



John Plane Construction Inc.

June 3, 2008

CITY OF SAN JOSE
DEPARTMENT OF PUBLIC WORKS
City Facilities Architectural Services Division
200 East Santa Clara Street, Tower 6
San Jose CA 95113-1905

ATTENTION: Don DeWald, Project Manager

REGARDING: BASCOM LIBRARY AND COMMUNITY CENTER
PROTEST OF BID

Gentlemen:

In the event that the City of San Jose staff proposes awarding the above referenced project to the apparent low bidder, Zolman Construction and Development Inc., pursuant to Special Provisions Section 3-1.01C, Protest of Bid Award, be advised that John Plane Construction Inc. does hereby protest such award. The grounds for protest are as follows:

1. California Public Contract Code Sections 4100 through 4114, inclusive, state, in part, "...any person making a bid or offer to perform work, shall, in his or her bid or offer, set forth: The name and the location of the place of business of each subcontractor who will perform work or labor...in excess of one-half of 1 percent of the prime contractor's total bid...".
2. Project Specifications Section 15973 states "The Facility Master Systems Integrator (FMSI) shall be hired by the General Contractor...".
3. Addendum No. 1, RFI-17 Question: Will you please confirm that we are to list, assuming that this contractor meets the .5 of 1% requirement, separate contractors for the Energy Management and Control Systems and the Facility Management Systems Integration. Answer: Confirmed.
4. Zolman failed to list a Facility Management Systems Integration (FMSI) subcontractor for this highly specialized scope of work.
5. Control Technologies, the only subcontractor bidding the FMSI scope of work, provided the exact same proposal to all of the bidding General Contractors, including Zolman, in an amount in excess of \$200,000.00. This can be confirmed with Ronald Padilla, Vice-President of Control Technologies, at (631)484-8471. This can also be confirmed with the other GC's.
6. Control Technologies bid is double the legal requirement for subcontractor listing and even the highest bidder on this project would have had to list the subcontractor for the FMSI scope of work.



John Plane Construction Inc.

7. Per the California PCC referenced in item 1 above, John Plane Construction listed Control Technologies for the FMSI scope of work.
8. Zolman listed Honeywell for HVAC Commissioning/Controls, a completely different specification section from FMSI. Honeywell did not bid the FMSI. This can be confirmed with Larry Taviani, Sales Estimator for Honeywell, at (510)760-6619.
9. The stringent and highly technical requirements of Specification Section 15973, including the extensive experience required, preclude any general contractor from claiming their capability of self-performing the FMSI work.

In consideration of the above detailing the grounds for protest, including all supporting facts, John Plane Construction Inc. requests that the City of San Jose reject the bid from Zolman Construction and Development and award the project to John Plane Construction Inc.

If you have any questions, please call.

Sincerely,

Ben Ortiz
Project Manager

Cc: John Plane/Paul Grech



2485 Technology Drive
Hayward, CA 94545
Phone: 510-784-1273
Fax: 510-784-0173

June 3, 2008

Don DeWald
City of San Jose
Department of Public Works
City Facilities Architectural Services Division
200 E. Santa Clara St., 6th Floor
San Jose, CA 95113-1905

Re: Bascom Library & Community Center Project Bid Protest

Dear Mr. DeWald

This letter shall act as a formal protest to the bids submitted by Zolman Construction & Development and John Plane Construction based on the following reasons. Zolman Construction's sub list is illegible & inconsistent as subs listed are written in between lines making it unclear if they are being crossed out. Also, it appears there are two subcontractors listed for the same portion of work, plastering (JIP & Dasco). John Plane Construction's sub list failed to list a subcontractor to perform book theft protection equipment work. Per specification section #11055-1.4A it states "installers qualifications: firm with minimum 5 years successful experience installing library book security systems and self-checkout systems similar to application indicated and acceptable to system manufacturer." & 1.6A states "maintain book security system installation for 12 months after system is placed into operation." Also per public contract code all subcontractors to be used on the project in excess of 1/2 of one percent of the bid amount must be designated on the subcontractor list. Attached is a proposal from a qualified book theft protection equipment contractor for this project, listed by Zovich Construction, which clearly shows this scope of work is well in excess of 1/2 percent of the bid amount. John Plane failed to meet these requirements in both instances.

In conclusion, based on the information provided, Zovich Construction would respectfully request the City of San Jose deem both Zolman Construction & John Plane Construction's bids non responsive and/or non responsible and award the project to Zovich Construction as the low responsive responsible bidder.

Sincerely,

Ante Zovich Jr
Zovich Construction

FAX BID FORM

Date: 05/29/08 Project: **Bascom Branch Library** No. of Pages: 1

Yamada Enterprises 16552 Burke Lane Huntington Beach, CA 92647 (800) 444-4594 (714) 843-9202 FAX Contact: Beth Hamilton beth@yamadaenterprises.com	License No.: (CA) 582159 Exp. Date: (CA) 3-31-10 Bondable: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Rate: 1 1/2% DBE / WBE: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Addendum: 1-5	Plans: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Specifications: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Substitution: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Installed: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Tax Included: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Union: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
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Item	Description	Bid Amount
1.	Section 11055-Book Theft Protection Equipment (Includes): -(1) #3802 Dual corridor system, 36" corridor, buried cable, installed -(4) #6420 V2 Table Top SelfCheck w/Corian Top & Laminate Base -(2) #943 Staff Workstation -One year warranty / service agreement	\$181,000.00

Clarifications: GC to provide blockouts, conduit, concrete fill and all electrical service for book detection system. GC to cut all holes and install all hardware/mounting heads if #943's are to be in-counter. Corian and laminate selections for #6420 quoted as mfg. std. Providing standard installation and submittal package for system (with regard to anchoring and system components). Price does not include gates as they are being phased out by 3M, rarely used and are not shown on plans. Specified remote control switch has been discontinued (no replacement). 3M provides an instruction manual and instructional DVD in lieu of discontinued on-site training (neither 3M nor Yamada provide training). Testing of equipment to be done at the time of installation. GC to be responsible to coordinate with architect/owner to be present at the time of installation to view testing, if required. Yamada carries 2 million in liability (agg) with a 4 million umbrella and 1 million auto coverage. No CG2010 form or other CG endorsements, per project agg, mold/pollution, builders risk or XCU coverage. Waiver of subrogation wording in body of policy only. No separate document can be provided. Acceptance of this bid implies GC accepts Yamada's standard insurance with all associated forms and documents.

Exclusions: Cost of bonds.

