



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: David Sykes

SUBJECT: PAUL MOORE PARK
YOUTH & TOT LOT RENOVATION

DATE: 05-31-11

Approved

Date

6/7/11

COUNCIL DISTRICT: 9

RECOMMENDATION

Report on bids and award of contract for the Paul Moore Park Youth & Tot Lot Renovation Project No. 6231 to the low bidder, Goodland Landscape Construction, Inc., for the base bid and Add Alternate No. 1 in the amount of \$777,231, and approval of a contingency in the amount of \$39,000.

OUTCOME

Approval of this construction contract will allow for the removal and replacement of play equipment in the youth and tot lots to provide universally accessible play areas and reduce maintenance costs.

BACKGROUND

Paul Moore Park, an 8-acre neighborhood park, is in a residential area in central San José on the southwest corner of Hillsdale and Cherry Avenues and is bordered by streets on all four sides (map attached). The existing park amenities include: a youth-age play lot, a tot play lot and a separate swing area; a softball field and tennis and basketball courts; picnic areas; and a recreation building and restrooms. The Department of Parks, Recreation and Neighborhood Services (PRNS) recommended the replacement of all play equipment in both the youth and tot lots due to the high level of maintenance. A separate area for swings is a more recent addition to the park and in good condition.

In early 2009, the project scope was modified which resulted in universally-accessible youth and tot lots. Subsequent designs were developed with themed play equipment and resilient rubber surfacing throughout both play lots. Community meetings were conducted in January and June of 2010 to obtain feedback on the project's design.

The base bid scope of work for the project consists of: demolition of all play equipment in the youth and tot lots and removal of the wood chip play surfacing in the play areas, including the swing area; removal of portions of the concrete play area wall; construction of new concrete

ramps and seat walls; installation of new benches, picnic tables and a shade structure; and installation of new play equipment in the youth and tot lots and new resilient surfacing in the youth and tot lots and swing areas.

In addition to the base bid scope of work, there is one add alternate bid item as follows:

	Description	Bid Amount
Add Alternate No. 1	Add one accessible spring rider	\$10,070

Construction is anticipated to begin in August 2011 with completion in January 2012.

ANALYSIS

Bids were opened on March 17, 2011 with the following results:

<u>Contractor</u>	<u>Base Bid</u>	<u>Add Alt No.1</u>	<u>Total Bid</u>	<u>Variance</u>	<u>Over/ (Under) Percent</u>
CF Contracting (Fairfax)	\$900,058	\$8,360	\$908,418	\$22,418	3
Calstate Construction (Fremont)	883,200	7,500	890,700	4,700	1
Engineer's Estimate	878,000	8,000	886,000	---	---
Elite Landscaping (Clovis)	819,250	15,000	834,250	(51,750)	(6)
Robert A. Bothman (San Jose)	821,737	7,592	829,329	(56,671)	(6)
Suarez & Munoz (Hayward)	797,200	7,500	804,700	(81,300)	(9)
Blossom Valley (San Jose)	792,044	8,215	800,259	(85,741)	(10)
Star Construction (San Bruno)	787,500	9,000	796,500	(89,500)	(10)
Joseph J. Albanese (Santa Clara)	770,690	8,000	778,690	(107,310)	(12)
Goodland Landscape (Tracy)	767,161	10,070	777,231	(108,769)	(12)

The low bid submitted by Goodland Landscape Construction, Inc. is 12 percent below the Engineer's Estimate (EE) of \$886,000 and is considered acceptable for the work involved. The EE was based on trends of high construction costs experienced with this type of project resulting in anticipated higher costs for site preparation and concrete work. The continued downturn in the construction market resulted in the City receiving nine competitive bids.

Following the bid opening, the City sent a letter to all bidders stating its intention to award the construction contract to Goodland Landscape Construction, Inc. (GLC). The second low bidder, Joseph J. Albanese, Inc. (JJA,) submitted a letter to the City protesting the award of contract to GLC which is attached as Attachment A. The City Attorney's Office responded in a separate letter to JJA that the protest is without merit. The City Attorney's letter is attached as Attachment B

Based upon the above information, it is the recommendation of staff for the City Council to award the project to Goodland Landscape Construction, Inc. In accordance with the City's standard specifications, the award of contract must be made within 90 days after the bid opening unless an extension is agreed upon between the Director of Public Works and the bidder. The 90-day time period to award the contract ends on June 15, 2011. GLC has been contacted and has agreed to hold their bid for an additional 30 days.

Council policy provides for a standard contingency of five percent on public park projects. Approval of the five percent contingency will provide funding for any unanticipated work necessary for the proper completion and construction of the 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 listed above. This memorandum will be posted on the City's website for the June 21, 2011 Council agenda.

