

## **RESOLUTION 2017-043**

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN PABLO (1) REJECTING THE LOW BID OF BAY CITIES PAVING AND GRADING AS NON-RESPONSIVE; (2) AWARDING PHASES 3 & 4 OF THE PLAZA SAN PABLO ROADWAY IMPROVEMENTS PROJECT TO THE SECOND LOWEST AND RESPONSIVE BID OF MAGGIORA AND GHILOTTI, INC.; (3) AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH MAGGIORA AND GHILOTTI, INC. IN THE AMOUNT OF \$1,619,824 WITH 15% CONTINGENCY, FOR A TOTAL AUTHORIZATION AMOUNT OF \$1,862,798; (4) APPROVING \$100,000 FOR UTILITY COORDINATION; AND (5) APPROPRIATING \$1,962,798 FROM THE GENERAL FUND DESIGNATED RESERVES FUTURE CAPITAL PROJECTS PLAZA SAN PABLO & CIVIC AND INFRASTRUCTURE PROJECTS TO PLAZA SAN PABLO PHASES 3&4 (PSP-3&4) TO FUND THE CONTRACT AND UTILITY COORDINATION**

WHEREAS, the Phases 3 and 4 of the Plaza San Pablo Roadway Improvements (the "Project") is in the approved capital projects budget for the City of San Pablo (the "City");

WHEREAS, the plans, specifications and working details of the Project were approved for bidding by the City's Public Works Department;

WHEREAS, the Project is consistent with, and encompassed in, the Mitigated Negative Declaration for the Mixed Use Center South Regulating Plan adopted by the City Council on October 17, 2011, and submitted to the State of California's Clearinghouse and Planning Unit (SCH No. 2011092047);

WHEREAS, the City solicited public bids for work in conformance with the requirements of State Law and City ordinances, and the Purchasing Officer opened the bids on February 22, 2017;

WHEREAS, the lowest bidder Bay Cities Paving & Grading is nonresponsive for exceeding the maximum allowable bid amount for bid schedule line items "Mobilization" and "Traffic Control and Construction Area Sign";

WHEREAS, the lowest responsive and responsible bid was submitted by Maggiora & Ghilotti, Inc., in the amount of \$1,619,824, and the City desires a 15% contingency for the Project;

WHEREAS, the City desires to allocate a total of \$100,000 for utility coordination;

WHEREAS, the City desires to appropriate \$1,962,798 from the General Fund Designated Reserves Future Capital Projects Plaza San Pablo & Civic and Infrastructure Projects; and

WHEREAS, the total project budget balance will be \$1,962,798 and any funding leftover will be used for prior approved and future professional services required to complete the Project.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SAN PABLO DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. Recitals. The Recitals set forth above are true and correct and incorporated herein.

Section 2. Rejection of Low Bid. The City Council hereby rejects the low bid of Bay Cities Paving & Grading as non-responsive for exceeding the maximum allowable bid amount for bid schedule line items “Mobilization” and “Traffic Control and Construction Area Signs” as laid out in the bid documents. Given the fact that there is not much traffic on the internal streets for Plaza San Pablo yet because the parcels have not all been developed, staff felt that limiting the allowable bid amount for mobilization to \$25,000 and traffic control to \$30,000 would be necessary and thus capped the amounts in sections 16.1.07B (Page 78) and 16.1.13B (Page 83) as set forth in the attachment PSP-3&4 Front End Contract (Bid Documents). Bay Cities included \$75,000 for mobilization and \$50,000 for traffic control. The second bidder, Maggiora & Ghilotti, Inc., properly limited these bid line items as required by the bid documents. The City Council makes the following findings

a. Bay Cities created a competitive advantage by not complying with the bid specifications that limited the bid items for mobilization and traffic control. The courts have consistently held that strict compliance with bidding requirements is necessary “even if there was no corruption or adverse effect upon the bidding process, and the deviations would save the entity money.” *MCM Construction Inc. v. City and County of San Francisco*, 66 Cal. App. 4<sup>th</sup> 359, 369 (1998). Although a public entity may waive inconsequential deviations, Bay Cities’ deviations were not inconsequential. By failing to comply with the limitation on these two bid line items, Bay Cities had the opportunity after bid opening to claim a mistaken bid pursuant to Public Contract Code section 5103 and withdraw its bid without forfeiting its bid bond. The City can determine that failure to limit the bids on two line items was a “mistake made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work or in reading the plans or specifications.” Thus, Bay Cities could claim a mistake and withdraw its bid without forfeiting its bid bond as was the situation in *Valley Crest Landscaping, Inc. v. City Council*, 41 Cal. App. 4<sup>th</sup> 1432 (1996).