By: 
 Beth Hamilton, Representative

Attachment "D"- 1 & 2 Resp

EST. 1929
MILLER MORTON CAILLAT & NEVIS, LLP

ATTORNEYS AT LAW

June 9, 2008

David L. Nevis
Frank J. Hughes
Peter A. Kline
Stevan C. Adelman
Joseph A. Scanlan, Jr.
William K. Hurley
Peter V. Dessau
David I. Kornbluh
Katherine S. Pak
Christopher J. Hersey
Anthony F. Ventura
Amber S. Crothall
Daniel J. Nevis
Roger F. Liu
Angela F. Storey
Autumn E. Casadonte
Eric C. McAllister

VIA E-MAIL, FAX & PERSONAL DELIVERY

Fax #: (408)292-6288

E-Mail: donald.dewald@sanjoseca.gov

Don DeWald, Project Manager
City of San Jose
Department of Public Works
City Facility Architectural Services
200 E. Santa Clara Street, 6th Floor
San Jose, CA 95113

Re: Bascom Library & Community Center
Response to Bid Protests
Our File No.: 66403-0801

Dear Mr. DeWald:

We represent Zolman Construction & Development, Inc. ("Zolman"), the lowest responsible bidder for the City of San Jose ("City") Bascom Library & Community Center project ("Project"). Your letters to Reza Zolfaghari dated June 4, 2008, enclosing the bid protests submitted to the City by John Plane Construction ("Plane") and Zovich Construction ("Zovich") have been forwarded to us for response.

Zolman's bid was responsive to the City's Request for proposal in all material respects. In conformance with Public Contracts Code sections 4104 and 4106, Zolman properly identified all subcontractors performing work at the Project in excess of one-half of 1% of its total bid. Additionally, Zolman listed only one subcontractor for each scope of work. Consequently, there is no legal or factual basis for rejecting Zolman's bid. We will address the specific issues raised by Plane and Zovich separately below:

1. Response to bid protest from John Plane Construction

In its letter dated June 3, 2008, Plane protests Zolman's bid on the basis that Zolman did not specifically identify a subcontractor to install the Facility Management Systems Integration ("FMSI") scope of work. As you are undoubtedly aware, and as Plane itself admits in its bid protest letter, Zolman was only required to list those subcontractors performing work costing in excess of one-half of 1% of the total amount of its bid. Section 15973 of the Project Specifications states that, "the Facility Master Systems Integrator (FMSI) shall be hired by the General Contractor..." In response to a specific

Don DeWald, Project Manager
June 9, 2008
Page 2 of 5

RFI on this requirement, however, the City confirmed that bidders were only required to list a separate FMSI subcontractor *if* the scope of work exceeded the minimum amount identified in the Public Contracts Code:

RFI-17 Questions: Will you please confirm that we are to list, ***assuming that this contractor meets the .5 of 1% requirement,*** separate contractors for the Energy Management and Control Systems and the Facility Management Systems Integration.

Answer: Confirmed.

See, Addendum No. 1, Request for Information Responses dated May 14, 2008, RFI 17 at page 4 of 5. In this instance, Zolman was *not* required to separately list an FMSI subcontractor because the cost of that installation work does not exceed .5 of 1% of its total bid. Zolman's base bid, excluding any proposed alternates, was \$17,750,000.00. One-half of 1% of this amount is \$88,750.00. Prior to bidding the project, Zolman's consulting engineer accurately estimated the cost to install the FMSI system, exclusive of the cost of any of the materials which Zolman intended to purchase separately, at only \$80,000.00. Thus, because the cost of installing the FMSI System is less than one-half of 1% of Zolman's total bid, it did not (and was not required to) identify an FMSI subcontractor in its bid documents.

Nevertheless, in response to Plane's bid protest, Zolman is prepared to provide the City with the documentation confirming that the cost to install the FMSI system, exclusive of the material purchase price, does not exceed one-half of 1% of its total bid (e.g. \$88,750.00). Attached hereto is the bid letter Zolman received from Integrated Building Solutions Corporation, located in San Ramon, California, proposing to install the FMSI system for the total cost of \$78,000. The letter also details other specific projects that Integrated Building Solutions has successfully completed. If necessary, Zolman is prepared to identify other qualified subcontractors that have agreed to install the system for less than \$80,000.00.

Zolman's deliberate decision not to list a subcontractor to install the FMSI system was neither unique nor unusual. Our review of the bidder list reveals that Zolman was not the only bidder that intentionally did not list a subcontractor for the FMSI scope of work because the cost of that work would not exceed one-half of 1% of their bid amount. Like Zolman, neither Zovich nor McCrary Construction, identified an FMSI subcontractor. Similarly, Gonsalves and Stronck, the general contractor that was the successful bidder for the City's Seven Trees Community Center & Branch Library project (which also required an FMSI system), also did not list an FMSI subcontractor. In fact, with regards to the FMSI work, Gonsalves and Stronck specifically wrote "No listing required" in its bid response.

Don DeWald, Project Manager
June 9, 2008
Page 3 of 5

The bid submitted by Plane also apparently followed the procedure of not separately listing material suppliers (as opposed to systems installers). In its bid documents, Plane was one of the few general contractors who listed an FMSI subcontractor. However, as Zovich correctly points out in its bid protest letter, Plane did not list a separate subcontractor to install the book theft protection equipment. Ostensibly, this is because Plane itself clearly recognizes that the book theft system could be purchased separately and then installed for less than the cost of one-half of 1% of its total bid amount.

In summary, Zolman's bid was in full conformance with the requirements of Public Contracts Code sections 4104 and 4106, as well as the City's Request For Proposal and Addendum, which only require bidders to list subcontractors whose cost to *install* their work will exceed one-half of 1% of the total bid amount. There is thus no legal or factual basis for rejecting Zolman's bid based on Plane's protest.

2. Response to bid protest from Zovich Construction

Zovich has protested Zolman's bid on the grounds that it considers Zolman's list of subcontractors illegible. It also incorrectly states that Zolman has listed multiple subcontractors for the same portion of work. Zovich's protest, like Plane's, is both factually and legally without merit, and must be rejected.

First, Zovich is simply incorrect in its characterization of Zolman's bid as illegible. The names of each listed subcontractor, the location of their place of business, and each subcontractor's respective portion of work are clearly identified and are legible. In fact, Zovich, which also hand-wrote its list of subcontractors, fails to identify any specific portion of the bid submitted by Zolman that cannot be read or easily understood.

Second, Zolman did not, as asserted by Zovich, list multiple subcontractors for the same proposed scopes of work. On the first page of Zolman's List of Subcontractors, Dasco Construction of Milpitas is clearly identified as the proposed gypsum and metal stud subcontractor. The same subcontractor, Dasco Construction, is also clearly identified on page 3 of Zolman's List of Subcontractors as the entity that will perform the plastering scope of work. The other proposed plastering subcontractor, J.I.P. of Oakland was deleted from Zolman's list of subcontractors by clearly striking out the name, the location of the place of the business, and the proposed scope of work. Factually, therefore, Zovich's protest is without merit because Zolman's bid is both legible and listed only one subcontractor for each scope of work.

Even assuming purely for the sake of argument, however, that Zolman had listed multiple subcontractors, this would not form a proper legal basis for automatically rejecting Zolman's bid as non-responsive. Public Contracts Code section 4106 provides in relevant part that:

Don DeWald, Project Manager
June 9, 2008
Page 4 of 5

"If a prime contractor fails to specify a subcontractor *or if a prime contractor specifies more than one subcontractor for the same portion of work* to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that *the prime contractor shall perform that portion himself...*"

In this case, Zolman is a responsible, licensed general contractor, and is capable, if necessary, of self-performing the required drywall and plastering work.

