City of FRESNO REPORT TO THE CITYCOUNCIL

AGENDA ITEM NO. 1 E
COUNCIL MEETING 10/1/09
APPROVED BY
DEPARTMENT DIRECTOR
CITY MANAGER

October 1, 2009

FROM: KENNETH A. NERLAND, Director
General Services Department

BY: KELLY S. RIDDLE, Manager
GSD/Facilities and Major Projects Division

MARK M. JOHNSON, Senior Project Manager
GSD/Facilities and Major Projects Division

SUBJECT: REJECT ALL BIDS TO RE-ROOF FRESNO ART MUSEUM (BID FILE NO. 2971)

RECOMMENDATIONS

Staff recommends the City Council reject all bids to re-roof the Fresno Art Museum (FAM) building and direct staff to re-bid the project in the spring of 2010 during favorable weather conditions. The rejection of all bids is based on a decision that the project will be awarded too late in the winter, exposing the FAM building and contents to inclement weather during construction.

EXECUTIVE SUMMARY

The roof system at the FAM is original to the building and has exceeded its life expectancy. The Facilities and Major Projects Division of the General Services Department is proposing to remove and replace the roof system at the FAM building.

Fryer Roofing Co., Inc. of Fresno, CA (Fryer) was initially determined to be the lowest responsive and responsible bidder. During the bid evaluation period, Fryer was determined to be non-responsive. Staff proposed to bypass Fryer and recommend the contract be awarded to Fresno Roofing Company, Inc. of Fresno, CA (Fresno Roofing) as the next lowest responsive and responsible bidder. Fryer filed an appeal based on the original staff determination to bypass their apparent low bid as non responsive. An appeals hearing was heard on September 21, 2009. The Hearing Officer concludes that Fryer submitted a responsive bid.

The bid appeals process has delayed the award of the contract and has pushed the construction start date later into the winter months. The delay of construction may expose the FAM building and contents to damage during construction in inclement weather. Staff recommends the City Council reject all bids to re-roof the FAM building and direct staff to re-bid the project in the spring of 2010 during favorable weather conditions. Facilities and Major Projects is prepared to mitigate and weather proof the roof at the FAM for the winter months prior to the project being re-bid in the spring of 2010.

BACKGROUND

The roof system at the FAM is original to the building and has exceeded its life expectancy. The roof system leaks during the rainy season and needs to be replaced. The scope of work includes removal of existing asphaltic built-up roofing, insulation, base flashings, patches, mastic, damaged roof sheathing, and related flashings down to wall and deck substrates on all twenty-one (21) roof surfaces at the FAM, and furnishing and installing a new thermoplastic roof system over a 1 ½" thickness roof insulation and ¼" gypsum cover board

and related elements on all twenty-one (21) roof surfaces. Contract provisions provide for a twenty (20) year warranty of the new roof system.

The roof will be Title 24 compliant and meet "cool roof" requirements. The State of California's Title 24 Energy Efficiency Standards for Residential and Nonresidential Buildings were established in 1978 in response to a legislative mandate to reduce California's energy consumption.

Specifications were prepared by Troy Brooks and Associates to remove and replace all twenty-one (21) roof surfaces of the FAM. A Notice Inviting Bids was published on August 7, 2009. Specifications were distributed to ten Building Exchanges via Fax Notice Inviting Bids and distributed to ten prospective bidders. Six sealed bid proposals were received and opened in a public bid opening on September 3, 2009. The six bids were received from Williamson Roofing Inc., dba Williamson Construction Group of Fresno, CA; Fresno Roofing Company, Inc. of Fresno, CA; Fryer Roofing Co., Inc. of Fresno, CA; Graham Prewett, Inc., of Fresno, CA; Roof Systems, Inc., dba Nations Roof West of Fresno, CA; and AAA Roofing By Gene, Inc., of Riverside, CA.

Based on the sealed bids, Fryer was initially determined to be the lowest responsive and responsible bidder with a base bid of $253,266.00. During the bid evaluation period, Fryer was determined to be non-responsive as they did not comply with the requirements of the contract documents to submit a completed Bid Proposal. Staff proposed to bypass Fryer and recommend the contract be awarded to Fresno Roofing as the next lowest responsive and responsible bidder with a base bid of $283,000.00. Fryer was notified on September 4, 2009 of this determination and given the opportunity to appeal pursuant to Council Resolution 2003-129. Fryer filed an appeal based on the original staff determination to bypass their apparent low bid as non responsive. An appeal hearing was heard by the Honorable Alan Yengoyan, Appeal Hearing Officer, on September 21, 2009. The Hearing Officer concludes that upon arguments presented by the City, Fryer submitted a responsive bid.