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

COORDINATION

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

FISCAL/POLICY ALIGNMENT

This project is consistent with the Council-approved Budget Strategy, Economic Recovery section in that it will help to stimulate construction spending in our local economy and create temporary construction jobs to help lessen the effects of the current economic downturn.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION/COST OF PROJECT:	\$777,231
COST OF PROJECT:	
Construction	\$777,231
Project Delivery	285,000
Contingency	<u>39,000</u>
Total Project Costs	\$1,101,231
Prior Year Expenditures	<u>\$97,458</u> *
REMAINING PROJECT COSTS	\$1,003,773

*Prior year expenditures for FY2008-09 and 2009-10 totaling \$97,458 were for feasibility and design phases.

2. COST ELEMENTS OF AGREEMENT/CONTRACT:	
Mobilization, Storm Water Pollution Prevention & Utility Conflict Work	\$37,500
Demolition, Grading & Drainage	26,780
Asphalt & Concrete Paving and Play Area Walls	48,615
Playground Equipment & Site Furnishings	507,620
Playground Protective Surfacing	<u>156,716</u>
TOTAL CONSTRUCTION CONTRACT AWARD	\$777,231

3. SOURCE OF FUNDING:	375 – Parks Trust Fund
	388 – Construction and Conveyance Tax Fund: CD 9

4. OPERATING COST: The proposed operating and maintenance costs for this project have been reviewed and will have no additional impact on the General Fund other than what is already budgeted for this facility.

BUDGET REFERENCE

The table below identifies the fund and appropriations proposed to fund the contract 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	2010-11 Adopted Capital Budget (Page)	Last Budget Action (Date, Ord. No.)
Total Remaining Project Costs				\$1,003,773			
Current Funding Available							
375	6370	Paul Moore Park Renovation	158705	\$239,000	\$150,000	V-574	10/19/2010 Ord. No. 28829
388	6370	Paul Moore Park Renovation	166175	\$863,000	\$627,231	V-442	12/14/2010 Ord. No. 28872
Total Project Funding				\$1,102,000	\$777,231		

CEQA

CEQA: Exempt, PP10-176.

/s/

DAVID SYKES
Acting Director of Public Works

For questions, please contact HARRY FREITAS, DEPUTY DIRECTOR, at 408-535-8300.

MH:jp:sa
Attachments

ATTACHMENT A



Jos. J. Albanese, Inc.

Concrete Construction CONTRACTORS LICENSE NO. 299880

www.jjalbanese.com

986 Walsh Avenue Santa Clara, CA 95050-2649 or
P.O. Box 667 Santa Clara, CA 95052-0667

PHONE (408) 727-5700
FAX (408) 727-0366

March 23, 2011

Ms. Susan Aizumi
City of San Jose, Department of Public Works
City Facilities Architectural Services Division
200 E. Santa Clara Street, 6th Floor Tower
San Jose, CA 95113

Via Electronic Mail and Facsimile

Re: Paul Moore Park Youth and Tot Lot Renovation
CPMS Project ID: 6231
Bid Date- March 17, 2011
Bid Protest: Goodland Landscape Construction, Inc.
Notice of Intent to Award dated March 18, 2011

Dear Ms. Aizumi:

Joseph J. Albanese, Inc. ("JJA") protests the City's intention to award the above captioned project to Goodland Landscape Construction, Inc. ("Goodland").

JJA protests the award to Goodland because Goodland's bid proposal failed to properly designate its subcontractors pursuant to the Subletting and Subcontracting Fair Practices Act, California Public Contract Code section 4100 et. seq. ("Act") as well as the City's Standard Specifications.

As part of a responsive bid package, both the City Standards and the Act require each bidder to designate its subcontractor and the portion of the work which will be done by each subcontractor. See Cal. Pub. Cont. Code § 4104 (b) and San Jose Standard Specification § 2-1.15A (2) (emphasis added). These standards exist to protect the public from bid peddling and bid shopping in the context of public works contracting.

In this instance, Goodland failed to sufficiently designate the portion of work it intends to subcontract to its listed concrete contractor. Goodland's failure derives from the "portion" of work it designated to Maxicrete; described as "Concrete-partial." Inasmuch as Goodland failed to designate an objective scope of work to Maxicrete, its bid submission should be deemed non-responsive and rejected.

The Prime Contractor must Describe Subcontracted Work with Particularity

The statute and Standard require the 'portion of work' to be subcontracted be described with reasonable particularity. The particularity requirement serves the underlying purpose of the

Ms. Susan Aizumi, City of San Jose
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March 21, 2011
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Act in many respects. Though the mere listing of a subcontractor does not create a contract, it does create a binding obligation upon the prime contractor to use the listed subcontractor.