Finally, California law is clear that minor or immaterial irregularities in a bid should be waived by the awarding authority. *See, Universal Buy-Products v. Modesto*, 43 Cal.App.3d 145 (1974). Material deviations in bids are those that create a vehicle for favoritism, that create an unfair advantage for one bidder by allowing the otherwise successful bidder to pull its bid after award, that influence other potential bidders to refrain from bidding, or that effect that ability of the public entity from making accurate bid comparisons. *See, Tonica Business Machines USA, Inc., v. Regents of US*, 206 Cal.App.3d 449, 454 (1988)

Thus, a substantially confirming bid, even it not strictly responsive, should nevertheless be accepted if the variance did not affect the amount of the bid or did not give the successful bidder an advantage allowed other bidders. *See, Universal Buy Products*, 43 Cal.App. 3d 145.

Another controlling case, *Menese v. County of Fresno*, 163 Cal.App.3d 1175 (1985), is indicative of the law regarding the responsiveness of bids and the ability of a public entity to waive immaterial or technical deviation. In that case, the low bid was challenged because the bidder failed to sign the appropriate line on the proposal sheet of its bid form although the form was signed in other places and was accompanied by a signed bid bond. A losing bidder protested the bid, arguing that the failure to sign the form at all of the required locations invalidated the entire bid. The County of Fresno concluded that the failure to sign the form in all of the locations did *not* invalidate that bid and that the bid substantially confirmed to the bid requirements and was thus responsive. The court reviewing this decision upheld the County's decisions *not* to reject the bid as non-responsive. The court concluded that because the bidder gained no material advantage by not signing the bid in multiple locations, the County could waive the immaterial defect. Consequently, because the low bidder could not refuse to enter the contract based upon its failure to sign one portion of the bid form, the bid was deemed responsive.

Here, Zolman's List of Subcontractors was in full compliance with the City's Request for Proposal, was legible, and it identified only one subcontractor for each respective portion of work. Nevertheless, any technical deviation otherwise asserted by Zovich

Attachment "D"- 1 & 2 Resp

MILLER MORTON CAILLAT & NEVIS, LLP

Don DeWald, Project Manager

June 9, 2008

Page 5 of 5

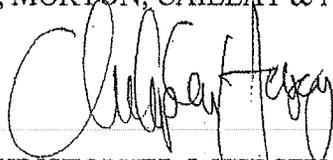
would be legally immaterial. Zolman's proposed list of contractors did not create any advantage for Zolman in the bidding process, nor did it provide any legal basis for it to unfairly withdraw its bid after contract award. As such, Zovich's bid protest must be rejected as both factually and legally meritless.

Based on the above, we are confident that Zolman has addressed any concerns raised by the bid protests submitted to the City by Plane Construction and Zovich Construction. If, however, after receiving this response and the supporting documentation, the City has any further concerns about the responsiveness of Zolman's bid or its proven ability to successfully complete the Projects for the City of San Jose, please do not hesitate to contact either me or Reza Zolfaghari at Zolman directly.

Very truly yours,

MILLER, MORTON, CAILLAT & NEVIS, LLP

By:


CHRISTOPHER J. HERSEY

CJH/lij

Enclosure

cc: Client (via email)

06/09/2008 13:13

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Jun 09 08 01:07p

IBS

925-997-3020

P. 1



Integrated Building Solutions, Inc.
12919 Alcosta Blvd. Suite 10
San Ramon, Ca 94583
Office (925) 244-1900
Fax (925) 397-3020
<http://www.ibs-ca.com>

June 9, 2008

Sent Via email/fax: (650) 236-9393

Zolman Construction - Ali Mostafian

From: Eugene Gutkin, IBS

Subject: Bascom Library FMSI

After detailed review of section 15973 (Facility Management System Integration) and the approved drawings, I would like to inform you that IBS, Inc. is capable of completing this section with reference to all of the requirements (Excluding conduit, race way, and wiring) to the satisfaction of the inspectors, the architect, and mechanical consultant for a price not to exceed \$78,000. Please be advised that we are certified by Echelon Corporation and have completed many similar and larger projects in the past and also have the ability to provide technicians with LonMark Certification.

Here is a sample of recent Integration and control Projects:

- Symantec - HQ - Integration and controls for HVAC, lighting, via Lon - \$1,352,000 (2008-07)
- Ebay - South Campus - Integration of Data Centers, lighting controls - \$1,791,000 (2007-08)
- Adobe - ET6 Data Center Expansion, and Power Monitoring - \$182,000 (2007-08)

Sincerely, Eugene Gutkin
Integrated Building Solutions, Inc.
egutkin@ibs-ca.com
925 244-1900



State Approved LMCC

June 5, 2008

City of San Jose,
Department of Public Works
City Facilities Architectural Services Division
200 East Santa Clara Street, Tower 6
San Jose, CA 95113-1905

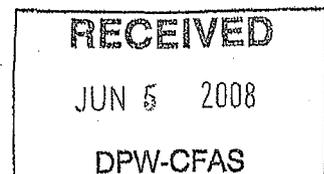
Attn: Don DeWald, Project Manager
Re: Bid Protest
Project: Bascom Branch Library/Community Center (Westside Library)
Contractor: Zolman Construction and Development Inc.
3417 Stacy Court
Mountain View, CA 94040

Electrical
Sub- Contractor: FPV Electrical Co.
3781 W Mac Arthur BLVD B#358
Santa Ana, CA 92704

Dear Mr. DeWald:

This is an official letter of protest on behalf of Smith and Sons Electric and serves to supplement the letter filed by John Plane Construction Inc., for the above project bid May 29, 2008. The basis for this bid protest is that the apparent low bidder Zolman Construction and Development, Inc. (Zolman) listed electrical subcontractor, FPV Electric Co., a NON-RESPONSIBLE and NON-RESPONSIVE Bidder pursuant to Public Contracts Code requirements of the above-referenced project, and as such, Zolman should have REJECTED its bid and accepted the next low responsive and responsible bidder. Additionally, Zolman itself is a NON-RESPONSIBLE and NON-RESPONSIVE bidder pursuant to Public Contracts Code requirements of the above-referenced project. Specifically, Zolman and FPV Electric Co. should be disqualified under 2-1.10 Disqualifications of Bidders (4), (5), (6) and (10) of the contract documents set forth by the City of San Jose.

The Joint Electrical Industry Fund (JEIF) is a labor-management cooperative committee working to ensure fairness and lawful bidding in public contracting and by doing so, protect public funds. We represent over 75 C-10 and C-7 electrical and low voltage contractors and over 2800 electrical workers in Santa Clara County. We monitor over 300 public construction projects yearly for compliance with public contracting and labor laws and maintain an extensive database of pertinent information regarding each project.