Staff recommends the City Council reject all bids to re-roof the FAM building and direct staff to re-bid the project in the spring of 2010 during favorable weather conditions. The bid appeals process has delayed the award of the contract and has pushed the construction start date later into the winter months. This delay of construction may expose the FAM building and contents to damage during construction in inclement weather. Facilities and Major Projects is prepared to mitigate and weather proof the roof at the FAM for the winter months prior to the project being re-bid in the spring of 2010.

FISCAL IMPACT
None

Attachments: Bid Evaluation Proposal
Respondent's Brief, September 14, 2009
Record of Decision, Alan Yengoyan, Appeal Hearing Officer, September 21, 2009

Fresno Art Roof 10-1-09

EVALUATION OF BID PROPOSALS

FOR: RE-ROOF FRESNO ART MUSEUM

Bid File No. 2971
Bid Opening: September 3, 2009

	BIDDER'S NAME		TOTAL NET BID AMOUNT
1.	Fryer Roofing Co., Inc. 4877 W Jennifer, Ste 105 Fresno CA 93722	Total Net Base Bid Amount	$253,266.00
		Add Alternate No. 1	$6,614.00
		Add Alternate No. 2	$104.00
		Add Alternate No. 3	$500.00
2.	Fresno Roofing Company, Inc. 5950 E Olive Avenue Fresno CA 93727	Total Net Base Bid Amount	$283,000.00
		Add Alternate No. 1	$4,900.00
		Add Alternate No. 2	$155.00
		Add Alternate No. 3	$750.00
3.	Williamson Roofing, Inc. dba Williamson Construction Group 5627 E Kings Canyon #102-156 Fresno CA 93727	Total Net Base Bid Amount	$293,458.00
		Add Alternate No. 1	$5,000.00
		Add Alternate No. 2	$192.00
		Add Alternate No. 3	$1,000.00
4.	Graham Prewett, Inc. 2773 N Business Park Ave #102 Fresno CA 93727	Total Net Base Bid Amount	$325,000.00
		Add Alternate No. 1	$12,600.00
		Add Alternate No. 2	$125.00
		Add Alternate No. 3	$1,200.00
5.	Roof Systems, Inc. dba Nations Roof West 5463 E Hedges Avenue Fresno CA 93727	Total Net Base Bid Amount	$368,800.00
		Add Alternate No. 1	$393,480.00
		Add Alternate No. 2	$74.71
		Add Alternate No. 3	$664.10
6.	AAA Roofing By Gene, Inc. 2685 Avalon Street Riverside CA 92509	Total Net Base Bid Amount	$380,845.00
		Add Alternate No. 1	$9,800.00
		Add Alternate No. 2	$128.00
		Add Alternate No. 3	$750.00

EVALUATION OF BID PROPOSALS

FOR: RE-ROOF FRESNO ART MUSEUM

Bid File No. 2971
Bid Opening: September 3, 2009

Each bidder has agreed to allow the City sixty-four (64) days from date bids are opened to accept or reject their bid proposal. Purchasing requests that you complete the following sections and return this bid evaluation to the Purchasing Division at the latest by Wednesday, September 30, 2009, 5:00 P.M.

The Engineer's Estimate for this expenditure is $515,000.00. The contract price is 50% below the Engineer's Estimate. If the overage is greater than 10% or only one bid was received, give explanation:

BACKGROUND OF PROJECT (To be completed by Evaluating Department/ Division. Explain need for project/equipment):

The roof system at the Fresno Art Museum is original to the building and has reached the end of its useful economic life. The roof leaks during times of inclement weather and is in need of replacement. The new roof system will meet or exceed the State of California Title 24 Energy Conservation Standards and will meet "cool roof" requirements.

DEPARTMENT CONCLUSIONS AND RECOMMENDATION:

[__] Award a contract in the amount of $_____
to _____
as the lowest responsive and responsible bidder.