In this instance, there are many concrete related scopes of work on the Paul Moore project. The project requires concrete pavement, concrete ramps, concrete walls, concrete walkways, concrete bands, concrete sub-slabs, and miscellaneous concrete footings. In order to create the binding obligation discussed above, it is imperative that the City, Maxicrete, and the public objectively understand Goodland's intention as it relates to this subcontractor and particular scope of work. Goodland could have avoided this problem by simply identifying, with reasonable particularity, what work it meant to designate for Maxicrete. However, Goodland failed to define the work and leaves the Public, the City, and Maxicrete uncertain as to who is doing what.

Absent a Clear Scope of Work the City can not Effectively Monitor the Project

With the given "portion" of work undefined, it will be impossible for the City to objectively determine if Goodland is using the listed subcontractor as it intended at bid time. By using vague and ambiguous language, there is no way for the City to administer the contract and ensure the scope of work performed by Maxicrete is the scope intended at bid time. Equally important, in the event Goodland seeks to substitute a contractor for Maxicrete, the City would have no basis or ability to fairly grant or deny the substitution request as required by the Act.

Furthermore, Goodland can press Maxicrete to reduce its bid price to perform the concrete. If Maxicrete refuses, Goodland can usurp the Act and only offer a contract for a very small portion of the required concrete work and seek a substitution or perform the work itself. In this instance, the City would have no way of knowing if Maxicrete received the benefit of its bargain with Goodland or if some other influence was involved.

Goodland's Own Actions Introduced the Ambiguity.

Goodland had the opportunity to sufficiently describe the portion of work it intended to subcontract to Maxicrete and its failure to do so warrants the City declaring its bid non-responsive. When describing the "portion" of work to be subcontracted, the prime contractor has discretion to use appropriate terms, (e.g. concrete pavement versus concrete walls) to sufficiently describe the work it intends to subcontract. In essence, Goodland had the opportunity to be clear, it failed to do so, and now has left a material term in the contract open to interpretation.

The City Should Deem Goodland's Bid Non-Responsive.

Because Goodland violated the Act and San Jose Standard, it enjoys an unfair advantage over JJA and other bidders, requiring the City to deem its bid non-responsive. By failing to identify with any degree of particularity the scope of work it intends to subcontract to

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Maxierete, Goodland enjoys the opportunity to reduce its project costs by bid shopping its concrete price. In the event it gets a better price, it can force Maxierete to reduce its price or substitute another subcontractor for Maxierete. This possibility undermines the objective public contracting process, the Act, and should not be permitted.

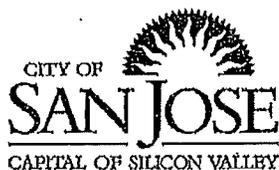
While one may not expect Goodland to actually engage in the evils described above, evils sought to be ameliorated by the Act; it is of no consequence. Inasmuch as they their ambiguous bid allows them to bid shop or bid peddle, it must be deemed non-responsive.

Sincerely yours,

Kevin J. Albanese

KJ Kevin J. Albanese
Vice President/Chief Operating Officer

ATTACHMENT B



Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

GLENN SCHWARZBACH
Sr. Deputy City Attorney
Direct Line: 408 - 535-1927

May 13, 2011

Kevin J. Albanese
Vice President/Chief Operating Officer
Joseph J. Albanese, Inc.
986 Walsh Avenue
Santa Clara, CA 95050-2649

SENT VIA FAX: 408-727-0366

**Re: Paul Moore Park Youth and Tot Lot Renovation Project ("Project")
Bid Protest by Joseph J. Albanese, Inc. ("Albanese")**

Dear Mr. Albanese:

This responds to your letters of April 22, 2011 and March 23, 2011 protesting staff's recommendation to award the construction contract for the Project to the apparent low bidder, Goodland Landscape Construction, Inc. ("Goodland"). Your letters are attached for reference. The sole basis of the protest is Goodland's description of the portion of work to be performed by one of the listed subcontractors. The protest is without merit.

Before submitting its bid to the City, Goodland and Maxicrete Concrete Construction ("Maxicrete") communicated regarding Maxicrete performing concrete work on the Project as a subcontractor. In a letter dated April 11, 2011, Maxicrete states that it provided Goodland with a proposal that reflected their "thorough communication" on the issue. In the letter, Maxicrete confirms that Goodland intends to perform the concrete base work for the playground rubber surface. Maxicrete also confirms that it agreed with Goodland to perform the rigid paving and walls concrete work, excluding the concrete base work. A copy of this letter is attached for your reference.

Goodland listed Maxicrete as a subcontractor in its bid. For the portion of work Maxicrete would perform, Goodland put "Concrete - partial." Despite Maxicrete and Goodland having an agreement as to the scope of concrete work to be performed by Maxicrete, Albanese complains that Goodland "could have better defined the 'portion' of

work” to be performed by Maxicrete and that Goodland’s bid should be rejected on this basis as non-responsive.