Joint Electrical Industry Fund

1493 Park Ave. • San Jose, CA 95126-2139 • Tel. 408-288-5502
(Mailing Address) P.O. Box 6329 • San Jose, CA 95150-6329 • Fax 408-288-5709



Attachment "D"-3

Apparent low bidder Zolman was NON-RESPONSIBLE and NON-RESPONSIVE for the following reasons:

FPV Electrical

- 1) FPV Electrical performed work at the Lee Mathson Middle School in San Jose. The attached reports indicate that FPV Electricals' performance was so poor that they were apparently thrown off the job. Moreover, the workmanship of FPV Electrical was so poor that the inspector indicated that it could "kill" a worker. (attachments)
- 2) San Jose City College Applied Sciences Project – it is reported that due to incorrect installation that a transformer had to be taken out and the work done – a new. Moreover, it is also reported that FPV Electrical lost ½ the underground. (contact SJCC)
- 3) Mayfair Community Center, City of San Jose (please note that FPV Electrical was not the original listed sub) a complaint has been filed alleging that FPV Electrical has performed work on Saturdays without reporting such work on their Certified Payrolls – a serious violation of Prevailing Wage Law. (attachment)

Zolman

- 1) In a case filed with the Labor Commissioner's Office, State Case No. 40-17847/218 & 40-17861/218, Zolman was found to have failed to pay Prevailing Wages properly and was issued a penalty for such violation. (attachment)
- 2) For work performed at the CET project in the City of San Jose, Zolman apparently engaged in cash pay and failure to report wages for employment tax purposes. (contact EDD)

The above omissions by Zolman constitute a FATAL ERROR, rendering the Bid NON-RESPONSIBLE and NON-RESPONSIVE.

As a public agency, the City of San Jose contracting procedures are governed by the California Public Contract Code and its competitive bidding laws which exist to protect the public from misuse of public funds, eliminate favoritism and corruption and provide all bidders with a fair opportunity to compete. Applicable sections of the California Public Contract Code require that the selected bid must be both "responsible" and "responsive"

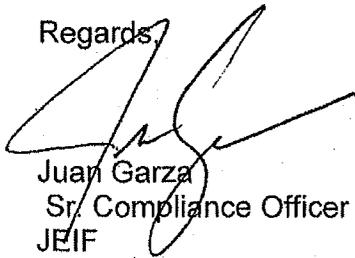
A "responsive" bid is one which is strict and full accordance with all material terms of the bid package. To maintain fairness in the bidding process, the public entity must reject any bid which is not fully responsive to all enumerated bid requirements specified by the agency as outlined in the letter of protest by John Plane Construction and this supplemental letter. In this instant case, bidder FPV Electrical Co. and Zolman are both NOT responsive to all enumerated bid requirements of this bid.

Therefore, we respectfully request the City of San Jose to REJECT the bid of the apparent low bidder Zolman as NON-RESPONSIBLE and NON-RESPONSIVE and award the contract to the second low responsive and responsible bidder, John Plane Construction, Inc.

Attachment "D"-3

Please Review this formal bid protest and contact me at 488-288-5502 if you have any questions. **I recommend a response within five days from the City of San Jose regarding the next course of action.** If necessary, I will be available to present my case at the Council meeting when this project is scheduled for award. We are informed that the award is scheduled for June 10, 2008. However, due to the complaint regarding work at the Mayfair Community Center, it may be in the City's interest to allow the Office of Equality Assurance time (to make a preliminary determination) to vet the allegations it received regarding Zolman. Please advise me of the date and time of such meeting should it be rescheduled.

Regards,



Juan Garza
Sr. Compliance Officer
JEIF

Attachment "D"-3

Labor Commissioner, State of California Department of Industrial Relations Division of Labor Standards Enforcement 5555 California Avenue Suite 200 Bakersfield, CA 93309 661-395-3830 FAX: 661-395-3872	
Carpenters Local #405 2102 Almaden Road Ste 115 San Jose, CA 95125 Jorge Moreno	
DATE: August 24, 2006	In Reply Refer to Case No: 40-17847218

NOTICE OF COMPLAINT CLOSED

PROJECT NAME Fire Station #6 Replacement Project	Project No. 0
Prime Contractor Zoltan Construction & Development Company	
Subcontractor Zoltan Construction & Development Company	

The complaint against the above-named contractor(s) is being closed for the following reason(s):

- Subject firm has satisfactorily paid all prevailing wages and/or penalties found due.
- The statute of limitations for the Labor Commissioner to prosecute California Public Work Law (Labor Code sections 1720 through 1861) has expired. Information for claimant please note: There are other legal claims which you may still pursue even though the statute of limitations has expired for the Labor Commissioner to enforce the public work provisions of the Labor Code. You may want to review the California Court of Appeals decision in the case of *Tippett v Terich* (1995), 37 Cal.App.4th 1517, 44Cal.Rptr.2d 862 and/or consult with an attorney to determine if you may pursue any of the legal actions discussed in the *Tippett v Terich* decision.
- There is insufficient evidence to confirm California Public Work Law was violated.
- Subject firm was not within the jurisdiction of California Public Work Law on this project.
- Other: _____

STATE LABOR COMMISSIONER

By *R Farmer*
 Rachel Farmer
 Deputy Labor Commissioner

Attachment "D"-3

Labor Commissioner, State of California Department of Industrial Relations Division of Labor Standards Enforcement 5555 California Avenue Suite 200 Bakersfield, CA 93309 661-395-3830 FAX: 661-395-3872	
Jorge Moreno 2102 Almaden Road Suite 115 San Jose, CA 95125 Judy Greene	
DATE: December 20, 2005	To Reply Refer to Case No: 40-17861/218

CASE ASSIGNMENT LETTER

PROJECT NAME Monta Vista High School Project	Project No.
Prime Contractor Zolman Construction & Development Company	Awarding Body Fremont Union High School District
Subcontractor Zolman Construction & Development Company	

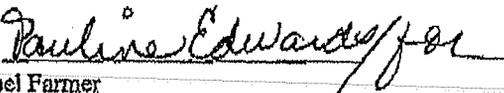
Please be advised that I have been assigned to investigate your complaint against the above named contractor.

Any additional information should be directed to my attention, in writing. Please reference the case number on all correspondence.

You will be kept advised of the progress of this investigation as needed and of the final disposition in this matter.

Sincerely,

STATE LABOR COMMISSIONER

By 
 Rachel Farmer
 Deputy Labor Commissioner

RACHEL FARMERS
 661. 3953. 830

TEACY M
 916.263.2892

6 months

HOLD AT AN ANGLE TOWARD LIGHT TO VERIFY ARTIFICIAL WATERMARK ON FACE & BACK

PHILIP ANGELODES, TREASURER
STATE OF CALIFORNIA
SACRAMENTO

ACCOUNT NUMBER SERIAL
117 - 252435

40-17847-401-00000 NSG
821842
FIRE STATION No.
V. ZOLMAN CONSTRUCTION & DEVELOPMENT, INC.
FULL PAYMENT
\$7376.05

WARNING: THIS NUMBER
BLEEDS THROUGH PINK
TO THE BACK

80-1232
1211

117-252435

PAY TO THE ORDER OF

MANUEL ARAGON PAYON
1616 ROBBIE AVENUE
MODESTO CA 95350

ISSUE DATE: 05/21/2008
CHECK AMOUNT: \$7376.05

DEPARTMENT OF INDUSTRIAL RELATIONS

Summy Batey

MICR NUMBER APPEARS PINK ON THE REVERSE SIDE

⑈0117⑈ ⑈121113423⑈ ⑈00252435⑈ ⑈

DEC-01-1998 16:48

GEN-CON, INC.