Remarks:

[X] Reject all bids. Reason:

EVALUATION OF BID PROPOSALS

FOR: RE-ROOF FRESNO ART MUSEUM

Bid File No. 2971
Bid Opening: September 3, 2009

Division Head Approval

Mark M. John FOR KELLY RIDDLE

Title SR. PROJECT MANAGER

Date 9/23/09

Department Head Approval

K Sperland

Title General Services Director

Date 9/23/09

[X] Approve Dept. Recommendation

[ ] Disapprove

[ ] See Attachment

[ ] Approve GSD/Purchasing Recommendation

[ ] Disapprove

GENERAL SERVICES DEPARTMENT

Jason B. MacDonald 9/23/09
Purchasing Manager Date

K Sperland 9/23/09
Director Date

CITY MANAGER

9/23/09
City Manager or Designee Date

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Half Moon Bay, California 94019

RECEIVED
2009 SEP 14 AM 10: 00
PURCHASING DIVISION
CITY OF FRESNO

September 14, 2009

Our File No.
3824-10DVT

Via hand delivery and facsimile

Jason MacDonald, Purchasing Manager
City of Fresno
2101 "G" Street, Building A
Fresno, California 93706

Re: Appeal of Fryer Roofing Co., Inc. from staff determination to by-pass Fryer Roofing bid as non-responsive regarding the re-roofing of the Fresno Art Museum Project (Bid File No. 2971); Project ID PM-139

Dear Mr. MacDonald:

This firm represents Fryer Roofing Co., Inc. ("Fryer Roofing") and I am submitting this appeal pursuant to Resolution 2003-129 from the City's tentative finding that Fryer Roofing's bid has been determined to be non-responsive to the specifications for the above project.

I. SUMMARY

Fryer Roofing's bid which was $30,000 lower than the second bidder, was, in fact, responsive and furnished the City with the precise dollar amount that Fryer Roofing agreed to perform the project. If there were any irregularity in the Fryer Roofing bid, it was only a minor irregularity and an inconsequential deviation which the City should waive. Moreover, Fryer Roofing should not be punished for submitting a bid on a City generated bid form that was ambiguous at best and misleading at worst.

II. FACTS

On September 3, 2009, Fryer Roofing submitted a timely bid on the project, the pertinent portion of which is attached hereto as **Exhibit "A"** and incorporated herein (referred to as the "bid form"). Fryer Roofing's total bid was $253,266.00 which was approximately $30,000.00 lower than the second bidder. As set forth in the bid form, items 1 ($4,000.00 for mobilization) and 3 ($1,000.00 for a mediator) were pre-designated lump sum items leaving only one item (item 2 to remove and replace roof) for a bidder to fill in.

Bid items 1 through 3 were addressed in the specifications, at page 6-1, a true and correct copy of which is attached hereto as **Exhibit "B."** The bid item for the mediator (item 3) made reference to page 2.17 of the specifications which noted in pertinent part that: "This bid item may be increased, decreased, or deleted in its entirety and is not to be construed as additional money owed to the Contractor. If no Change Order is issued against this bid item, the Contract Price shall be reduced by the full amount of the bid item included in the Bid Proposal for the Mediator."

Specifications page 1.4 discuss "minor irregularities" and provides:

> "The City reserves the right to waive any informality or minor irregularity that does not have a monetary consideration when it is in the best interests of the public and of the City to do so. A discrepancy that offers a Bidder an unfair advantage will cause the bid to be nonresponsive."

At the bid opening, the City stated the bid of Fryer Roofing was the apparent low bidder and its bid amount of $253,266.00 was read by the City's representative.

Despite being approximately $30,000.00 lower than the next bidder, the Purchasing Department has tentatively found the Fryer Roofing bid to be nonresponsive on the basis that Fryer Roofing failed to bid item 2 on the bid proposal "as required in the bid proposal specifications. In evaluating bids a critical factor was that in order to be responsive, a bidder had to fully fill in all items on the bid proposal page." (City of Fresno letter to Fryer Roofing dated September 8, 2009.)

As noted, the bid form (**Exhibit "A"**), refers to the "Total Net Base Bid Amount." The City had already preprinted the amounts for items 1 and 3 in the bid form.

Neither the bid form nor the specifications define the term "net base bid" nor is any indication given of what this number is net of. This reference to "net base bid" is confusing at best.

Fryer Roofing's $253,266.00 bid is its total bid and the amount for which it has agreed to perform the work to construct the subject project. This amount includes everything in the scope of work including items 1 and 3 for mobilization and the mediator.