Contrary to Albanese’s protest, Goodland’s description of the “portion” of the work to be performed by Maxicrete is sufficient to meet the requirements of Section 2-1.15A of the San Jose Standard Specification. In relevant part, Section 2-1.15A requires each bidder to set forth in its bid proposal:

The **portion of the work** which will be done by each subcontractor. . . . The Contractor shall list only one subcontractor for each portion of the work **as defined by the Contractor** in their proposal.

(Emphasis added.) The above quoted language is materially the same as the language contained in Public Contract Code Section 4104(b) of the California Subletting and Subcontracting Fair Practices Act.

Neither Section 2-1.15A nor Section 4104(b) requires any specific level of detail when describing the “portion” of work to be performed by a subcontractor. Beyond stating that “portion” does not require bidders to specify the percentage of work to be performed by a subcontractor, courts have provided little relevant guidance on this issue. (See, *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432.)

In determining what constitutes a reasonable description of the “portion” of work to be performed by a subcontractor, consideration should be given to construction industry standards and practice. Bidders typically receive many proposals from subcontractors – some just minutes before the deadline for submitting bids. Bidders commonly maintain contact with a person located near where the bid is to be submitted for the purpose of making last-minute adjustments to the bid. Bidders often list subcontractors tentatively and leave blanks on the subcontractor listing forms so that they can more easily make last minute adjustments. In this bidding environment, requiring bidders to provide a detailed description of the “portion” of work is not reasonable. The accepted practice is to use one or two generic words to describe the “portion” of work. The generic words used often varies by bidder and by project. The way that Goodland listed the description of work to be performed by Maxicrete is consistent with the kind of generic language generally used by bidders.

The underlying purpose of the subcontractor listing requirements is to protect subcontractors and public entities issuing bids from unscrupulous bid shopping by contractors. The generic, one or two word descriptions typically used by bidders further this purpose by putting the public entity on notice of which subcontractor(s) the bidder has a duty to use and in what general area of work. For example, the language used by Goodland, sufficiently informs the City that Goodland must use Maxicrete for a portion of the concrete work. Having designated Maxicrete, Goodland can not substitute

another subcontractor unless the City consents and one of the reasons to allow substitution exists. (See, *E.F. Brady Co. v. M.H. Golden Co.* (1997) 58 Cal.App.4th 182.)

Albanese's protest asserts that the description used by Goodland is too "vague and ambiguous" to ensure the scope of work performed by Maxicrete is the scope intended at bid time. This assertion misses the point. The actual scope of work that a bidder has a duty to give to a listed subcontractor is *not* defined by the description of the "portion" of work provided by the bidder on the subcontractor listing form. The actual scope of work that the bidder must give to a listed subcontractor is defined by the subcontractor's bid proposal to the bidder, the acceptance of that bid proposal by the bidder, and any negotiations engaged in by the bidder and subcontractor. (See, Public Contract Code Section 4107(a)(a); City of San Jose Standard Specifications Section 2-1.15B1(a); also see generally, *Golden State Boring & Pipe Jacking, Inc. v. Orange County Water Dist.* (2006) 143 Cal.App.4th 718.)

Albanese contends that if Goodland seeks to substitute a subcontractor for Maxicrete the City would not have a basis or ability to fairly grant or deny the substitution request. This contention is wrong. If the actual scope of work to be performed by Maxicrete is at issue in a contested substitution request, Goodland and Maxicrete would have to submit evidence demonstrating that Goodland offered or did not offer to give Maxicrete the work under the terms and conditions agreed to by the parties at the time that Goodland submitted its bid. The description of the "portion" of work to be performed by a subcontractor is not intended by itself to provide the basis for granting or denying a substitution request.

Albanese also contends that the description at issue would allow Goodland to press Maxicrete to reduce its bid price to perform the concrete work and that if Maxicrete refused to reduce its price Goodland could offer Maxicrete a very small portion of the required concrete work. This is simply wrong. Goodland would be in violation of the subcontractor listing requirements if it offers Maxicrete less than the scope of work that it has agreed to give Maxicrete. Both the City's Standard Specifications and the California Subletting and Subcontracting Fair Practices Act provide a variety of similar remedies for such violations.

Albanese also incorrectly asserts that Goodland's description of Maxicrete's work violates the requirement against listing only one subcontractor for each "portion" of work. Goodland submitted its bid based on Maxicrete performing one "portion" of the concrete work and Goodland self-performing another "portion" of the concrete work. For this reason, Goodland described Maxicrete's "portion" of the work as "concrete – partial."

