

AGENDA ITEM NO.	1	E
COUNCIL MEETING	02/24/2009	
APPROVED BY		
		
DEPARTMENT DIRECTOR		
CITY MANAGER		

February 24, 2009

FROM: PATRICK N. WIEMILLER, Director 
Public Works Department

KENNETH A. NERLAND, Director
General Services Department

BY: EFREN BAÑUELOS, Assistant Director 
Public Works Department, Capital Management Division

JASON MACDONALD, Purchasing Manager 
General Services Department, Purchasing Division

SUBJECT: REJECT ALL BIDS FOR FRUIT AVENUE BIKE LANE PROJECT, FILE 2765-11103
(COUNCIL DISTRICTS NO. 1 AND NO. 7)

KEY RESULT AREA

Prudent Financial Management

RECOMMENDATIONS

Staff recommends the Council reject all bids to construct bicycle facilities along Fruit Avenue between McKinley Avenue and Ashlan Avenue, and direct staff to re-bid the project within thirty (30) calendar days. The rejection of all bids is based on a decision made by the City of Fresno's Appeal Hearing Officer Findings and Recommendations on January 12, 2009.

EXECUTIVE SUMMARY

The Public Works Department is proposing to construct bicycle facilities along Fruit Avenue from McKinley Avenue to Ashlan Avenue. The project will remove the existing four lanes of striping for two way traffic and install a slurry seal to prolong the life of the asphalt. The limits of the project will be re-striped with 2 lanes of travel, a dual left turn lane, bike lanes, and on street parking. The project will complete that portion of the Bicycle Transportation Plan along the Fruit Avenue corridor.

On September 11, 2008, two sealed bids were received and opened by the Purchasing Department. Based on the sealed bids, Cruco Construction Group, Inc. (Cruco) was initially determined to be the lowest responsive and responsible bidder with a bid of \$304,286.50. The second bid was received from Seal Rite Paving and Grading (Seal Rite) for \$336,197.00. Both companies are located in Fresno.

Subsequent to the opening of bids, issues were raised by both companies relating to compliance with Federal Highway Administration (FHWA) regulations that require the prime contractor to self perform 30 percent of the total net bid amount, excluding specialty items. Cruco filed an appeal based on the original staff determination to bypass their apparent low bid for non-compliance by failing to detail the work they would be self-performing. A hearing was held on December 22, 2008. In his decision dated January 12, 2009, Mr. Alan Yengoyan, Appeal Hearing Officer, issued a primary recommendation “that all bids...be rejected and the project resubmitted for bid”, or alternatively, a secondary recommendation that “Cruco be found as the lowest responsive [and responsible] bidder.” City staff concurs with the primary recommendation of the Hearing Officer.

KEY OBJECTIVE BALANCE

The recommended action achieves the key objective of Financial Management by rejecting all bids, modifying project specifications to require more information and documentation relating to the Federal 30 percent requirement, and re-bidding the project in compliance with the Fresno City Charter.

BACKGROUND

Bids were opened on September 11, 2008. Staff initially found Cruco to be the apparent low bidder. On September 29, 2008, both companies were notified of the staff determination to award the contract to Cruco as the lowest, responsive bidder. On September 30, 2008, Seal Rite appealed the staff determination.

Staff, in consultation with the City Attorney’s office, subsequently determined that Cruco’s proposal was nonresponsive, due to failure to comply with the specifications which required the three lowest bidders to provide, within three working days from the bid opening, “a letter that the bidder will perform not less than 30 percent of the total net bid amount”, and further requiring “the letter shall identify those bid items or work to be done by the Prime Contractor”. The letter received by the City from Cruco, although timely, did not identify the bid items or work to be self performed by Cruco. The “30 percent requirement” is required on all Federally funded projects administered by the Federal Highway Administration (FHWA).

Staff reversed its initial determination, and on November 21, 2008, Cruco was notified of the staff determination to reject Cruco’s bid as nonresponsive and award the contract to the second bidder, Seal Rite. Cruco did not agree with staff’s revised determination and filed an appeal.

The appeal filed by Cruco was heard by the Honorable Alan Yengoyan, Appeal Hearing Officer, on December 22, 2008. His findings and recommendations from the appeal hearing, dated January 12, 2009, are attached for reference. The Hearing Officer concludes that upon arguments presented by the City, Cruco submitted a responsive bid. However, the Hearing Officer finds “that there is a cloud upon this bid project in regard to Cruco’s contention that it could and would be in compliance with the 30 percent requirement”. The Hearing Officer made a two-part recommendation that the Council may act on:

“[T]hat all bids ... be rejected and the project re-submitted for bid with specifications that demand more information and documentation of the bidder’s claim that it can comply with the Federal 30 percent [self-performance] requirement” or in the alternative, that “Cruco be found as the lowest responsive [and responsible] bidder”.