The bid form specifically provides that "the lowest bid shall be determined by the lowest bid price on the Total Net Base Bid Amount, ..." While Fryer Roofing did not fill in item 2, it did fill in an amount ($253,266.00) for the "Total Net Base Bid Amount" as the bid form required. Thus, it is undisputed the City knows the total amount of Fryer Roofing's bid <u>regardless</u> of whether item 2 was left blank.

III. DISCUSSION

The purchasing manager has taken the position that because Fryer Roofing did not fill in the blank in item 2 for removing and replacing the roof, its bid was nonresponsive. Fryer Roofing disagrees.

A. Fryer Roofing's Bid Furnishes the City With the Total Amount of Its Bid.

At the outset, the City knows the amount of Fryer Roofing's "Total Net Base Bid Amount" -- $253,266.00. The critical part of the form is complete. The only blank was item 2 and this did not need to be filled in because it is obvious the amount of Fryer Roofing's bid covers all items. (Items 1 and 3 were already filled in the bid form [a total of $5,000.00] so by process of elimination only item 2 remained and the total figure bid [more than $5,000.00] was obviously the bid for the entire project.

Assuming that the failure to insert an amount in item 2 was an irregularity it was so minor as to be waivable as follows.

B. The Standards for Evaluation for Alleged Irregularities in a Bid.

At the outset, the City's own specifications (p. 1.4 quoted above) recognize that there can be irregularities in a bid. To the extent that the failure to include an amount in item number 2 constitutes an irregularity, the question is whether this is the type of irregularity that can be waived. The answer is yes.

In making that determination, California courts have held that a bid which is not strictly responsive but which substantially conforms to the advertisement, may 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 or, in other words, if the variance is inconsequential." (*Konica Business Machines USA, Inc. v. Regents of University of California* (1988) 206 Cal.App.3rd 449, 454; 47 Ops.Cal.Attorney General 129, 130 (1966).) The relevant inquiry is whether the bid deviation facilitates "corruption or extravagance" or is likely to affect the amount of bids or the response of potential bidders. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 370.)

Further, ". . . [a] public entity may waive inconsequential deviations from contract specifications in a public contract bid. To be considered inconsequential, a deviation must neither give the bidder an unfair competitive advantage nor otherwise defeat the goals of insuring economy and preventing corruption in the public contracting process." (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 900.)

C. Fryer Roofing's Bid Was Responsive and There Was Only an Insignificant and Minor Irregularity.

As a practical matter, the failure to fill in item number 2 was at most an inconsequential error. As noted in the bid form, items 1 and 3 for mobilization and mediation were already set forth in the bid form by the City. Thus, the fact that Fryer Roofing failed to fill in item number 2 and left it blank is of no consequence because it gave a total amount of its base bid, i.e. the amount that Fryer Roofing has agreed to perform the work.

The City's purchasing agent's analysis and conclusion might make some sense if there were numerous items that a bidder left blank. For example, let us assume this were a street project and a bidder had left blank the items for sidewalks, street lights, and landscaping, but only filled in the item for asphalt paving and then gave a total price. Under this example where a bidder left numerous items blank, the City might reasonably wonder whether the bidder was in fact agreeing to perform all items that were called for in the bid. The City could justifiably find the bid nonresponsive. However, that is not the case in this situation.

On the contrary, there were three items on which bidders were asked to bid, two of which were already set forth by the City. There is no ambiguity or confusion as to whether Fryer Roofing has agreed to perform the work described in the specification (remove and replace the roof) because the bid amount of $253,266.00 obviously includes items 1 and 3 leading to the inescapable conclusion that Fryer Roofing is offering to perform the work and had in fact bid the job for $253,266.00. There is no question that Fryer Roofing was intending to perform all the items as there was really only one item blank to fill in which the bidder unfortunately failed to do. However, this failure is of no consequence because the City has the total bid amount and there can be no question that the bidder intends to perform all of the work called for in the contract and specifications for that amount.

