

## Legislation Text

File #: #17-0081, Version: 1

**PREPARED BY:** KEVIN MCCOURT

**DATE OF MEETING:** 03/06/17

**SUBJECT:**

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) AWARDDING 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 \$1,862,797; (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

**CITY MANAGER RECOMMENDATION**

Adopt Resolution

**COMPLIANCE STATEMENTS**

**FY 2015-2017 Council Priority Workplan**

*Plaza San Pablo Phases 3&4*, Project PSP-3&4, is an adopted policy item under Policy Area: Economic Development, Policy Item 2.3 in FY 2015-17 City Council Priority Workplan, effective October 1, 2016.

**CEQA Compliance Statement**

The Plaza San Pablo Roadway Improvements are 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).

**BACKGROUND**

On February 22, 2017, the City opened the bids for Plaza San Pablo Roadway Improvements (Improvements) Phases 3 and 4 (PSP-3&4), a continuation of Phases 1 and 2 (PW620) which was accepted on June 6, 2016. This is a rebid from the bid opening on November 16, 2016. All bids during this opening were rejected at the Council meeting on December 19, 2016 due to the lowest responsible bidder well exceeding the project budget. Staff revised the scope of work by removing an unnecessary section of pavement from being demolished to try to keep the project within budget. Two bids were received and both are less than the December 19, 2016 lowest responsible bid.

Company	Bid Order	Total Bid
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Bay Cities Paving & Grading, Inc.	1	\$1,586,899
Maggiora & Ghilotti Inc.	2	\$1,619,824

Staff reviewed the bids and determined Bay Cities Paving and Grading, Inc. to be nonresponsive 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 sent a letter dated February 23, 2017 to Bay Cities (attached) indicating that its bid was nonresponsive for exceeding the maximum allowable bid amounts for the mobilization and traffic control line items. Bay Cities’ Vice-President and General Counsel responded on February 27, 2017 (attached) making the following arguments:

1. *That Bay Cities could list any amounts for these two line items but that the specifications (“Maximum compensation allowed for this item on the project will be...”)* just means that the City will only pay \$25,000 for mobilization and \$30,000 for traffic control and that the bidders could insert any number into the bid form for these line items.

The issue with this argument is that 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.

2. *“At the most, the variance in Bay Cities’ bid is insignificant and we ask the City to reconsider its finding that Bay Cities’ bid was nonresponsive...”*

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.

3. *Bay Cities argues that Caltrans acceptance of a bidder’s subcontractor list that showed more than 100% of work performed by the subcontractor could be interpreted to be 100% supports Bay Cities interpretation that its bid line items are not controlling of its bid amounts*

This situation at hand is different from the one facing Caltrans in 2014 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, there is a practical difference in that a subcontractor cannot perform more than 100%, so 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 can be reduced by \$55,000 without undermining the strict conformity to competitive bidding requirements.

Further, although the City has received the attached 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.

Staff therefore recommends the City Council to award the project to Maggiora & Ghilotti, Inc. as the lowest responsive and responsible bidder in the amount of \$1,619,824 ("Contract Amount") for construction.

The Improvements are necessary to facilitate the development of the sites and the implementation of the Council adopted Regulating Plan for Plaza San Pablo. The Improvements include the demolition of existing concrete sidewalk, curb and gutter, AC pavement, and select utilities; installation of new underground utilities, storm drain piping and inlets, sanitary sewer main pipe and sanitary sewer manhole; fine grading; and placement of base rock, concrete sidewalk, curb and gutter, AC pavement, ADA ramps, signage and striping, bio-swales, landscaping and planting, and irrigation system; and installation of street lighting and traffic signals.

In accordance with California Public Contract Code Section 220382(b), the City Council must award the work to the lowest responsive and responsible bidder. In accordance with California Public Contract Code Section 22039, Staff recommends that the City Council adopt the plans, specifications and working details for the Improvements which were approved for bidding by the City's Engineering and Environmental Services Division.

City Staff will coordinate with utility companies for required service installation.

#### **FISCAL IMPACT**

The Maggiora & Ghilotti Inc.. contract amount is \$1,619,824, with an available 15 percent contingency amount of \$242,974, for a total authorization amount of \$1,862,798. Additional funds in the amount of \$100,000 are needed for utility coordination. Total funding in the amount of \$1,962,798 needs to be appropriated from the General Fund Designated Reserve Future Capital Projects Plaza San Pablo & Civic and Infrastructure Projects to the CIP Plaza San Pablo Phases 3&4 (320-3200-43600-PSP-3&4).

Action	From: Fund/Account	To: Fund/Account	Amount
Appropriate	General Fund Designated Reserve Future Capital Projects Plaza San Pablo & Civic and Infrastructure Projects	CIP Plaza San Pablo Phases 3&4 (320-3200-43600-PSP-3&4)	\$1,862,798
			\$100,000
		<b>Appropriation Total</b>	<b>\$1,962,798</b>

**ATTACHMENTS**

PSP-3&4 Front End Contract

PSP-3&4 Notice Inviting Bids

Bid Proposal Bay Cities Paving & Grading

Bid Proposal Maggiora & Ghilotti

Bid Opening Summary

Nonresponsive Bid Letter

Bay Cities Correspondence