Albanese's assertion seems to be based on the premise that only one subcontractor can be listed for each discrete item of work or trade, e.g., that only one subcontractor

must do all of the concrete work. However, there is nothing in the City's Standard Specifications or the California Subletting and Subcontracting Fair Practices Act that prohibits a bidder from having multiple contractors perform different parts of a larger, discrete item of work or trade. To the contrary, both the City's Standard Specifications and the California Subletting and Subcontracting Fair Practices Act expressly state that the bidder has the authority to define the "portion" of work to be performed by a subcontractor. This recognizes that it is up to the bidder to determine how to divide up the work in its bid.

Finally, Albanese's reliance on *Bay Cities Paving and Grading, Inc. v. Hensel Phelps Construction Company* (1976) 56 Cal.App.3d 361 is misplaced. The *Bay Cities* case did not involve a bid protest like the current situation. The *Bay Cities* case involved a situation in which a listed subcontractor was trying to recover damages from the general contractor. The subcontractor asserted that it was entitled to perform both the excavation work and the asphalt paving work. The contractor offered the subcontractor the asphalt work, but not the paving work. The subcontractor refused to perform the asphalt work if it did not also perform the paving work.

The court determined that the contractor was to have performed the asphalt work and the subcontractor was to have performed the excavation work. The court also found that the contractor was willing to let the subcontractor perform the asphalt work but that the subcontractor refused. For this reason, the court concluded that there was no "benefit of the bargain" for the subcontractor to recover. Thus, the court's discussion of the Subletting and Subcontracting Fair Practices Act is dicta. It was irrelevant to the court's decision.

Moreover, the court's discussion of the Subletting and Subcontracting Fair Practices Act focused on the fact that the general contractor listed both itself and the subcontractor on the same line on the subcontractor listing form. That did not happen here.

In short, Albanese's protest is without merit. To allow bidders to use the subcontractor listing requirements in the manner suggested by Albanese's protest would result in public entities having to engage in endless battles over the appropriateness of the descriptions of the "portion" of work identified in subcontractor listing forms. Such battles would do nothing to further the purpose of the subcontractor listing requirements.

Re: Bid Protest -- Paul Moore Park Youth and Tot Lot Renovation Project
May 13, 2011
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Staff intends to proceed with its recommendation to the City Council to reject the bid protest and award the construction contract for the Project to the low bidder, Goodland.

Very truly yours,

RICHARD DOYLE, City Attorney

By: 

GLENN SCHWARZBACH
Sr. Deputy City Attorney

KDJ/gds
Attachments



Jos. J. Albanese, Inc.

Concrete Construction CONTRACTORS LICENSE NO. 299880

www.jalbanese.com

986 Walsh Avenue Santa Clara, CA 95050-2649 or
P.O. Box 667 Santa Clara, CA 95052-0667

PHONE (408) 727-5700
FAX (408) 727-0366

April 22, 2011

Mr. Harry Freitas, PE, LEED AP
City of San Jose Department of Public Works
200 East Santa Clara St. 5th Floor
San Jose, CA 95113-1905

Via Electronic Mail: Harry.Freitas@sanjoseca.gov

Re: Paul Moore Park Youth and Tot Lot Renovation
CPMS Project ID: 6231
Bid Date: March 17, 2011
Bid Protest: Goodland Landscape Construction, Inc.

Dear Mr. Freitas:

Thank you and your staff for the courtesies extended as we deal with this bid protest and ultimate award of the Paul Moore Park Project ("Project.") Yesterday, I first received Goodland Landscape Construction, Inc.'s ("Goodland") responses to Joseph J. Albanese, Inc.'s ("JJA") bid protest.

Goodland's good intentions notwithstanding, by listing a "partial" subcontractor and reserving a portion of the designated work for themselves violates the Subletting and Subcontracting Fair Practices Act ("Act"). Cal. Pub. Cont. Code § 4100 et. seq. Accordingly, Goodland's bid should be deemed non-responsive and JJA should be awarded the project.

By admittedly listing Maxierete for the concrete and reserving a portion of the work for itself, Goodland frustrated the purpose of the Act. The Act requires a prime contractor to "list only one subcontractor for each such portion as is defined by the prime contractor in his or her bid." Cal. Pub. Cont. Code § 4104 (b). Goodland's admitted intent to award partial concrete to Maxierete, while retaining the right to perform its own concrete, does not fulfill the requirements of the Act.

These circumstances are very similar to the circumstances addressed by the court in *Bay Cities Paving & Grading, Inc. v. Hensel Phelps Construction Co.*, (1976) 56 Cal. App. 3d 361. In *Bay Cities*, Bay Cities submitted a bid to Hensel Phelps for work in connection with the BART project in Concord. When submitting its bid, Hensel Phelps listed both itself and Bay Cities as the subcontractors for the paving and excavating work. *Id.*

Addressing whether or not this violated the Act, the court held "By designating both itself and appellant [Bay Cities] on the same line in the designation of subcontractors, respondent [Hensel Phelps] frustrated the purpose of the listing requirement of the act." *Id.* at 365.

