



REPORT TO COUNCIL City of Sacramento

915 I Street, Sacramento, CA 95814-2604
www.CityofSacramento.org

Staff Report
June 24, 2008

Honorable Mayor and
Members of the City Council

Title: Reject all bids for Midtown Water Meter Retrofit Project (PN: ZS10, Z14010007)

Location/Council District: The area from F St. to the South, B St. to the North, 21st St. to the West and Alhambra Blvd. to the East as shown on the location map at Attachment 1 / Council District 3.

Recommendation: Adopt a **Resolution** rejecting all bids received for the **Midtown Water Meter Retrofit Project (PN: ZS10, Z14010007)**

Contact: Michael Malone, Field Services Manager, 808-6226; Chris Powell, Utilities Construction Coordinator, 808-4031.

Presenters: Not Applicable

Department: Utilities

Division: Field Services

Organization No: 14001411

Description/Analysis

Issue: The Department of Utilities is recommending the rejection of all bids so that the Emerging and Small Business Enterprise (ESBE) language included in the bid specifications can be clarified and the project can be rebid.

Policy Considerations: The City Council is authorized to reject all bids under Chapter 3.60 of the City Code.

Environmental Considerations: CEQA does not apply to the rejection of bids.

Commission/Committee Action: None

Rationale for Recommendation: After the plans and specifications were completed

by Field Services, the project was formally advertised to solicit public bids. On March 26th, 2008, the City Clerk opened eleven bids. The apparent low bidder was Preston Pipelines. A protest was filed by the second low bidder, Florez Paving, relating to Preston Pipelines' ESBE subcontractor listings. After reviewing Preston Pipelines' ESBE listings, City staff determined that Preston Pipelines did not meet the City's ESBE participation requirement and therefore was nonresponsive, because Preston's trucker was claiming ESBE credit for the cost of purchasing supplies from a non-ESBE supplier. Preston Pipelines responded that the City has provided this ESBE credit on past contracts, so that it was reasonable for bidders to interpret the bid specifications' ESBE provisions to allow this. City staff confirmed that this practice has been allowed on previous contracts. Due to the resulting ambiguity regarding the amount of ESBE participation credit that can be given for ESBE trucking services, staff recommends rejecting all bids, so that the project can be rebid with revised ESBE language that clarifies the City's requirements. A more detailed discussion of the protests filed, including a second protest filed by Florez Paving urging the City Council to award the contract to Florez Paving rather than rejecting all bids and rebidding, is provided in the Background section of this report (Attachment 2).

Financial Considerations: The expense of re-advertising the project after bids are rejected is minor and sufficient funds to pay this cost is available as part of this project (PN: ZS10, Z14010007).

Emerging Small Business Development (ESBD): This project included a participation requirement of 20% for emerging and small business enterprises (ESBE's) as required by Ordinance 99-007 and Resolution 99-055, relating to ESBD participation goals and policies, adopted by the City Council on February 9, 1999.

Respectfully Submitted by: 
Michael Malone
Field Services Manager

Approved by: 
Marty Hanneman
Interim Director of Utilities

Recommendation Approved:


Ray Kerridge
City Manager

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WATER METER RETROFIT PROJECT

(PN: ZS10)



Attachment 2

BACKGROUND

On September 24, 2004, Governor Arnold Schwarzenegger signed Assembly Bill 2572 into law. The law set a deadline of 100% metering of all residential and commercial accounts by 2025.

On May 24, 2005, the City Council adopted Resolution 2005-347, directing that water meters be installed according to a plan developed using the following implementation criteria: spreading meter installation projects throughout the City, coordinating water meter installation with the replacement of old water mains, and continuing to add new meter installation projects that are adjacent to completed projects.

This project is part of the 5 year plan developed by the Department of Utilities based on the implementation guidelines approved by Council. This project will install 597 meters on all un-metered services within the project area.

At the retrofit program's inception in 2004, there were approximately 104,930 meters to install within the City. To date, the Department of Utilities has installed 4,250 meters through Capital Improvement Projects. With the completion of this project a total of 4,847 meters will have been installed under the retrofit program. Approximately 100,083 meters will remain for future Capital Improvement Projects. All retrofit projects are coordinated with public outreach to customers and stake holders.