Staff recommends that the Hearing Officer’s Primary Recommendation be adopted by Council, with direction to re-bid the project within 30 calendar days. Council can accept the staff recommendation and direct staff to reject all bids and re-bid the project within 30 days, or alternatively, in the event Council finds Cruco to be the lowest responsive and responsible bidder Council may award the contract to Cruco. In the event Council finds Cruco to be nonresponsive, Council may award the contract to Cruco if there is found to be a minor irregularity by Cruco not identifying in its letter the work which it would self-perform, and such minor irregularity is waived by Council. If Council finds Cruco to be nonresponsive, and either does not find a minor irregularity or chooses not to waive a minor irregularity, then Council may award to the next lowest responsive and responsible bidder, Seal Rite.

To avoid this type of situation from occurring in the future, Purchasing is working to add language to the bid documents, specifically on the bidders submission list, that will expressly spell out the City’s requirement and expectation that any self-perform work under the 30 percent requirement be clearly identified by the contractor in their bid proposal, as it is already called for within the current bid specifications.

PNW/KAN/MMJ/eam
Reject All Bids Fruit Bike Ln Final 2-24-09

Attachments: Respondent’s Brief, December 22, 2008
Declaration of Jason McDonald in Support of Respondent’s Brief, December 22, 2008
Record of Decision, Alan Yengoyan, Appeal Hearing Officer, January 12, 2009
Appellant’s Letter of Appeal of Determination of Non-Responsive Bid
(dated November 10, 2008, although received by City on December 2, 2008)
Evaluation of Bid Proposals

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6 Attorneys for Respondent, CITY OF FRESNO

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8 IN RE:

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10 CITY OF FRESNO BID FILE NO. 2765
(FRUIT AVENUE BIKE LANE PROJECT) –
11 BID APPEAL FILED BY CRUCO
CONSTRUCTION GROUP, INC., OF
12 FRESNO, CALIFORNIA

) Date: December 22, 2008

) **DECLARATION OF JASON
MACDONALD IN SUPPORT OF
RESPONDENT'S BRIEF**

13
14 I, JASON MACDONALD, hereby declare and state as follows:

15
16 1. I am employed in the position of Purchasing Manager for the City of Fresno. I
17 have been employed with the City's General Services Department since January 9, 2007. I have
18 been employed in the capacity of City Purchasing Manager since July 1, 2008. The matters
19 stated in this declaration are of my own personal knowledge, except as to those matters stated
20 upon information and belief, and as to those matters, I am informed and believe them to be true.
21 If called upon, I could and would competently testify to all matters stated in this declaration
22 under oath.

23
24 2. This declaration is submitted in support of staff's determination to bypass
25 Appellant, Cruco Construction Group, Inc.'s bid proposal in Bid File No. 2765 (BF 2765)
26 pursuant to City of Fresno Resolution No. 2003-129.

27
28 3. In August, 2008, the City Purchasing Department, in its normal course of

1 business, published BF 2765 as a federally funded municipal public works project. BF 2765
2 contains federal procurement requirements and provisions.

3 4. BF 2765, as published, expressly required that the three lowest bidders provide,
4 within three working days from the date of the bid opening, a letter that the bidder would
5 perform not less than 30% of the total net bid amount of the original contract price, excluding
6 specialty items designated by the City.
7

8 5. BF 2765, as published, expressly required that the letter to be submitted by the
9 three lowest bidders identify the bid items or work to be done by the Prime Contractor.
10

11 6. The project under BF 2765 is primarily related to slurry seal work.

12 7. Bids for BF 2765, Fruit Avenue Bike Lane Project were opened on September 11,
13 2008.

14 8. City received two bids for BF 2765, which consisted of Appellant and Seal Rite
15 Paving & Grading.
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17 9. Appellant's bid was read by staff at the public bid opening. Appellant's total net
18 bid amount for BF 2765 was \$304,286.50.

19 10. The bid of Seal Rite Paving & Grading was read by staff at the public bid
20 opening. Seal Rite Paving & Grading's total net bid amount for BF 2765 was \$336,197.00.