Under the legal standards and City specifications quoted above, there was at most a minor irregularity for the failure to fill in item number 2. Fryer Roofing is not getting any type of competitive advantage over the second bidder inasmuch as Fryer Roofing's bid was $30,000 lower than the next bidder. Thus, the failure to fill in item number 2 is of no monetary consequence. A finding of a minor irregularity would also promote the salutary effect of public works contracts and competitive bidding and insures economy (*Ghilotti Construction Co. v. City of Richmond, supra*, 45 Cal.App.4th 897, 900) because Fryer Roofing's bid is lower than the second bidder by tens of thousands of dollars.

Next, there would certainly be no corruption for finding a minor irregularity under these circumstances. Fryer Roofing would not be given a competitive advantage by finding a minor irregularity.

If anything, the Fryer Roofing's bid arguably caused itself a competitive disadvantage when compared to other bidders. That is, had Fryer Roofing filled in item number 2 and then added all three items together, its bid would in fact have been $5,000.00 higher, therefore costing the City even more money. Instead, the City is getting a significant break here.

The variance also did not affect the amount of the bid (except to Fryer Roofing's disadvantage) making the variation inconsequential. (*Konica Business Machines USA, Inc. v. Regents of University of California, supra,* 206 Cal.App.3rd 449, 454.)

No other bidder would be disadvantaged by finding a material variance under these circumstances.

It should also be mentioned that the bid form is less than perfect in this case. The bid form refers to the "net" base bid amount but nowhere is net defined. This only created confusion because if there were a net amount, the person arriving at the net amount should have been able to determine from the documents or the transaction what the factors were to determine the net. No factors were, however, given.

This bid form only created confusion in terms of setting forth a net number. It would be grossly unfair to punish Fryer Roofing for an arguably misleading form.

IV. CONCLUSION

There is no factual or legal basis to find Fryer Roofing's bid nonresponsive. Fryer Roofing has submitted a bid for $253,266.00 which is approximately $30,000.00 below the next bidder to perform the work.

At a time when public agency budgets are strapped and every dollar counts, it would only promote and insure "economy" by finding Fryer Roofing's bid responsive. (*Ghilotti Construction Co., supra*, 45 Cal.App.4th 897, 900.)

Fryer Roofing asks that the hearing panel reverse the purchasing manager's decision, find the bid responsive and authorize the award to Fryer Roofing. Fryer Roofing and the undersigned would request notice of any hearing and the opportunity to be heard.

Respectfully Submitted,

PERKINS, MANN & EVERETT

Jerry H. Mann

JHM:dl
Enclosures

cc: Fryer Roofing Co., Inc.

EXHIBIT "A"

(REVISED) **BID PROPOSAL**
BIDDER'S NAME: Triyer Roofing Co., Inc.

TO: THE PURCHASING MANAGER OF THE CITY OF FRESNO:

The undersigned Bidder, having carefully examined the location of the hereinafter described work, plans and/or specifications therefore, hereby proposes to furnish, all, in strict accordance with said plans and/or specifications, the materials, labor, and equipment necessary to complete the project for the prices set forth in the following bid items:

BASE BID

ITEM	QUANTITY	DESCRIPTION OF WORK	UNIT PRICE	TOTAL PRICE
1.	Lump Sum	Mobilization	Lump Sum	$*4,000.00
2.	Lump Sum	Remove & Replace Roof	Lump Sum	$
3.	Lump Sum	Mediator (Owner's 50% share, see page 2.17 of General Conditions)	Lump Sum	$1000.00

TOTAL NET BASE BID AMOUNT: $ 253,266.00

The Total Net Base Bid Amount is Two Hundred Fifty Three Thousand Two Hundred Sixty Six Dollars and Zero Cents.

*This item has been determined to be $4,000.00 as noted in the "Explanation of Bid Items," page 6.1.

The Bid Prices set forth herein shall include any and all applicable taxes.

ADD ALTERNATE NO. 1	UNIT PRICE	TOTAL PRICE
1. Alternate 1 ½" roof system	Lump Sum	$ 6,614.00

TOTAL AMOUNT ADD ALTERNATE NO. 1 $ 6,614.00

ADD ALTERNATE NO. 2

1. Plywood Roof Sheathing (unit price as defined per sheet 6.1)	Each	$ 104.00

TOTAL AMOUNT ADD ALTERNATE NO. 2 $ 104.00

ADD ALTERNATE NO. 3

1. Roof Drain (unit price as defined per sheet 6.1)	Each	$ 500.00

TOTAL AMOUNT ADD ALTERNATE NO. 3 $ 500.00

The Base Bid and all Add Alternate Prices set forth herein shall include any and all applicable taxes.