This project was advertised on February 26, 2008 and eleven (11) bids were received and opened on March 26, 2008. The bids are summarized below:

Contractor	Bid Amount
Preston Pipelines	\$623,397
Florez Paving	\$683,000
Vulcan Construction	\$687,450
Navajo Pipelines	\$690,100
Teichert Construction	\$727,485
Frank Madina	\$751,750
L.L. Christian Construction	\$756,224
Cal Sierra Construction	\$769,750
North Star Construction	\$819,732.50
Exaro Technologies	\$884,775
Doug Veerkamp Gen. Engineering	\$1,019,197

The engineer's estimate was \$ 850,000.

Florez Paving Protest

On April 10, 2008 the second low bidder, Florez Paving, filed a bid protest claiming that the dollar amounts listed for subcontractors to meet the ESBE requirements on Preston's bid were too high. After reviewing Preston's subbids, and consulting with the City Attorneys Office and the Office of Small Business, Department staff determined that Preston Pipelines did not meet the City's ESBE participation requirement and should be rejected as nonresponsive, because Preston's trucker was claiming ESBE credit for the cost of purchasing supplies from a non-ESBE supplier. Based on this determination, Florez Paving withdrew its bid protest.

Preston Pipelines Protest

Subsequently, Preston Pipelines filed a protest against staff's determination, indicating that having an ESBE trucker supply material, and receive ESBE participation credit for the material cost, has been accepted in previously awarded projects. City staff confirmed that this practice has been allowed on previous contracts, such that it could be reasonable for bidders to interpret the bid specifications' ESBE provisions to allow this. Due to the resulting ambiguity regarding the amount of ESBE participation credit that can be given for ESBE trucking services, staff recommends that the City Council reject all bids, so that the project can be rebid with revised ESBE language that clarifies the City's requirements.

Second Florez Paving Protest

After receiving notice that City staff would be recommending that the City Council reject all bids, Florez Paving, through its attorney, submitted a protest against this recommendation. A copy of this protest letter, dated June 4, 2008, is attached as Attachment 3. In summary, the Florez Paving protest requests that the City reject the Preston Pipelines bid and award the contract to Florez Paving, instead of rejecting all bids and rebidding, based on its position that (1) there is no ambiguity regarding compliance with the ESBE requirements, and Preston Pipelines did not comply with these requirements, and (2) by rejecting all bids the City would be improperly bowing under pressure from Preston Pipelines.

City staff have reviewed the June 4, 2008 Florez Paving protest, and do not agree with its conclusions. The City Council is authorized to reject all bids under City Charter Section 203 and City Code Section 3.60.140, and, as recognized in the Florez Paving protest letter, deciding whether to reject all bids is entirely within the City Council's discretion (see *Pacific Architects Collaborative v. State of California* (1979) 100 Cal. App. 3d 110 , 121-125).

City staff believes that sufficient ambiguity exists concerning the amount of ESBE

participation credit that can be given for ESBE trucking services that it is in the City's best interests to reject all bids so that the project can be re-bid using revised ESBE language that eliminates this ambiguity, and the City's Office of Small Business and City Attorney's Office concur with this recommendation. The revised ESBE language also will be included in the bid specifications for all City construction projects, to provide clear direction to bidders on all City construction projects and eliminate a potential basis for future bid protests.

Reject All Bids For Midtown Water Meter Retrofit (PN Z14010007)

June 24, 2008

Attachment 3

Florez Paving Protest Letter (June 4, 2008 Attached)

WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.
ATTORNEYS AT LAW

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June 4, 2008

VIA OVERNIGHT MAIL

City Clerk
Historic City Hall
915 "I" Street
Sacramento, CA 95814

VIA OVERNIGHT MAIL

Chris Powell (Project Manager)
Utilities Construction Coordinator
Department of Utilities
City of Sacramento
1395 - 35th Avenue
Sacramento, CA 95822-2911

Re: Protest of the May 27, 2008 Recommendation of the Department
of Utilities Pursuant to Article X of Chapter 3.60 of Title 3 of
the Sacramento City Code ¹

Public Contract: Midtown Water Meter Retrofit - 2008
(PN: ZS10) B083331019

Issued by: Department of Utilities, City of Sacramento
Bid Proposals Submitted on March 26, 2008

Protesting Bidder: Florez Paving
4000 Twenty-Fourth Street
Sacramento, CA 95822
Tel: 916.452.3903
Fax: 916.455.0217

Dear City Clerk and Messrs. Powell & Brent:

Florez Paving ("Florez"), by and through its counsel, submits this letter to the City Council of the City of Sacramento ("City Council") in order to urge the City Council to reject the May 27, 2008 recommendation of the Department of Utilities for the City of Sacramento (the "City"), requesting that the City Council re-advertise a request for bids for the Midtown Water Retrofit Project (the "Project.") See Exhibit 1.