21 11. Within three working days from bid opening, Appellant and Seal Rite Paving &
22 Grading each submitted a letter to the City indicating they would self-perform more than 30% of
23 the contract amount.
24

25 12. City staff initially determined Appellant to be the apparent low bidder.

26 13. On September 29, 2008, City staff posted a staff determination to award to
27 Appellant, as the apparent low bidder.
28

1 14. On September 30, 2008, Seal Rite Paving & Grading filed its letter appealing the
2 staff determination.

3 15. City staff subsequently determined that Appellant failed to identify in its letter the
4 bid items or work to be done by Appellant as the Prime Contractor and did not comply with the
5 requirements of BF 2765.
6

7 16. City determined Appellant to be nonresponsive and reversed its staff
8 determination.

9 17. On November 21, 2008, staff notified Appellant of the staff determination to
10 reject Appellant's bid as nonresponsive, due to Appellant's failure to identify in its letter the
11 specific bid items or work to be performed by Appellant.
12

13 18. City staff has determined that the bid proposal from the staff determined awardee,
14 Seal Rite Paving & Grading, is complete and complies with the express requirements of BF
15 2765.
16

17 19. The Charter of the City of Fresno requires the City to award to the lowest
18 responsive responsible bidder, subject to the City's right to reject any and all bids.

19 20. It was determined by City staff that Seal Rite Paving & Grading was the lowest
20 responsive and responsible bidder.
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22 21. On November 21, 2008, staff posted its determination to award to the second
23 lowest bidder, Seal Rite Paving & Grading.

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22. In accordance with City of Fresno Council Resolution 2003-129 which sets forth the appeal procedures, Appellant has appealed the staff determination.

I declare, under the penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed at Fresno, California

DATED: December __, 2008.

Jason MacDonald
Purchasing Manager
City of Fresno

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6 Attorneys for Respondent, CITY OF FRESNO

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8 IN RE:

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10 CITY OF FRESNO BID FILE NO. 2765
(FRUIT AVENUE BIKE LANE PROJECT) –
11 BID APPEAL FILED BY CRUCO
CONSTRUCTION GROUP, INC., OF
12 FRESNO, CALIFORNIA

Date: December 22, 2008

RESPONDENT'S BRIEF

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15 INTRODUCTION

16 Respondent, City of Fresno, (City) submits this Brief pursuant to City of Fresno Resolution
17 No. 2003-129 in support of the November 21, 2008 determination by City staff to bypass the
18 apparent low bid submitted by Appellant, Cruco Construction Group, Inc., of Fresno, California, as
19 nonresponsive to the Bid File No. 2765 Specifications (BF 2765). Respondent respectfully requests
20 that the Hearing Authority uphold the staff determination that Appellant's failure to identify in its
21 letter those bid items or work to be done by Appellant as the Prime Contractor, as required by BF
22 2765, is a material deviation from the requirements of BF 2765 so as to make Appellant's bid non-
23 responsive to BF 2765.

24 BACKGROUND

25 In August, 2008, consistent with and pursuant to the Fresno City Charter and as a local
26 project and municipal affair,¹ the City published BF 2765. Through BF 2765, the City invited

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28 ¹ City Charter Section 1208; Fresno Municipal Code Sections 4-102.

1 sealed bids for a bike lane project including, but not limited to, removal of existing striping,
2 designated signing, installation of roadside signs, traffic striping, asphalt paving, crack sealing, and
3 slurry sealing. BF 2765 is a federally assisted project, subject to federal procurement requirements.²

4 Bids were opened on September 11, 2008. Staff initially found Appellant Cruco
5 Construction Group, Inc., to be the apparent low bidder.³ On September 29, 2008, the second low
6 bidder, Seal Rite Paving & Grading, of Clovis, California, was notified of the staff determination to
7 award to Cruco Construction Group, Inc. On September 30, 2008, Seal Rite Paving & Grading
8 filed its letter appealing the staff determination. Staff subsequently determined that Cruco
9 Construction Group, Inc.'s proposal was nonresponsive, due to failure to comply with the
10 specifications which required the three lowest bidders to provide within three working days from
11 the bid opening "a letter that the bidder will perform not less than 30% of the total net bid amount"
12 and further requiring "[t]he letter shall identify those bid items or work to be done by the Prime
13 Contractor."⁴ The letter received by City from Appellant Cruco Construction Group, Inc., although
14 timely, did not identify the bid items or work to be performed by Cruco Construction Group, Inc.⁵
15 Staff reversed its determination, and on November 21, 2008, Appellant Cruco Construction Group,
16 Inc. was notified of the staff determination to reject Appellant's bid as nonresponsive and to award
17 to the second place bidder, Seal Rite Paving & Grading. Staff found Appellant's Bid Proposal (Bid)
18 nonresponsive for the following reasons:

19 "The specifications require that the three lowest bidders provide, within three working days
20 from the date of the bid opening, a letter that the bidder will perform not less than 30% of
21 the total net bid amount (original contract price), excluding specialty items designated by the
22 City on the bid proposal. The specifications further require that "The letter shall identify

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24 ² BF 2765, page i, page viii, page 1.14, page 3.1

25 ³ See Declaration of Jason MacDonald in Support of Respondent's Brief.

26 ⁴ BF 2765, page viii.

27 ⁵ Declaration of Jason MacDonald in Support of Respondent's Brief.

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1 those bid items or work to be done by the Prime Contractor". Your letter was received in
2 the time frame allowed but it did not identify the bid items or the work that would be
3 performed by your firm."⁶

4 Appellant has appealed the November 21, 2008 staff determination.

5
6

AUTHORITY

7 1. Federal Funding Source Procurement Requirements.

8 This project receives financial assistance from the U.S. Department of Transportation,
9 Federal Highway Administration.⁷ Federal procurement requirements applicable to BF 2765
10 provide, in part, "[i]n all cases where the construction is to be performed ... a request for
11 submission of bids shall be made by advertisement unless some other method is approved by the
12 Secretary. The Secretary shall require such plans and specifications and such methods of bidding as
13 shall be effective in securing competition."⁸

14 In general, bidding requirements provide that construction of each project "shall be
15 performed by contract awarded by competitive bidding..."⁹ "Contracts for the construction of each
16 project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder
17 meeting established criteria of responsibility. No requirement or obligation shall be imposed as a
18 condition precedent to the award of a contract to such bidder for a project, or to the Secretary's
19 concurrence in the award of a contract to such bidder, unless such requirement or obligation is
20 otherwise lawful and is specifically set forth in the advertised specifications."¹⁰

21 Public entities which are awarded federal funding "shall use their own procurement
22 procedures that reflect applicable State and local laws and regulations, provided that the

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24 ⁶ City's November 21, 2008 Notice of Intent to Reject Bid on BF 2765, page 1.

25 ⁷ BF 2765, page 1.14, page 3.1.

26 ⁸ 23 USC §112(a).

27 ⁹ 23 USC §112(b)(1).

28 ¹⁰ 23 USC §112(b)(1).

1 procurements conform to applicable Federal law....”¹¹ Federal contract law principles will apply
2 if there is no State law on a particular aspect of procurement.¹²

3 2. Constitutional Home Rule Authority of Charter City.

4 Charter cities derive authority directly from the California Constitution.¹³ The California
5 Constitution grants to charter cities supreme authority in the area of municipal affairs.¹⁴ The
6 administration of public works and procurement are municipal affairs, which includes the mode
7 for municipal contracting.¹⁵ A city must follow a charter provision requiring bids be awarded to
8 the lowest responsive and responsible bidder consistent with its local practices and procedures.¹⁶

9 The City is a charter city and procures and awards public works as a local municipal
10 affair.¹⁷ The Fresno City Council is to award the contract to the lowest responsive and
11 responsible bidder, subject to the right to reject any and all bids.¹⁸

12 3. Bid File 2765 Requirements.

13 a. General Bidding Provisions:

14 Bid File 2765 provides that all proposals “must be made on the Bid Proposal Form
15 provided by the Purchasing Manager....”¹⁹ Bid proposals are required to be “submitted on the
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17 ¹¹ FTA Circular 4220.1E “Procurement Standards Applicable to Third-Party Procurements”, Section 7(a).

18 ¹² *Id.*

19 ¹³ Cal. Const. Art. XI.

20 ¹⁴ Cal. Const. Art. XI, §5.

21 ¹⁵ *Loop Lumber Co. v. Lan Loben Sels*, 173 Cal. 228 (1916); Cal. Const. Art. XI.

22 ¹⁶ *Associated General Contractors of California v. San Francisco*, 813 F.2d (9th Cir. 1987), overruled in part
23 on other grounds in *C.S. McCrossan Construction, Inc. v. Rahn*, (2000) 96 F. Supp.2d 1283.