The fact that Bay Cities now claims that it will accept the lower amounts for these bid items – and in effect reduce its bid by \$55,000 after bid opening -- does not change the fact that it could have also claimed a bid mistake allowing withdrawal of its bid. This creates a prohibited “two bites of the apple” discussed in the Valley Crest case: “permitting a postbid inquiry and ‘clarification’ would give [the bidder]...an opportunity to consider whether it really wanted the work; this would give . . .an unfair ‘two bites of the apple.’” *Valley Crest Landscaping, Inc. v. City Council*, 41 Cal. App. 4<sup>th</sup> 1432,

1436. A bidder cannot submit a bid in a way that allows it after bid opening and seeing the other bids to decide whether to enter into a contract or withdraw its bid.

As indicated in both the MCM Construction case and Valley Crest Landscape case, "...a waiver of an irregularity in a bid should be allowed only if it would not give the bidder an unfair advantage by allowing it to withdraw its bid without forfeiting its bid bond." MCM Construction, 66 Cal. App. 4<sup>th</sup> 359, 371 quoting Valley Crest Landscape, 41 Cal. App. 4<sup>th</sup> 1432, 1442-1443; see also Bay Cities Paving & Grading v. City of San Leandro, 223 Cal. App. 4<sup>th</sup> 1181, 1199.

b. Section 12 in the Instructions to Bidders (page 6) gives the City the right to "waive immaterial bid irregularities." Case law is also clear that a City is not required to waive a bid variance or irregularity, but may do so. There are no cases that hold that the City must waive Bay Cities' deviation and that it abuses its discretion if it chooses not to waive the deviation. "A bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders..." MCM Construction, 66 Cal. App. 4<sup>th</sup> 359, 373-4; see also Ghilotti Construction Co. v. City of Richmond, 45 Cal. App. 4<sup>th</sup> 897, 904; Bay Cities Paving & Grading v. City of San Leandro, 223 Cal. App. 4<sup>th</sup> 1181, 1188, 1199. Bay Cities' deviation did affect its bid amount and did give it an advantage of other bidders, and it is within the City's discretion not to waive the deviation even if it had not affected Bay Cities' bid amount or the other bidder.

c. This situation at hand is different from the one facing Caltrans in 2014 as described in the letter sent to the City by Bay Cities on February 27, 2017 on two accounts. First, the issue at hand is how the bid form itself was submitted and not the subcontractor's list. As noted above, the courts are particularly concerned when a bid variance or discrepancy affects the amount of the bid. "A bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allow other bidders..." MCM Construction, 66 Cal. App. 4<sup>th</sup> 359, 373-4 (underlining added for emphasis but italics in the original); see also Ghilotti Construction Co. v. City of Richmond, 45 Cal. App. 4<sup>th</sup> 897, 904). Second, Caltrans interpreting a number in excess of 100% as 100% is not equivalent to Bay Cities now claiming that its bid for \$1,586,899.00 can be reduced by \$55,000 without undermining the strict conformity to competitive bidding requirements.

d. Although the City received the correspondence from Bay Cities dated February 27, 2017, the City has not received a bid protest following the requirements in section 11.3 of Instructions to Bidders in the attached Bid Documents.

Section 3. Award of Contract. The City Council hereby awards the contract for the Phase 3 & 4 of the Plaza San Pablo Roadway Improvements, Project PSP-3&4 to Maggiora & Ghilotti, Inc. and authorizes the City Manager to execute an agreement in the amount of \$1,619,824 with Maggiora & Ghilotti, Inc. and to make such changes or additions thereto with the concurrence of the City Attorney as are necessary or appropriate and which do not substantially alter the rights and obligations of the City thereunder. The City Manager is further authorized to execute such other documents and take such other actions as are necessary to carry out and implement the obligations of the City.

Section 4. Appropriation of Funds. The City Council hereby authorizes the appropriation of \$1,962,798 from the General Fund Designated Reserves Future Capital Projects Plaza San Pablo & Civic and Infrastructure Projects.

Section 5. Adoption of Plans. The City Council hereby adopts the Plans, Specifications and working details for Plaza San Pablo Roadway Improvements, Phase 3 and Phase 4, Project PSP-3&4.

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ADOPTED this 6<sup>th</sup> day of March, 2017, by the following vote:

AYES:	COUNCILMEMBERS:	Cruz, Kinney, Morris, Calloway and Valdez
NOES:	COUNCILMEMBERS:	None
ABSENT:	COUNCILMEMBERS:	None
ABSTAIN:	COUNCILMEMBERS:	None

ATTEST:	APPROVED:
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/s/ Ted J. Denney  
Ted J. Denney, City Clerk

/s/ Cecilia Valdez  
Cecilia Valdez, Mayor