Attachment "D" of 3



Proj. Name	Proj. Name
Proj. #	
File #	
Copy To:	Copy To:
Address	Address

RECEIVED

DEC 01 1998

THE STEINBERG GROUP

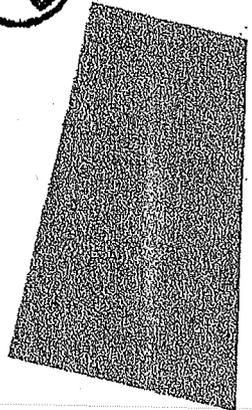
December 1, 1998

The Steinberg Group
60 Pierce Ave.
San Jose, CA 95113

At: Tom Lawrence

RE: Lee Mathson Middle School Project
Job #95-05

SENT VIA FAX
408/ 295-5928



Dear Tom,

Gen-Con's requesting an inspection of electrical work that has been completed at the above project.

Please contact us with a time for Conrad Kaelin, Majid of F.P.V. Electrical and you or your representative for attendance.

Very Truly Yours,

Conrad Kaelin
General Superintendent
Cell: 408/ 640-1748

CK:dj

800 Cristich Lane • Campbell, CA 95008-5406 • (408) 879-1680 • Fax (408) 879-1686
License # 533708

**ALUM ROCK UNION
ELEMENTARY SCHOOL DISTRICT**



2930 GAY AVENUE

SAN JOSE, CALIFORNIA 95127

(408) 928-6800 FAX (408) 272-0372

TO: Al Anzoategui
President, Gen-Con Inc.
Via FAX 408-879-1686

FROM: Stan Rose, Director, Facilities and Planning

DATE: 9-28-98

RE: Electrical Issues at Mathson Middle School Modernization Project

Dear Al:

As you know, your electrical subcontractor agreed to correct improper installations, which were clear violations of appropriate codes. These violations involved the improper installation of three pole breakers.

It has been one month. The items should have been corrected by now. They are not. On Friday, one of our maintenance workers found another breaker improperly installed, not to code. The kind of installation which did occur could injure--or even kill--a worker.

You have had every opportunity to correct these errors, and you have not done so. The expertise of your electrical subcontractor is in serious question. Accordingly, I am having an independent, properly licensed, electrical company review the installation, document any improper installations, and make corrections. The safety of our workers and all who utilize the School is at stake. You will receive a report of all time and material expenditures, and they will be deducted from your contract.

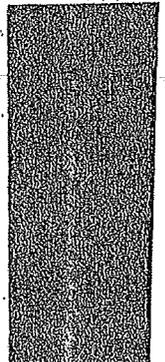
I know that the safety of our community concerns you, as it does us. I am sure you will agree that at this late date, this is the only responsible approach.

Thank you.

Sincerely,

Stan Rose

copy: Sheldon Goldsmith, Construction Supervisor
Neil Wise, Project Supervisor
Tim Conniff, District Electrician
Tom Lawrence, Architect
Roger Ludlow, Inspector of Record



**ALUM ROCK UNION
ELEMENTARY SCHOOL DISTRICT**



2930 GAY AVENUE

SAN JOSE, CALIFORNIA 95127

(408) 928-6800 FAX (408) 272-0372

TO: Al Anzoategui
President, Gen-Con Inc.
Via FAX 408-879-1686

FROM: Stan Rose, Director, Facilities and Planning

DATE: 9-2-98

RE: Electrical Issues at Mathson Middle School Modernization Project

Dear Al:

Recently, your electrical subcontractor agreed to correct improper installations, which were clear violations of appropriate codes. These violations involved the improper installation of three pole breakers.

The errors were discovered by District personnel. Sheldon Goldsmith discussed the issue with the owner of FPV Electrical, who agreed that the installations in question were wrong and that they were consistently wrong throughout the school. They agreed to correct the errors without involving the electrical engineer.

After these corrections were made, the problem with the irrigation pump breaker manifested itself, as explained in the recent communication received by your office.

The result of these and other ongoing electrical problems during the construction of the, as yet, uncompleted electrical system has prompted the District to take the following action in order to protect students, staff, and the community at Mathson School.

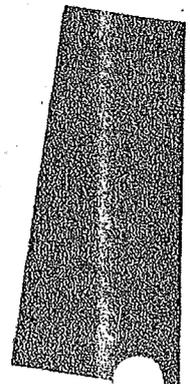
Due to the District's uncertainty about the correctness and safety of the electrical system, we will bring in a outside, qualified electrical inspector to review the plans and inspect the new electrical system for compliance with the contract drawings and good workmanship practices. If no correctable deviations or violations are found, the cost of the inspector will be borne by the District. If however, significant violations or deviations are found, the cost of this service will be charged to your account.

Please reply to me on this matter by tomorrow at 3:00 p.m. Thank you.

Sincerely,

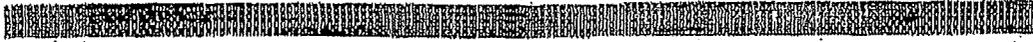
Stan Rose

copy: Sheldon Goldsmith, Construction Supervisor
Neil Wise, Project Supervisor
Tim Conniff, District Electrician
Tom Lawrence, Architect
Roger Ludlow, Inspector of Record



F.P.V. Electrical Co.

3055 Alvarado St. #108
San Leandro, CA 94577
Tel: (510) 614- 8444
Fax: (510) 614- 9440



September 30, 1998

Gen-Con Building Contractors Inc.
800 Cristich Lane,
Campbell, CA 95008
Tel: (408) 879-1680
Fax: (408) 879-1686
Attn.: Mr. Al Anzoategui

Re: Letter dated 9/29/98 from Alum Rock Union School District about
Electrical issues at Lee Mathson Middle School

Dear Al;

As I mentioned in my letter yesterday, after I checked with my electrician (jassi), he notified me about three instances like that and ordering them to my supplier. I checked and they were not there yet, so I purchased them from another supplier and took to job site and gave them to jassi.

At school, I saw Mr. Wise, which told us that we should have not been there and I noticed the Cupertino electric (very good and reputable company) truck there, and I informed Mr. Wise about circuit breakers and them being in my possession.

I believe the walkthrough with electrical engineer and inspector should be the method to check the project, and we are there to correct and take care of the punch list. I have to say, up to now, we have been very fast to answer and take care of Mr. Wise concerns.

I object to having another company working on our project, once before I expressed my objection at bldg. D, which I thought it was violation of warranty agreement.

I appreciate your immediate attention, we are here and willing and eager to cooperate.

Sincerely;

Majid Darace

cc: Conrad (9/29/98)

522



09-29-98P04:43

To: Alum Rock School District
 Attn: Neil Wise
 Re: Lee Mathson School
 Date: September 29, 1998

Neil,

We offer the "not-to-exceed" price of \$2,300.00 to spend a maximum of 30 hours checking panels and wiring in existing buildings and write report for any code deficiencies that we may find.

If you want us to proceed, please issue us a purchase order in the above amount.