Mr. Harry Freitas, City of San Jose
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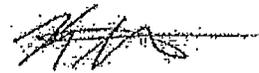
By using the word "partial" in its bid and subsequently admitting it intended to perform part of the work it designated to Maxlerete, Goodland violated the Act and its bid should be deemed non-responsive. *Buy Cities* and the statute require that only one subcontractor be listed for the work. Since Goodland essentially listed Maxlerete and itself for this work, it violated the plain meaning and the intent of the Act; accordingly, its bid should be deemed non-responsive.

Though the inquiry should stop here, Goodland suggests the format of the bid form left it no alternative, but to bid as it did. JJA disagrees with this point as more fully set forth in its March 23, 2011 protest. Subject to the limitation of only listing one contractor for each portion, both the City Specifications and Public Contract Code require the contractor to *define* the portion of work. City of San Jose Standard Specifications § 2-1.15A(3) and Cal. Pub. Cont. Code § 4104(b).

JJA reiterates Goodland could have better defined the "portion" of work to avoid this situation. It had alternatives to use more descriptive terms, in the space provided on the bid form, to better define the scope of work it intended to subcontract to Maxlerete. Simply put, Goodland could have used easily recognized industry terms to effectuate its intent. For example, it could have stated "all exposed concrete," "all site concrete," or some other objective terminology required to further the intent of the Act and City requirements. Goodland did not, and by listing more than one contractor for the portion of work Goodland defined, it violated the Act.

In closing, because Goodland admittedly listed more than one contractor to perform the work it defined, it violated the bidding requirements for the project. Goodland's bid should be rejected as non-responsive and the project should be awarded to JJA.

Sincerely yours,



Kevin J. Albanese
Vice President/Chief Operating Officer

Cc: Susan Alzumi, City of San Jose



MAXICRETE

CONCRETE CONSTRUCTION

April 18, 2011

Ms. Susan Alzumi
City of San Jose Public Works
City Facilities Architectural Services Division
200 E. Santa Clara Street, 6th Floor Tower
San Jose, CA 95113

RE: Paul Moore Park Youth & Tot Lot Renovation Project -- Bid Protest

Dear Ms. Alzumi,

After reviewing the statement provided by Goodland Landscape Construction, Inc. ("GLC") regarding this matter, Maxicrete Concrete Construction ("MCC") is in agreement with this statement. Prior to submitting our bid proposal we had thorough communication with GLC regarding our scope of work for this particular project. Thus the reason why our proposal was itemized as shown in Attachment B, GLC expressed they had the capacity and the experience to self-perform the concrete base for the playground protective rubber surfacing and MCC is in agreement with their intent to do so. GLC agreed to award MCC with a contract to perform the scope of rigid paving and walls excluding the concrete base at the playground protective rubber surfacing.

If you have any further questions, please contact me at:
Ph: (707) 249-9747 or Email Address: ddlaz@maxicrete.com

Respectfully,

David Diaz
General Manager
Maxicrete Concrete Construction



Ms. Susan Aizumi
City of San Jose Public Works
City Facilities Architectural Services Division
200 E. Santa Clara Street, 6th Floor Tower
San Jose, CA 95113

April 01, 2011

RE: Paul Moore Park Youth and Tot Lot Renovation
Follow Up to GoodLand Landscape Construction Letter dated 03/25/2011
Response to J. J Albanese, Inc. Bid Protest Letter dated 03/23/2011

Dear Ms. Aizumi,

As a follow up to our March 25th letter explaining the facts behind our Paul Moore Subcontractor listing form we would like to point out that the assertion by the Jos. J. Albanese Inc ("JJA") that GoodLand Landscape Construction ("GLC") did not sufficiently designate the portion of work the Maxicrete Concrete Construction ("MCC") would perform is misplaced. The Bid Form line item only refers to Rigid Paving and Walls. It does not itemize any of the concrete items as many bid forms often do. In addition to that, the List of Subcontractors Sheet the City used on this particular project did not ask for Dollar Amounts or Percentages of Work by the listed subcontractors.

How then given this format could GLC had conveyed our described intentions other than the way we did?

GLC is currently reviewing a Bid possibility for the City of Campbell who coincidentally references the same City of San Jose Standard Specification 2-1.5A, as related to listing. We are including a copy of the Stojanovich Family Park Bid Form and Subcontractor Listing Form. This form, which requires the General Contractor to list the dollar amounts of each listed subcontractor, would eliminate any question about how much given work that firm would perform. Many other public agencies utilize this same format. The Paul Moore Subcontractor Listing form did not require this information.