Bidders must bid all Bid Items including Add Alternates. Bids that are not fully filled in will be considered incomplete and non-responsive.

The Council may award a contract to the lowest responsive and responsible bidder. The lowest bid shall be determined by the lowest bid price on the TOTAL NET BASE BID AMOUNT, without consideration of the price of any Add Alternates.

The City reserves the right to award the Total Net Bid Amount with or without any Add Alternates.

EXHIBIT "B"

TECHNICAL SPECIFICATIONS

Explanation of Bid Items

The unit price bid per unit measure of work shall include all costs of labor, equipment, and materials necessary for the furnishing and constructing complete in place and operating in accordance with the Plans and Specifications for the City of Fresno for all work listed in the bid items.

BASE BID

Bid Item No. 1 - Mobilization

This item shall be bid a lump sum and shall conform to the provisions of Section 11 of the Caltrans Standard Specifications and these Specifications.

This item shall consist of covering the Contractor's cost for contract documents and for the moving of personnel, equipment, supplies and incidentals to the project site.

The lump sum price for this item has been determined to be $4,000 and shall not exceed that amount. No additional payment will be made for this item.

Bid Item No. 2 – Remove & Replace Roof:

For the performance of all Work on the areas specified on the project drawings including removal of all existing roofing related items, and wood elements where indicated and installation of a new thermoplastic roof system over layer of 1" thickness polyisocyanate roof insulation and ¼" gypsum cover board and related elements on the areas indicated on the project drawings. Bid Includes manufacturer 20 Year NDL warranty. Includes removal and replacement of damaged roof sheathing as approved.

Bid Item No. 3- Mediator

This bid item shall be bid lump sum for Mediator. Reference is made to "Mediator", on page 2.17 of the General Conditions.

This work shall consist of paying the City's share of the costs of the Mediation, in conformance with the provisions in the Specifications, and as directed by the Engineer.

The dollar amount listed on the Bid Proposal form is an estimate only and will be included in each bidder's Bid Proposal.

ADD ALTERNATES

Bid Item No. 4 – Alternate System:

Bid to install 1-1/2" thickness polyisocyanurate roof system in lieu of 1" thickness insulation, with specified scope of work per Base Bid.

Bid Item No. 5 – Plywood Roof Sheathing:

For removal and disposal of one (1) 4'x 8' sheet of plywood roof sheathing (in addition to those included in Base Bid) and installation of new replacement plywood panel of matching thickness, including nailing per specifications.

Bid Item No. 6 – Remove & Replace Roof Drain:
For removal and replacement of one (1) existing roof drain with new cast-iron drain, including installation, per specifications.

The Building Owner reserves the right to select all or any of the above bid proposals.

DATE: September 21, 2009 (revised for typographical errors on 09/22/09)

TO: ANDREW T. SOUZA, Fresno City Manager

FROM: ALAN YENGOYAN, Administrative Appeal Hearing Officer

SUBJECT: FINDINGS AND RECOMMENDATIONS FROM THE APPEAL BY FRYER ROOFING CO., INC. REGARDING BID FILE NO. 2971 (FRESNO ART MUSEUM PROJECT)

An appeal hearing was held on September 21, 2009 on the appeal filed by Fryer Roofing Co., Inc. (hereinafter, "Fryer"), the lowest bidder on the subject bid proposal, in regard to the Purchasing Division of the General Services Department's (hereinafter, "Purchasing") staff determination that Fryer was not a responsive bidder and its determination therefore to award the subject bid contract to Fresno Roofing Co., Inc. as the next lowest responsive and responsible bidder.

This written decision is a supplement to the bench decision made at the hearing wherein the decision by this hearing officer was made that Fryer was the lowest responsive bidder and was recommended that Fryer be awarded the subject bid contract.

The City was represented by: Nancy A. Algier, Senior Deputy City Attorney and Jason MacDonald, City Purchasing Manager.

Representing the Appellant Fryer was attorney Jerry H. Mann of Perkins, Mann & Everett, Attorneys at Law, and Leigh Ann Fryer, President of Fryer and Bruce Fryer, CEO of Fryer.

Testimony was also provided from Edward Duarte, President of Fresno Roofing Co., Inc.