24 ¹⁷ Charter 1208. Charter 1208(a) provides, “Every contract involving an expenditure of city moneys of more
25 than one hundred thousand dollars (\$100,000), adjusted annually on the first of July to the nearest one thousand
26 dollars (\$1,000) in response to changes in the National Consumer Price Index (United States City Average For All
27 Products), for materials, supplies, equipment or for any public work of improvement, shall be let to the lowest
28 responsive and responsible bidder after notice by publication in a newspaper of general circulation within the city by
one or more insertions, the first of which shall be at least seven days before time for opening bids. For purposes of
this subsection, Council shall by ordinance define “public work of improvement”.”

¹⁸ FMC 4-102; BF 2765, page 1.4.

1 forms furnished by the Purchasing Manager, with all documents listed on the Bidder's Checklist,
2 completely filled out, properly signed by the Bidder and delivered, under sealed cover ... to the
3 Office of the Purchasing Manager ... prior to the date and time specified in the Notice Inviting
4 Bids, when all bids will be publicly opened and recorded."²⁰ BF 2765 further provides that "bids
5 received by the City by the scheduled bid opening time will be opened and publicly read but are
6 subject to verification that all the required documents have been submitted."²¹

7 The City reserves the right to "waive any informality or minor irregularity that does not
8 have a monetary consideration when it is in the best interest of the public and of the City to do
9 so. A discrepancy that offers a Bidder an unfair advantage will cause the bid to be
10 nonresponsive."²² The bid specifications provide any award of a contract "will be made to the
11 lowest responsive and responsible bidder...."²³ The City expressly reserves the right to reject
12 any and all bids.²⁴

13 b. FHWA Requirement:

14 Under the *Required Contract Provisions for Federal-Aid Construction Contracts* (Form
15 1273), as contained within BF 2765, it is provided "the contractor shall perform with its own
16 organization contract work amounting to not less than 30 percent (or a greater percentage if
17 specified elsewhere in the contract) of the total original contract price, excluding any specialty
18 items designated by the State. Specialty items may be performed by subcontract and the amount
19 of any such specialty items performed may be deducted from the total original contract price
20 before computing the amount of work required to be performed by the contractor's own
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23 ¹⁹ BF 2765, page i.

24 ²⁰ BF 2765, page iii, page 1.1.

25 ²¹ BF 2765, page 1.1.

26 ²² BF 2765, page 1.4.

27 ²³ BF 2765, page 1.4.

28 ²⁴ BF 2765, page 1.3.

1 organization.”²⁵

2 BF 2765 expressly requires the submission of documentation by the three lowest bidders,
3 which states compliance with the FHWA 30% self-performance requirement.²⁶ BF 2765
4 provides the three lowest bidders will submit “within three working days from the date of the bid
5 opening, a letter that the bidder will perform not less than 30% of the total net bid amount
6 (original contract price), excluding specialty items designated by the City on the bid proposal.
7 The letter shall identify those bid items or work to be done by the Prime Contractor.”²⁷

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9 4. Responsive Bidder Requirements.

10 The purpose of competitive bidding is to “eliminate favoritism, fraud, and corruption;
11 avoid misuse of public funds; and stimulate advantageous marketplace competition.”²⁸ Contracts
12 awarded “without strict compliance with bidding requirements will be set aside ... even where
13 ... there was in fact no corruption or adverse effect upon the bidding process, and [where] the
14 deviations would save the entity money.”²⁹

15 The invitation for bids must be written so that there is a clear method to compare bids.³⁰
16 A bid must conform to the material terms of the bid specifications.³¹ Responsiveness should be
17 determined from the face of the bid.³² A bid is responsive if it “promises to do what the bidding

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19 ²⁵ BF 2765, page 3.9; Local Assistance Procedures Manual (Form 1273), Exhibit 12-E, Attachment B,
20 Section VII(1); 23 CFR 635.

21 ²⁶ BF 2765, page viii.

22 ²⁷ BF 2765, page viii.

23 ²⁸ *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, (1988) 206 Cal. App. 3d 449,
24 456.

25 ²⁹ *Ibid.*

26 ³⁰ *Id.* at 457.

27 ³¹ *Menefee v. County of Fresno*, (1985) 163 Cal. App. 3d 1175, 1179.

28 ³² *Taylor Bus Service, Inc. v. San Diego Board of Education*, (1987) 195 Cal. App. 3d 1331, 1342.