The JJA protest also describes the various concrete needs on the site, and would suggest that MCC should somehow be responsible for pouring all bench, and playground footings. Parks are not built that way. Without the exactness of the Bid Form that JJA suggest should allow the public or the City to understand the construction means and methods of several overlapping tasks, GLC could not have spelled out our intentions any better than we did using the term "partial" after MCC intended portion of work to be performed. As we explained in our initial response, GLC will self perform the balance of the concrete work.

The JJA protest question's the City's ability to monitor GLC's subcontractor activity. The City has had two labor compliance employees visit the Bramhall Park Project a minimum of once a week and often two times a week. All of the certified payrolls can be

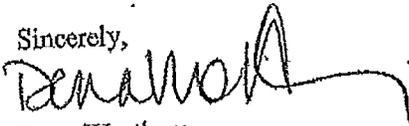
reviewed at any time to confirm both GLC activity and all of that of our listed subcontractors.

The JJA protest suggest that GLC or any General Contractor should itemize walls from bench footings, flatwork from scab slabs, playground post footings from drinking fountain footings all on the Subcontractor Listing Form. That's what an itemized bid form would do in detail if the City chose to take that approach. The City did not. This type of job given its size and scope does not require that intense bid form detail.

The JJA protest finally accuses GLC of having the opportunity to reduce our project cost by substituting MCC. GLC has worked with MCC for ten years and has had great success with their workmanship. In fifteen years GLC has never "DELISTED" any firm that we have listed on the original bid forms. GLC has had to self perform and complete some work that troubled subcontractors needed help with and that's the job of a general contractor.

In closing GLC understands the City's obligation to insure the bidding process is fair for the public interest, thus the need to follow up with all the bidders concerns is important. GLC respects the process and strongly believes we have provided enough information allowing the City to determine that we provided the City with the lowest responsive bid, given the bid forms provided and should therefore be awarded the contract for the Paul Moore Park.

Sincerely,



Dena Wortham
President



March 25, 2011

Ms. Susan Aizumi
City of San Jose Public Works
City Facilities Architectural Services Division
200 E. Santa Clara Street, 6th Floor Tower.
San Jose, CA 95113

RE: Paul Moore Park Youth and Tot Lot Renovation
Response to J. J Albanese, Inc. Bid Protest Letter dated 03/23/2011

Dear Ms. Aizumi,

After reviewing the text of the Joseph J Albanese Inc ("JJA") letter of protest dated March 23, 2011 for the bid of the Paul Moore Park Youth and Tot Lot Renovation Project, Goodland Landscape Construction Inc ("GLC") has the following simple explanation.

We listed Maxicrete Concrete Construction ("MCC") as a partial subcontractor because their quote gave GLC the opportunity to self perform the slab work underneath the play surfacing. As the City knows GLC is currently self performing all the concrete work on the Bramhall Park Playlots Renovation. The Bramhall Park Renovations has essentially the exact scope as the Paul Moore Park. This puts to rest any assertions made referencing bid peddling. GLC is quite familiar with California Public Construction Code § 4104 and the need to list any firm performing more than one half of one percent of the total contract sum. We did just that and additionally used the term "partial" to clarify the fact that MCC would be performing all the concrete work except the scab slab beneath the play surfacing. GLC will self perform the rubber surfacing detailed concrete slab just as we have on several play surface projects.

We are providing the City of San Jose with the bid day quote from MCC which clearly itemizes the play surfacing detailed concrete scab slab separate from the other concrete work. As with any subcontractor listing the General Contractor may chose to self perform portions of work where they have the most experience. That was the decision GLC made on the Paul Moore Bid as it was on the Bramhall Park Bid. GLC has often used the term "partial" beside our various listings because of our experience self performing many of our Park related construction tasks including play equipment installation, underground construction, shade structure construction and installation, concrete construction, and grading.

In closing, the JJA protest letter has given no merit given the above referenced facts as they are. GLC's bid should therefore be accepted by the City as the lowest responsive bid.

Sincerely,

Dena Wortham
President



MAXICRETE

CONCRETE CONSTRUCTION

Fax

To:	From:
<u>Goodland landscape</u>	<u>Francisco Gonzalez</u>
Fax: <u>209-835-9554</u>	Pages: <u>2 inc. cover</u>
Phone:	Date: <u>3/17/11</u>
Re: <u>Pav mntnc. Park YOUTH #</u>	CC:
<u>TOT LOT RENOVATION</u>	FAX# <u>707-429-0750</u>

See attached concrete bid.