¹ The May 27, 2008 recommendation at issue was received by Florez Paving on May 29, 2008. Therefore, this protest is timely brought in accordance with Sacramento City Code 3.60.500. Please also find attached a check for \$750.00. Our understanding is that City of Sacramento has agreed to reimburse Florez Paving for a previously submitted bid protest fee in the amount of \$750.00 due to Florez Paving's voluntary retraction of a prior bid protest. See Exhibit 7.

City Clerk and Messrs. Powell & Brent
June 4, 2008
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I. Introduction

The City has correctly determined that the initial low bid submitted by Preston Pipeline ("Preston") contained inflated costs and plainly violated applicable ESBE participation requirements. See Exhibit 2. The City thereon properly rejected Preston's bid and awarded the Project to Florez as the lowest responsible bidder. Unfortunately, placed under pressure by counsel for Preston, the City has decided to recommend that the City Council reject all existing bids for the Project, clarify the ESBE requirements, and then solicit a new round of proposals. See Exhibit 1. In so recommending, the City cites to an alleged ambiguity to the ESBE regulations where none exists, proposes an unnecessary delay in the commencement of the Project, casts baseless doubt on past contract awards by the City Council, rewards Preston with another bite of the apple despite its efforts to circumvent ESBE requirements, and punishes Florez for conscientiously observing the rules and regulations enacted by the City Council. The City got it right when it recommended awarding this Project to Florez.

II. Brief Summary of Relevant Background Facts

On or about March 26, 2008, Preston and Florez submitted bids for the Project as required by the City. On or about April 8, 2008, the City notified all bidders that the Project had been awarded to Preston. After reviewing Preston's bid, however, Florez issued a written bid protest to the City, explaining that "it is very apparent that [Preston] inflated their subcontractor values to meet ESBE minimum participation levels." See Exhibit 3.

Upon receipt of the bid protest, the City conducted a closer examination of Preston's cost proposal pursuant to Sacramento City Code ("City Code") section 3.60.510. The City thereon discovered that Larry Jenkins Trucking ("LJ Trucking"), an ESBE certified subcontractor on Preston's bid, had inflated the value of his trucking services by including the cost of materials to be purchased for the Project in his cost proposal. More specifically, the City determined that LJ Trucking had improperly claimed ESBE participation credit for materials purchased from a non-ESBE supplier. See Exhibit 4, p. 1. The City held that LJ Trucking could not claim ESBE participation credit for the cost of material purchased from a non-ESBE supplier, resulting in the overall percentage of ESBE participation in Preston's bid failing to satisfy minimum participation requirements. See Exhibit 4, p. 3. Consequently, the City decided to recommend to the City Council that the Project be awarded to Florez, as the next low bidder, pursuant to City Code section 3.60.140. See Exhibit 2.

On or about May 12, 2008, Preston sent a letter, through retained counsel, disputing the City's routine application of the ESBE regulations and inexplicably claiming that LJ Trucking had properly submitted its cost proposal. See Exhibit 5. The Preston letter further alleged that the City had allowed ESBE accredited trucking

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subcontractors to include the cost of the transported materials in their cost proposals on prior bids. On or about May 27, 2008, apparently bowing under pressure from Preston, the City revoked its recommendation that Florez receive the Project contract, and now suggests that a new round of bidding take place. See Exhibit 1.

III. Application of the Unambiguous ESBE Requirements

In response to Preston's letter, the City claims that a new round of bidding should be authorized in order to "clarify" the ESBE regulations regarding trucking subcontractors. A detailed examination of the ESBE regulations as applied to this Project make it clear that no such clarification is needed.