Ralph Lacazc
 Ralph Lacazc

RL/mn

cc: Frank Estrada
 file
 \alumrock

Headquarters
 714 East Evelyn Avenue
 Sunnyvale, CA 94089
 (408) 991-1000
 FAX (408) 245-3430

3050 South Country Club Dr., #8
 Mesa, AZ 85210
 (602) 603-2530
 FAX (602) 503-2529

857 Harrison Street
 San Francisco, CA 94107
 (415) 284-2000
 FAX (415) 643-7429

1601 N. Sepulveda Blvd., #238
 Manhattan Beach, CA 90286-6133
 (310) 546-9230
 FAX (310) 546-9235

TOTAL P.5/11



To: Matheson School
Attn: Neil Wise
RE: Electrical Survey
Date: October 7, 1998

Neil:

As requested, we spent time surveying your electrical systems and report the following from our investigation:

Building A

- 1. Transformer T-1 mounted 1" off wall, should be 6" from non-combustible surface and 12" from combustible surface.
- 2. T-1 not grounded properly; no ground rod or not to cold water
- 3. T-1 neutral not bonded to ground

Building B

- 1. Main Switchboard
 - A. Missing one dead front piece
 - B. Phasing, found A,B,C - black, orange, yellow and black, red, blue, not code violations, but specification violations
- 2. Transformer T-2
 - A. Mounted 1 - 1/2" from wall (minimum should be 6")
 - B. Not grounded properly; no ground rod or not to cold water
 - C. Neutral not grounded in transformer
- 3. Panel B, 277/480 volt
 - A. Circuits 1, 3, 5, 20 amp/ 3 pole feeds 30 amp, 250 volt disconnect to left of panel
 - B. Circuits 7, 9, 11, same as "B"

Headquarters
714 East Evelyn Avenue
Stanislaus, CA 94706
(408) 931-7000
FAX (408) 245-3430

3050 South Country Club Dr., #8
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FAX (602) 503-2579

657 Harrison Street
San Francisco, CA 94107
(415) 284-2000
FAX (415) 543-7423

1601 N. Sepulveda Blvd., #236
Marlton Beach, CA 92785-5133
(310) 546-9230
FAX (310) 548-9236

OCT-08-1998 08:15

CUPERTINO ELECTRIC

Attachment D-3



4. Panel B1, 120/208 volt

- A. Circuits 7, 9, 11 - 3 white #8s on 20 amp, 3 pole breaker
- B. Circuits 8, 10, 12 - 4 #10s on 20 amp, 3 pole breaker, 2 blues on #12
- C. Circuit #22 - #10 red and #12 red on 30 amp, single pole breaker
- D. Circuit 36 - 2 #12 black on 20 amp, single pole breaker
- E. Circuit 38 - 2#12 black on 20 amp, single pole breaker, 1#12 splices to black, red and blue in panel and goes underground
- F. Circuit 40 - 2#12 red on 20 amp, single pole breaker
- G. White and red #10 come in back of panel, white goes to neutral bus, red splices to #12 red and goes out to 12 x 12 J box above panels

Building C

1. Transformer T-3

- A. Mounted 2" off wall
- B. No ground rod or no cold water ground
- C. Neutral not grounded
- D. T-3 feeds (20 Panels (C1 and C2), secondary feeders are doubled up on lug in transformer; no protection for feeders to Panel C2 over 100 feet away in another classroom

Building D

1. Transformer T-4

- A. Mounted 1" off the wall
- B. No ground rod or no cold water ground
- C. Neutral not grounded

2. Panel D

- A. 2 ground wires under 1 lug
- B. 3 - 1/2" hole in bottom of panel, needs KO seal

Headquarters
714 East Evelyn Avenue
Sunnyvale, CA 94085
(408) 891-1000
FAX (408) 245-3450

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Mesa, AZ 85210
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FAX (602) 503-2529

857 Harrison Street
San Francisco, CA 94107
(415) 284-2000
FAX (415) 543-7423

1801 N. Sepulveda Blvd., #236
Marlinton Beach, CA 90295-5139
(310) 548-9230
FAX (310) 548-8236



3. Panel D1

- A. 2 ground wires under 1 lug
- B. Circuit #8 has (2) #12 on 20 amp, single pole breaker

Building E

1. Transformer T-5

- A. Mounted 4" off wall (minimum 6")
- B. Not grounded to rod or cold water
- C. Neutral not grounded

Building F

1. Transformer T-6

- A. Mounted 1-1/2" off wall
- B. Not grounded to rod or cold water
- C. Neutral not grounded

2. Panel F

- A. Main neutral has insulation under big screw

3. Panel F1

- A. Circuit 37-2 #12s on 20 amp, single pole breaker
- B. Circuit 32-2#12s on 30 amp, single pole breaker
- C. Circuit 34-2#12s on 30 amp, single pole breaker
- D. Old Panels F and F1 are now junction boxes and need KO seals

Headquarters
714 East Evelyn Avenue
Sunnyvale, CA 94086
(408) 991-1000
FAX (408) 245-3430

3050 South Country Club Dr., #6
Mesa, AZ 85210
(602) 503-2530
FAX (602) 503-2529

197 Harrison Street
San Francisco, CA 94107
(415) 284-2000
FAX (415) 543-7429

1801 N. Sepulveda Blvd., #236
Manhattan Beach, CA 90266-5133
(310) 546-8230
FAX (310) 546-8235



Building G

1. Transformer T-7
 - A. Mounted 5" off wall (minimum 6"-getting closer)
 - B. Not grounded to rod or cold water
 - C. Neutral not grounded
 - D. T-7 is mounted in NEMA 3R enclosure, can needs louvers for air circulation
2. Panel G
 - A. 3 - #12s blue enter left side and out top, 277/480 volt panel + junction box
3. Panel G1
 - A. Cannot open door to 90 degrees

Building H

1. Transformer T-8
 - A. Mounted 2 + 1/2" from wall
 - B. Not grounded to rod or cold water
 - C. Neutral not grounded

Submitted by:

Ken Hayes

Headquarters
714 East Evelyn Avenue
Sunnyvale, CA 94086
(408) 991-1000
FAX (408) 245-3430

3050 South Country Club Dr., #8
Mesa, AZ 85210
(602) 503-2690
FAX (602) 503-2528

857 Harrison Street
San Francisco, CA 94107
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FAX (415) 543-7429

1801 N. Sepulveda Blvd., #236
Manhattan Beach, CA 90266-6133
(310) 546-8230
FAX (310) 546-8236

TOTAL P. 04

**ALUM ROCK UNION
ELEMENTARY SCHOOL DISTRICT**



2930 GAY AVENUE

SAN JOSE, CALIFORNIA 95127

(408) 928-6800 FAX (408) 272-0372

TO: Al Anzoategui
President, Gen-Con Inc.
Via FAX 408-879-1686

FROM: Stan Rose, Director, Facilities and Planning

DATE: 9-29-98

RE: Electrical Issues at Mathson Middle School Modernization Project

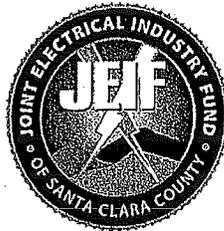
Dear Al:

I received a copy of a communication from Majid Daraee of F.P.U. Electrical today indicating that Neil Wise was not allowing him to correct installation errors on electrical panels. This is simply not true. The problem--which is documented in communications to you going back several weeks--is that Majid's company has been given several opportunities to correct problems with the panels, and to date they have not been corrected. We have received no communication to the effect that parts were not available. Frankly, it is too late in the process to offer that as an excuse for workmanship not to code. Installations which may become safety issues for District maintenance workers should not be made in the first place. Once discovered, they should be corrected immediately. When they have not been corrected, even after stern notifications from the District (note communications going back to August), it is the District's right to effect these corrections with someone acting in a more reputable manner. Today's communication to you is further indication Majid's actions have not been professional. Again, he has had well over a month to correct problems, and to date, at least one still exists. Before we let him near the system again, we demand a third party inspection to assess the accuracy of these installations against the plan, document discrepancies, and affect a method of correction. As F.P.U. has failed to carry out its responsibility, it is now the District's right and responsibility to see that plan specifications are followed.