Jos. J. Albanese, Inc.
Concrete Construction CONTRACTORS LICENSE NO. 299880

986 Walsh Avenue Santa Clara, CA 95050-2649 or
P.O. Box 667 Santa Clara, CA 95052-0667

www.jjalbanese.com

PHONE (408) 727-5700
FAX (408) 727-0366

March 23, 2011

Ms. Susan Aizumi
City of San Jose, Department of Public Works
City Facilities Architectural Services Division
200 E. Santa Clara Street, 6th Floor Tower
San Jose, CA 95113

Via Electronic Mail and Facsimile

Re: Paul Moore Park Youth and Tot Lot Renovation
CPMS Project ID: 6231
Bid Date- March 17, 2011
Bid Protest: Goodland Landscape Construction, Inc.
Notice of Intent to Award dated March 18, 2011

Dear Ms. Aizumi:

Joseph J. Albanese, Inc. ("JJA") protests the City's intention to award the above captioned project to Goodland Landscape Construction, Inc. ("Goodland").

JJA protests the award to Goodland because Goodland's bid proposal failed to properly designate its subcontractors pursuant to the Subletting and Subcontracting Fair Practices Act, California Public Contract Code section 4100 et. seq. ("Act") as well as the City's Standard Specifications.

As part of a responsive bid package, both the City Standards and the Act require each bidder to designate its subcontractor and the portion of the work which will be done by each subcontractor. See Cal. Pub. Cont. Code § 4104 (b) and San Jose Standard Specification § 2-1.15A (2) (emphasis added). These standards exist to protect the public from bid peddling and bid shopping in the context of public works contracting.

In this instance, Goodland failed to sufficiently designate the portion of work it intends to subcontract to its listed concrete contractor. Goodland's failure derives from the "portion" of work it designated to Maxicrete; described as "Concrete-partial." Inasmuch as Goodland failed to designate an objective scope of work to Maxicrete, its bid submission should be deemed non-responsive and rejected.

The Prime Contractor must Describe Subcontracted Work with Particularity

The statute and Standard require the 'portion of work' to be subcontracted be described with reasonable particularity. The particularity requirement serves the underlying purpose of the

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Act in many respects. Though the mere listing of a subcontractor does not create a contract, it does create a binding obligation upon the prime contractor to use the listed subcontractor.

In this instance, there are many concrete related scopes of work on the Paul Moore project. The project requires concrete pavement, concrete ramps, concrete walls, concrete walkways, concrete bands, concrete sub-slabs, and miscellaneous concrete footings. In order to create the binding obligation discussed above, it is imperative that the City, Maxicrete, and the public objectively understand Goodland's intention as it relates to this subcontractor and particular scope of work. Goodland could have avoided this problem by simply identifying, with reasonable particularity, what work it meant to designate for Maxicrete. However, Goodland failed to define the work and leaves the Public, the City, and Maxicrete uncertain as to who is doing what.

Absent a Clear Scope of Work the City can not Effectively Monitor the Project

With the given "portion" of work undefined, it will be impossible for the City to objectively determine if Goodland is using the listed subcontractor as it intended at bid time. By using vague and ambiguous language, there is no way for the City to administer the contract and ensure the scope of work performed by Maxicrete is the scope intended at bid time. Equally important, in the event Goodland seeks to substitute a contractor for Maxicrete, the City would have no basis or ability to fairly grant or deny the substitution request as required by the Act.

Furthermore, Goodland can press Maxicrete to reduce its bid price to perform the concrete. If Maxicrete refuses, Goodland can usurp the Act and only offer a contract for a very small portion of the required concrete work and seek a substitution or perform the work itself. In this instance, the City would have no way of knowing if Maxicrete received the benefit of its bargain with Goodland or if some other influence was involved.

Goodland's Own Actions Introduced the Ambiguity.

Goodland had the opportunity to sufficiently describe the portion of work it intended to subcontract to Maxicrete and its failure to do so warrants the City declaring its bid non-responsive. When describing the "portion" of work to be subcontracted, the prime contractor has discretion to use appropriate terms, (e.g. concrete pavement versus concrete walls) to sufficiently describe the work it intends to subcontract. In essence, Goodland had the opportunity to be clear, it failed to do so, and now has left a material term in the contract open to interpretation.

The City Should Deem Goodland's Bid Non-Responsive.

Because Goodland violated the Act and San Jose Standard, it enjoys an unfair advantage over JJA and other bidders, requiring the City to deem its bid non-responsive. By failing to identify with any degree of particularity the scope of work it intends to subcontract to

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Maxierete Goodland enjoys the opportunity to reduce its project costs by bid shopping its concrete price. In the event it gets a better price, it can force Maxierete to reduce its price or substitute another subcontractor for Maxierete. This possibility undermines the objective public contracting process, the Act, and should not be permitted.

While one may not expect Goodland to actually engage in the evils described above, evils sought to be ameliorated by the Act, it is of no consequence. Inasmuch as their ambiguous bid allows them to bid shop or bid peddle, it must be deemed non-responsive.

Sincerely yours,

Kevin J. Albanese

Kevin J. Albanese
Vice President/Chief Operating Officer