In order to determine the level of ESBE participation on any given bid for the Project, the City has enforced the plain meaning of the regulations. Part III of the ESBE Requirements for the Project provides as follows:

- A. **The percent of ESBE participation shall be determined based on the dollar amount of the work to be performed by a [sic] certified ESBEs designated in the bid, relative to the total dollar amount of the bid, except as provided otherwise below.**
- B. To receive credit for participation, a ESBE must perform a commercially useful function; i.e., must be responsible for the execution of a distinct element of the work and must carry its responsibility by actually performing, managing, or supervising the work.
- C. **Suppliers: Credit for ESBE vendor of materials or supplies is counted as one hundred (100) percent of the amount paid to the vendor for the material.**
- D. **Truckers: Credit for trucking by ESBEs will be (100) percent.**

See Exhibit 6, p. 1 (emphasis added).

As a threshold matter, the ESBE requirements specify that ESBE participation credit may only be claimed by an ESBE contractor for work the contractor "performed." The ESBE requirements immediately thereafter make an express distinction between "suppliers" and "truckers" for purposes of determining what constitutes performance. The ESBE regulations provide little or no room for confusion: *trucking companies may claim ESBE credit for transportation services only while a supplier may claim ESBE credit for the cost of materials provided.* Frankly, it is difficult to fathom how Preston can credibly claim ignorance of the distinction between "suppliers" and "truckers."

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Moreover, the distinction between “suppliers” and “truckers” is further crystallized in the documentation retention requirements imposed on the contractor to whom the bid is awarded. Section A of Part IV of the ESBE requirements for the Project states:

ESBE RECORDS – The Contractor shall maintain records of all subcontracts with certified ESBE subcontractors and records of materials purchased from certified ESBE vendors/suppliers for one (1) year

See Exhibit 6, p. 2 (emphasis added).

The ESBE regulations particularly identify ESBE suppliers as independent contractors subject to specific recordkeeping requirements. The ESBE regulations repeatedly explain and emphasize that suppliers of materials on a public project must be ESBE accredited in order for the cost of the supplies to count toward the ESBE participation credit. The City has expressed and enforced this understanding of the ESBE regulations, not in the least to protect a basic function of the ESBE program itself: to ensure that all small business are involved in all phases of a public project, and prevent contractors, such as LJ Trucking, from excluding lower tier ESBE suppliers by representing the cost of materials as part of its ESBE accredited trucking services.

IV. Response to May 12, 2008 Letter from Counsel for Preston

In the absence of any credible grounds for disputing the City’s rejection of its bid, Preston has engaged counsel in order to pressure the City with the specter of legal action. This tactic cannot be condoned as it is nothing more than a creative effort to resurrect an indefensible bid. Preston has stood the ESBE program on its head and pushed the City into retreating from its appropriate recommendation that Florez receive the Project contract at issue.

In pertinent part, Preston argues that following the ESBE requirements, as interpreted and applied by the City, “will pose a real and immediate hardship on the very type of enterprise the ESBE program was designed to help.” See Exhibit 5, p. 3. As this City Council is aware, quite the opposite is the case. In rejecting Preston’s bid, the City simply sought to ensure that truckers use ESBE accredited suppliers – nothing more. Had LJ Trucking purchased its material from an ESBE accredited supplier, the City would have accepted the bid.

Ironically, it is Preston’s understanding of the ESBE requirements that pose a significant threat to small business, and more particularly, to small suppliers of construction material. Pursuant to Preston’s understanding of the ESBE regulations, a subcontractor, such as LJ Trucking, could subsume the services of any number of non-ESBE suppliers under the umbrella of its ESBE license, and exclude ESBE accredited suppliers from the bidding process. By allowing truckers to represent the cost of

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materials purchased from non-ESBE suppliers as an ESBE participation credit, the inclusion of ESBE suppliers would occur improperly at the sole discretion of (and regulation by) the truckers themselves. This clearly constitutes an absurd reading of the ESBE rules and regulations. All that the City expects of subcontractors like LJ Trucking is that ESBE licensed suppliers be used to claim ESBE credit for the procurement of Project material.

Secondly, counsel for Preston claims that the City has previously allowed trucking subcontractors to tack the cost of materials onto their cost proposals. In support of this claim, counsel references four projects. See Exhibit 5, pp. 2-3. Although the prior bids attached as exhibits to counsel's letter do not make clear whether the underlying suppliers to the trucking subcontractors were ESBE certified, to the extent they are not, those bids contain inflated ESBE participation values. Thus, for example, in the event LJ Trucking, as the sole ESBE accredited subcontractor on the 2008 Speed Humps Project, failed to procure its materials from a licensed supplier, the prime contractor may be liable for sanctions. See Exhibit 6, Section B of Part IV of the ESBE Requirements. Whereas the City may not always scrutinize whether lower tier suppliers are certified during the bid process (and did so in this case only in response to Florez's bid protest), the City's application of the ESBE, in this case and others, is consistent and necessary. The City, with finite resources, must rely to a certain extent on the integrity of the bidders. Due to Florez's and the City's diligence in this instance, Preston and LJ Trucking got caught with their hands in the cookie jar.