Sincerely,


Stan Rose

copy: Sheldon Goldsmith, Construction Supervisor
Neil Wise, Project Supervisor
Tim Conniff, District Electrician
Tom Lawrence, Architect
Roger Ludlow, Inspector of Record



State Approved LMCC

June 4, 2008

Nina Grayson
City of San Jose
Office of Equality Assurance
200 East Santa Clara Street
Fifth Floor
San Jose, CA 95113

Re: Complaint

Project: Mayfair Community Center

Contractor: Zolman Construction and Development Inc.
3417 Stacey Court
Mt. View, CA 94040

Subcontractor: electrical, plumbing, plastering and possibly others

Dear Ms. Grayson:

It has come to our attention that Zolman may have been working on various Saturdays since late 2007. We base this assertion on the following facts:

- 1) A member from the Plumbers Union, who works on this project, came forward and told Rudy Carrasco and me that he visited the worksite on Saturday(s) to retrieve tools (to perform work on other projects) and has observed workers on the project.
- 2) In conversing with FPV workers during the week in February and March, he would ask what their plans were for the weekend. The FPV workers responded that they were working at the Mayfair Project.
- 3) Since April 12, 2008, Rudy Carrasco from the Plumbers Union, Bob Seaberg and Dan Romero from the IBEW and Juan Garza from JEIF began monitoring the Mayfair Community Center Job. Attached you will find photos and video taken on various Saturdays since then. However, you will also find photos taken on Friday May 23 (a Black Friday), May 26, Memorial Day and May 27, 2008 a Tuesday. (Digital and Hard Copies attached)
- 4) We have interviewed several citizens of the City of San Jose who rent plots to tend gardens that are adjacent the project. Each of these gardeners states that they tend their plots daily, including Saturdays. And each of them have distinct recollections and observations of workman performing labor on the job site on Saturdays going back to late 2007.

Joint Electrical Industry Fund



Attachment "D"-3

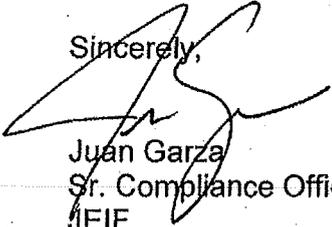
- 5) We have run license plate numbers and have obtained the registered owners of vehicles that we believe belong to the workman on this project. Our assumption is that these owners should appear on either Zolman's CPR's or one of his subcontractors. (list to be submitted as a supplemental)

In the event the City determines Zolman is engaged in activity to avoid the payment of Prevailing Wages that is alleged in this complaint, we respectfully request that the City consider Debarment of Zolman Construction for not less 3 years for the following reasons in addition other remedies:

- 1) The historical record of Zolman Construction on other City of Jose projects
- 2) In a case filed with the Labor Commissioner's Office, State Case No. 40-17847/218 & 40-17861/218, Zolman was found to have failed to pay Prevailing Wages properly and was issued a penalty for such violation.
- 3) Zolman was "apparently" found to have engaged in cash pay failed to report all wages paid for the purposes of evading payment of employment taxes with the EDD.

Should you have any questions regarding this complaint or the attachments supplied to corroborate our allegations please feel free to contact my office at your convenience.

Sincerely,



Juan Garza
Sr. Compliance Officer
JEIF

Summary of Attachments
Attachments

6/9/2008

Page 1 of 1
Attachment "D"-3

DeWald, Don

From: Juan Garza [juandgarza@aol.com]
Sent: Friday, June 06, 2008 2:08 PM
To: Donald.DeWald@sanjoseca.gov
Cc: Grayson, Nina
Subject: FW: CET EDD info on Zolman Complaint - Mayfair Community Center

Mr. DeWald,

In our protest we also indicated that this issue should be viewed and weighed accordingly. Via this email I am here by providing you with the confirmation information you need to verify the assertion.

Ms. Grayson and Mr. Dewald,

You should also be aware that the CET issue, I believe, was a multi-agency effort – meaning IRS, EDD, Dept. of Ins. DLSE and who else knows?

Juan

From: Juan Garza [mailto:juandgarza@aol.com]
Sent: Friday, June 06, 2008 2:00 PM
To: Grayson, Nina
Cc: 'ndahl@edd.ca.gov'
Subject: CET EDD info on Zolman Complaint - Mayfair Community Center

Ms. Grayson,

In our complaint we asserted that Zolman was the subject of an investigation regarding employment tax evasion. The EDD contact for you to obtain the results of this investigation is

Nora Dahl
Tax Administrator
EFTF
906 Ruff Drive
San Jose, CA 95110
408-277-9452
408-277-9041 fax
916-343-3695 cell

I have copied her on this email for your convenience on this email.

Thank you.

6/9/2008

EST. 1929
MILLER MORTON CAILLAT & NEVIS, LLP
ATTORNEYS AT LAW

Attachment "D"-3 Resp

June 16, 2008

David L. Nevis
Frank J. Hughes
Peter A. Kline
Stevan C. Adelman
Joseph A. Scanlan, Jr
William K. Hurley
Peter V. Dessau
David I. Kornbluh
Katherine S. Pak
Christopher J. Hersey
Anthony F. Ventura
Amber S. Crothall
Daniel J. Nevis
Roger F. Liu
Angela F. Storey
Autumn E. Casadonte
Eric C. McAllister

Via Electronic Mail, Facsimile (408) 292-6288 and Personal Delivery

Don DeWald, Project Manager
City of San Jose, Department of Public Works
City Facilities Architectural Services
200 E. Santa Clara St., 6th Floor
San Jose, CA 95113

Re: Bascom Library & Community Center
Response to Bid Protest by JEIF/Smith and Sons Electric
Our File No. 66403-0801

Dear Mr. DeWald:

As you are aware, 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"). The purpose of this letter is to respond to the bid protest submitted to the City on June 5, 2008 by the Joint Electrical Industry Fund ("JEIF") on behalf of Smith and Sons Electric, a subcontractor apparently listed by John Plane Construction, Inc in its unsuccessful bid.

