contractor shall not take a prime contract for any project involving trades other than framing or carpentry unless the prime contract requires at least two unrelated building trades or crafts other than framing or carpentry, or unless the general building contractor holds the appropriate license classification or subcontracts with an appropriately licensed specialty contractor to perform the work. A general building contractor shall not take a subcontract involving trades other than framing or carpentry, unless the subcontract requires at least two unrelated trades or crafts other than framing or carpentry, or unless the general building contractor holds the appropriate license classification. The general building contractor may not count framing or carpentry in calculating the two unrelated trades necessary in order for the general building contractor to be able to take a prime contract or subcontract for a project involving other trades.

We were told, quite correctly, by the city that we were eligible to bid. We bid and won and were wrongfully disqualified, apparently by your office. We were then told the job would be rebid, but that too turned out to be untrue.

We intend to use all legal means at our disposal to uncover the motivation behind these multiple about-faces by the city. Please respond to this matter by 3 p.m. on Friday April 16, 2009 or we will assume that the city and your office are engaging in further obfuscation and begin other proceedings.

Yours Truly,



Sean Kenny
CEO
Al Fresco Concepts Inc,
Db a Fresco Solar
license# 901992

McCullough, Michael

From: Sean Kenny [sean@frescosolar.com]
Sent: Tuesday, April 07, 2009 7:55 PM
To: McCullough, Michael
Cc: jed@frescosolar.com; Jeff, susan@frescosolar.com; pegfordney@yahoo.com; lalani@frescosolar.com; David Julius
Subject: Interchangeability of license classification and subcontract.

Hello Again Michael,

Please read paragraph 7057 (b) below. This clearly states under the California Business and Professions Code that holding the appropriate license category and subcontracting with a contractor who holds that license category are considered to be the same for the purpose of being eligible to undertake work in that category.

We would like to hear from the City Attorney in this regard as soon as possible.

Sean Kenny
CEO
Fresco Solar

B - General Building Contractor
Business & Professions Code
Division 3, Chapter 9. Contractors, Article 4. Classifications

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(c) No general building contractor shall contract for any project that includes the "C-16" Fire Protection classification as provided for in Section 7026.12 or the "C-57" Well Drilling classification as provided for in Section 13750.5 of the Water Code, unless the general building contractor holds the specialty license, or subcontracts with the appropriately licensed specialty contractor.

(Amended by Stats. 1997, Chapter 812 (SB 857).)

From: Sean Kenny [mailto:sean@frescosolar.com]
Sent: Thursday, April 16, 2009 8:29 AM
To: Constant, Pete
Cc: jed@frescosolar.com; Jeff; susan@frescosolar.com
Subject: Solar Buildings - lack of transparency and illegal decision!

Dear Councilman Pete,

We have now learned that the city has now changed its mind about rebidding this contract and insists on continuing to disqualify us even though as you can see from the excerpt below from the California Business and Professions code we are certainly legally qualified as a bidder.

Let me summarize the bizarre sequence of events so far:

1. San Jose calls for RFP's for solar photovoltaic on six city rooftops.
2. San Jose selects Fresco Solar as the low bidder.
3. Another bidder protests.
4. San Jose disqualifies Fresco Solar for not having a C46 license [solar].
5. Fresco Solar, an experienced solar contractor, points out that there is no legal difference between a company that bids with a listed C46 subcontractor and one that bids with a C46 subsidiary or C46 managing employee.
6. San Jose states that they are disqualifying all bids and rebidding the job.
7. Fresco Solar asks about the timing of the new bid.
8. Fresco Solar is told that the city is NOT rebidding and is awarding the bid to the next lowest bidder.

Moreover, Fresco Solar has received no official communication from the city other than e-mails to and from the project manager. This is not transparent, ethical management of taxpayer funds. These about-faces raise serious questions and certainly do not forebode well for the city's future green energy actions.

Can you please let us know what, if any, recourse is available to us to find out what is really happening?

Respectfully,

Sean Kenny
CEO
Fresco Solar
408-497-1579

--- On Tue, 4/7/09, Sean Kenny <sean@frescosolar.com> wrote:

From: Sean Kenny <sean@frescosolar.com>

Subject: Interchangeability of license classification and subcontract.

To: "MichaelMcCullough" <Michael.McCullough@sanjoseca.gov>

Cc: jed@frescosolar.com, "Jeff" <jeff@frescosolar.com>, susan@frescosolar.com, pegfordney@yahoo.com, lalani@frescosolar.com, "David Julius" <david@sbsolarenergy.com>

Date: Tuesday, April 7, 2009, 7:54 PM

Hello Again Michael,

Please read paragraph 7057 (b) below. This clearly states under the California Business and Professions Code that holding the appropriate license category and subcontracting with a contractor who holds that license category are considered to be the same for the purpose of being eligible to undertake work in that category.

We would like to hear from the City Attorney in this regard as soon as possible.

Sean Kenny
CEO
Fresco Solar

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necessary in order for the general building contractor to be able to take a prime contract or subcontract for a project involving other trades.

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