No other bidders on this subject bid were present at the hearing nor were any written statement of position or evidence presented from such bidders for consideration, pursuant to provisions of City Resolution No. 2003-129

Statement of Relevant Facts:

The relevant facts are rather simple and straightforward in this case. Fryer presented a revised bid proposal as did all other bidders. Its bid proposal (Exhibit #2) stated a Total Net Base Amount of $253,266.00 which was to be the sum of Items #1 (Mobilization), #2 (Remove and Replace Roof) and #3 (Mediator). Items #1 and #3

were amounts pre-set by the City at $4000.00 and $1000.00 respectively. Fryer failed to enter any amount for Item #2, but its Total Net Base Amount was approximately $30,000 less than the second lowest bid amount by Fresno Roofing (Exhibit #3). Fryer's stated reason for the failure to enter any amount for Item #2 was that it was an oversight on their part, but that that amount could readily be determined by subtracting $5000.00 from their total net base amount. Everything else upon Fryer's bid proposal was properly completed.

City's Position:

The City has argued that the Bid Proposal language specifically stated that "Bidders must bid all Bid Items including Add Alternates. Bids that are not fully filled in will be considered incomplete and non-responsive." By this language, the City argues that it must reject Fryer's bid proposal as non-responsive because it was incomplete in that one particular. The City argues that the integrity of the bidding process require total completeness in the preparation of bid proposals pursuant to the bid specification language demanded. The City presented no evidence nor did it argue that the failure to state an amount for Item #2 gave Fryer any competitive monetary advantage or benefit to the detriment of the other bidders.

Fryer's Position:

Fryer argues simple inadvertent and harmless error was committed by its failure to state the amount in Item #2 and that amount could readily be determined by subtracting $5000.00 from the total net base amount. Fryer further argues that the error provided no monetary advantage or benefit to itself over other bidders and that the same bid proposal language states "[T]he lowest bid shall be determined by the lowest bid price on the TOTAL NET BASE AMOUNT, without consideration of the price of Add Alternates" which it did state and which amount was the lowest.

Findings:

By the evidence presented by documents and testimony at the hearing, the following findings are made:

There was no monetary advantage or benefit gained by Fryer over other bidders for its failure to state an amount for Item #2.

Fryer stated the lowest total net base amount of all the bidders and is a responsible bidder.

Fryer did not complete Item #2 as requested, but that error was minor and of no consequence to the integrity of the bid process in this case.

Discussion:

Since Fryer stated its Total Net Base Amount, simple subtraction would provide the Purchasing Division with the amount for removal and replacement of the roof (Item

#2). If there were multiple other items (two or more) required to be provided in this bid proposal which Fryer had left blank so that it would be uncertain how much would be attributable to each, that would be a different matter, but in this bid proposal it was obvious that $248,266.00 was the lump sum attributable to removal and replacing of the roof.

The total net base amount Fryer provided as required by the bid proposal was also in conformance to Fresno Municipal Code section 4-103 (c)(1).

The integrity of the bidding process is of paramount importance, but rigidity to a process with a blind eye to readily ascertainable facts and common sense can itself be cause for concern for the integrity of the process. In this regard, the case of *Konica Business Machines v. Regents of the University of California* (1988) 206 Cal. App. 3rd 449 is directly on point where it held "[A] basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. <u>However, it is further well established that 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 or, other words, if the variance is inconsequential."</u>(underlining add for emphasis)

The bid proposal (page 1.4) states: "The City reserves the right to waive any informality or minor irregularity that does not have a monetary consideration when it is in the best interest of the public and of the City to do so. A discrepancy that offers a Bidder an unfair advantage will cause the bid to be nonresponsive." If the City can reserve this right, which it can, that right must be used fairly, honestly, not arbitrarily nor capriciously and only in the best interest of the public and the City in judging submitted bids for what is or is not a minor irregularity, or in this case in particular, an omission of no real consequence.

Decision:

Council Resolution No. 2003-129 states that the hearing officer shall decide whether the bidder is responsive and responsible, or is non-responsive or not responsible due to an irregularity in the bid proposal and whether such irregularity is minor and should be waived, or whether the City should reject any or all bids presented.

It is this hearing officer's finding that Fryer was the lowest responsive and responsible bidder and as such recommends that Fryer be awarded this subject bid.

Dated Sept. 22, 2009

Alan Yengoyan

Alan Yengoyan,
Appeal Hearing Officer