JEIF requests that the City reject Zolman's bid for two reasons. First, it contends that Zolman's bid is non-responsive to the City's Request for Proposal because FPV Electric Co. ("FPV") is allegedly unqualified to perform the required scope of electrical work. Second, JEIF contends that Zolman itself is a non-responsible bidder for allegedly failing to pay prevailing wages or to report wages for employment tax purposes on other projects. Neither of these arguments is truthful or accurate, and neither forms a proper legal basis for the City to reject Zolman's bid. As you are undoubtedly aware, the City pre-qualified Zolman as a responsible contractor prior to permitting it to bid on the Project. JEIF's allegations are unsubstantiated and fail to prove that either Zolman or FPV have ever previously been deemed non-responsible or are unable to successfully complete the Project. Moreover, even if the City were to determine that FPV, the listed electrical subcontractor, lacks the required experience or skill necessary to perform the work, there is no legal basis for the City to deem Zolman's bid non-responsive. Not only is Zolman licensed to self-perform the electrical work, but Public Contracts Code § 4107 specifically permits Zolman and the City to substitute out any non-responsible subcontractor. We will address each of JEIF's specific contentions below.

Harvey C. Miller
1906-1993
Richard W. Morton
1916-1975
Charles V. Caillat
1920-1990

Attachment "D"-3 Resp

Don DeWald
June 16, 2008
Page 2

1. Zolman Decision to List FPV Electrical Does Not Make Its Bid Non-Responsive

JEIF contends that Zolman should have rejected FPV bid and "accepted the next low responsive and responsible bidder" because FPV is non-responsive. Not only is JEIF's claim against FPV unsubstantiated, but even if true, would not serve to disqualify Zolman's bid as non-responsive. The City should reject JEIF's argument for four reasons.

First, our review of the public records maintained by the Contractors State License Board confirms that FPV is an actively licensed Class C-10 electrical subcontractor with no records of prior disciplinary action.

Second, in its protest letter JEIF fails to provide any reliable and/or conclusive evidence that FPV either is, or has previously been deemed to be, an irresponsible contractor. In fact, of the two projects cited by JEIF regarding FPV's job history, the Lee Mathson Middle School project was completed more than 10 years ago, and is no longer a credible indication of FPV's ability to successfully perform the required scope of work. Similarly, in referencing the San Jose City College Applied Sciences project, JEIF provides no documented evidence for its statements. Rather, JEIF relies upon vague and apparently third-hand "reports" that FPV allegedly "lost ½ the underground." JEIF's protest simply fails to establish that FPV is in fact a non-responsive contractor.

Third, JEIF fails to offer any credible explanation for how, even if its allegations regarding FPV's prior projects are assumed to be true, Zolman would have any basis for knowing about these allegations prior to the time of bid.

Fourth, even if the City ultimately deems FPV to be a non-responsive contractor, there is no legal basis (and JEIF fails to identify *any* legal authority) for the City to therefore also deem Zolman's bid non-responsive or Zolman itself non-responsive. In fact, Public Contracts Code § 4107(a)(9) specifically provides a mechanism for substituting potentially non-responsive subcontractors out of a project without rejecting the prime contractor's bid. As you are undoubtedly aware, Section 4107(a)(9) states in relevant part that:

"...the awarding authority, or its duly authorized officer, may, . . . consent to the substitution of another person as a subcontractor in any of the following situations:

(9) When the awarding authority determines that a listed subcontractor is not a responsible contractor."

Because the City is specifically vested by Public Contracts Code § 4107(a)(9) to approve the substitution of a non-responsive subcontractor, it necessarily follows that the "agency may accept or reject the bid in the first instance. The authority to cancel the contract necessarily

Attachment "D"-3 Resp

Don DeWald
June 16, 2008
Page 3

includes the authority to accept the bid." *See, Opinion of California Attorney General, 2003 DJDAR 6061, No. 02-1012, filed June 3, 2003.* In the unlikely event that the City were to nevertheless determine—even after providing FPV with due process and a separate opportunity to respond to JEIF's allegations—that FPV is not a responsible contractor, Zolman would be (and presently is) prepared to substitute FPV for another qualified electrical subcontractor, including Del Monte Electric Co., Inc. of Dublin. Alternatively, Zolman itself maintains an active C-10 electrical license, and would be prepared to self-perform the work. As such, there is no factual or legal basis to reject Zolman's bid as non-responsive based upon the unsubstantiated reports submitted by JEIF regarding FPV's prior work history.

2. Zolman is the Lowest *Responsible Bidder*, and it Possesses the Necessary Experience, Skill, and Financial Standing to Successfully Complete the Project

JEIF's second argument is that Zolman itself is a non-responsible contractor. Without any actual understanding of Zolman's extensive experience and its proven track record of successfully completing public works projects (including other projects for the City of San Jose), JEIF has challenged the City to determine that Zolman is a *non-responsible* bidder. This unsolicited attack on Zolman's experience and reputation is both factually unwarranted and legally indefensible. The ramifications of a premature determination by the City that Zolman is a non-responsible bidder would have enormous and understandable implications for Zolman's present and planned business opportunities. As such, Zolman vehemently opposes, and will continue to resist any such determination, including, if necessary, by seeking a writ of mandate.

As you are aware, contracts let under mandatory competitive bidding statutes must be awarded to the lowest responsible bidder. *See, Public Contracts Code sections 1103, 20111, and 20651.* In context of competitive bidding, the term "responsible" implicates the bidder's reputation, and the quality, fitness, capacity, and experience of the low bidder to successfully perform the proposed scope of work. *See, Inglewood-L.A. County Civic Center Authority v. Superior Court, 7 Cal.3d 861 (1972).* Consequently, the determination of whether Zolman is a responsible bidder is a question of fact within the reasonable discretion of the City. Before such a determination is made, however, Zolman is entitled to the protections of due process, and would expect the opportunity (if necessary) to present a more formal response to the unsubstantiated allegations presented by JEIF in its letter. *See, D.H. Williams Constr., Inc. v. Clovis Unified School Dist. (2007) 146 Cal.App.4th 757, 767.*

Fortunately and most importantly, we are confident no such determination by the City will be required. *Zolman has been actively licensed as a contractor for 20 years, with no record of any prior disciplinary action by the Contractors State License Board. Further, as you are aware, Zolman was pre-qualified as a responsible bidder for the Project prior to*

Don DeWald
June 16, 2008
Page 4

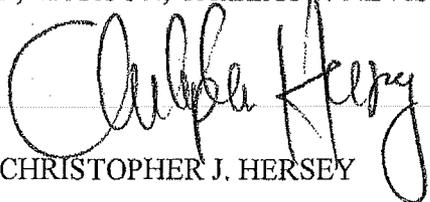
bidding. The City should therefore reject JEIF's protest as lacking any basis in either fact or law. The City is aware of the experience and skill that Zolman brings to all of its Projects from its work on the Mayfair Community Center project. As such, we urge the City to consult its own staff and to consider JEIF's unsubstantiated challenge in context of Zolman's exemplary performance on that equally demanding City project.

Please feel free to contact me directly with any questions or, if after receiving this letter, the City requires any additional information. As indicated, prior to any determination by the City that Zolman is a non-responsible contractor, we would demand the further opportunity to more formally address the unsubstantiated allegations in JEIF's letter. We look forward to hearing of the City's rejection of JEIF's bid protest.

Very truly yours,

MILLER, MORTON, CAILLAT & NEVIS, LLP

By:


CHRISTOPHER J. HERSEY

CJH/lij/jmh

cc: Client (via email)

::ODMA\GRPWISE\MMCN_SJDOMAIN.MMCN_SJPO.NewLitigationLibrary:36469.1