Preston has also misconstrued case law in an effort to bolster its untenable position. Preston cites to cases in support of the contention that the City and the City Council cannot reject Preston's bid for non-compliance with ESBE regulations when such non-compliance was purportedly overlooked on previous bids. Setting aside the question of whether the prior bids in fact complied with ESBE regulations, California case law actually requires the City and City Council to enforce the plain meaning of the ESBE regulations regardless of past decisions. (See *Braun, Bryant & Austin v. McGuire* (1927) 201 Cal. 134, 143 [holding that "[i]f [municipal law] be free from ambiguity no construction or interpretation is required or permissible, and it must be given no meaning other than its words import"]; *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 679 [holding that the plain meaning of words used in a city charter define its legal application].) Contrary to Preston's suggestion, California law expects the City Council to observe the plain meaning of municipal rules and regulations, even if such a construction results in significant inconvenience. (See *San Christina Inv. Co. v. City and County of San Francisco* (1914) 167 Cal. 762, 774 [holding that the city must enforce the plain meaning of its charter even if significant inconvenience is occasioned thereby].) The City was in full compliance with the mandates of California law in deciding to award the Project to Florez.

Moreover, referring to the case Preston primarily relies on, the prior practices of a municipal entity are only relevant when the regulations at issue are ambiguous. (See

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Castaneda v. Holcomb (1981) 114 Cal.App.3d 939, 942 – 945 [holding, in no uncertain terms, “[i]f the language of the [municipal] provision is free of ambiguity, it must be given its plain meaning[,]” and further noting that prior administrative interpretations are only relevant to resolve ambiguities.] To further its own purpose, Preston assumes a self-serving ambiguity to excuse its disregard for ESBE bidding requirements. We are confident the City Council will see through this false pretext.

V. Conclusion

We recognize that the City Council has broad discretion to advertise a new round of bidding for the Project. However, forcing contractors to resubmit otherwise responsive and proper bids would admit to a nonexistent ambiguity in the ESBE regulations, reward Preston for a wanton disregard of clear bidding requirements, and penalize Florez, the lowest responsible bidder, for observing the rules and regulations required by the City.

Additionally, a decision by the City Council to capitulate under threats of suit from Preston would create an unsettling precedent for future awards, signaling to the contractor community that the insinuation of legal action can salvage blatantly non-compliant bid proposals.

The City is unquestionably correct in its decision to reject Preston’s bid and to recommend that the Project be awarded to Florez. We strongly believe the City Council should stand by those decisions. Therefore, we ask that the City Council reject the May 27, 2008 recommendation of the City and award the Project contract to Florez as the lowest responsible bidder.

Very truly yours,

**WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P.**



David R. Chamberlin, Esq.

Enclosures
cc: Mr. Sam Florez

RESOLUTION NO.

Adopted by the Sacramento City Council

**REJECT ALL BIDS FOR THE MIDTOWN WATER METER RETROFIT PROJECT
(PN: ZS10, Z14010007)**

BACKGROUND

- A. After the plans and specifications were completed by Field Services, the Midtown Water Meter Retrofit project was formally advertised to solicit public bids. On March 26th, 2008, the City Clerk opened eleven bids.
- B. As a result of protests filed by the two lowest bidders, City staff has become aware of an ambiguity in the bid specifications regarding the amount of Emerging and Small Business Enterprise (ESBE) participation credit that can be given for ESBE trucking services.
- C. Due to this ambiguity, City staff has recommended that the City Council reject all bids, so that the project can be rebid with revised ESBE language that clarifies the City's requirements.

**BASED ON THE FACTS SET FORTH IN THE STAFF REPORT AND ALL OTHER
INFORMATION PRESENTED TO IT, THE CITY COUNCIL RESOLVES AS FOLLOWS:**

Section 1. All bids received for the Midtown Water Meter Retrofit project are rejected.