1 instructions demand. A bidder is responsible if it can perform the contract as promised.”³³

2 Where the bid does not fully comply with specifications, a city is not required to award
3 the bid even if its deviations were immaterial.³⁴ A city’s power to waive immaterial deviations is
4 permissive, not mandatory.³⁵

5 A bid may be responsive even if there is a discrepancy in the bid, as long as the
6 discrepancy is inconsequential, that is, the discrepancy must not: (1) affect the amount of the bid;
7 (2) give a bidder an advantage over others (e.g., give a bidder an opportunity to avoid its
8 obligation to perform); (3) be a potential vehicle for favoritism; (4) influence potential bidders to
9 refrain from bidding; or (5) affect the ability to make bid comparisons.³⁶ “Whether in any given
10 case a bid varies substantially or only inconsequentially from the call for bids is a question of
11 fact.”³⁷

12 The test to determine whether a deviation in a bid is “sufficiently material to destroy its
13 competitive character is whether the variation affects the amount of the bid or gives bidder an
14 advantage or benefit not enjoyed by the other bidders.”³⁸ The above general test should be
15 applied to accomplish such purpose fairly and reasonably with sole reference to the public
16 interest, not the interests of bidders.³⁹

17 ANALYSIS

18 1. Federal Procurement Regulations require competitive bidding consistent with City’s local

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20 ³³ *Id.* at 1341.

21 ³⁴ *MCM Construction, Inc. v. City and County of San Francisco*, (1998) 66 Cal. App. 4th 359, 373.

22 ³⁵ *Ibid.*

23 ³⁶ *Ghilotti Construction Co. v. City of Richmond*, (1996) 45 Cal. App. 4th 897, 906.

24 ³⁷ *Ghilotti Construction Company v. City of Richmond, supra*, 45 Cal. App. 4th 897, 906, citing 47 Ops.Cal.
25 Atty. Gen., *supra*, 131.

26 ³⁸ 64 Am. Jur. 2d. Public Works and Contracts, Section 59 (1972); *Ghilotti Construction Company v. City of*
27 *Richmond, supra*, 45 Cal. App. 4th 897, 906.

28 ³⁹ See *Ghilotti Construction Company v. City of Richmond, supra*, 45 Cal. App. 4th 897, 907.

1 procurement requirements.

2 Federal procurement regulations require the City award to the lowest responsive,
3 responsible bidder following a request for submission of bids made by advertisement, consistent
4 with City standard procurement practices.

5 2. City's Local Procurement Process requires award to the lowest responsive and responsible
6 bidder based upon the Bid Proposal Form submitted by Bidder.

7 City requires advertised competitive bidding with any award to be made to the lowest
8 responsive and responsible bidder based upon the Bid Proposal Form timely provided by the
9 Bidder, subject to City's right to reject any and all bids.

10 3. Appellant was required to submit a letter identifying those bid items or work to be done by
11 the Prime Contractor.

12 BF 2765 expressly required that the three lowest bidders provide, within three working days
13 from the date of the bid opening, a letter that the bidder would perform not less than 30% of the
14 total net bid amount.⁴⁰ Appellant claims that BF 2765 "...does not request that [Appellant] identify
15 which items [Appellant] will be performing, only that [Appellant] will be performing at least
16 30%".⁴¹ Such claim is without merit. BF 2765 expressly required the letter identify those bid items
17 or work to be done by the Prime Contractor.⁴² Nothing in BF 2765 states that bidders may
18 disregard this requirement.

19 4. Appellant submitted a letter that did not identify the bid items or work to be done by
20 Appellant as Prime Contractor.

21 Within three working days from the date of the bid opening, Appellant did submit a letter to
22 the City that Appellant would self-perform more than 30% of the total amount of the contract.
23 However, Appellant's letter did not identify the bid items or the work that would be performed by
24

25 ⁴⁰ BF 2765, page viii; Declaration of Jason MacDonald in Support of Respondent's Brief.

26 ⁴¹ Appellant's Letter of Appeal of Determination of Non-Responsive Bid (dated November 10, 2008,
27 although received by City on December 2, 2008).

28 ⁴² BF 2765, page viii; Declaration of Jason MacDonald in Support of Respondent's Brief.

1 Appellant, and thus did not comply with BF 2765.⁴³

2 Appellant claims it has “bid numerous projects with the City of Fresno”.⁴⁴ Appellant
3 references a “particular project [which] required a 50% letter...” and claims that “[t]here was no
4 objection to this letter, which was accepted by the City of Fresno....”⁴⁵ However, the previous
5 project referred to by Appellant is distinguishable from this project, because the previous cited
6 project contained many construction components, whereas this project is primarily related to slurry
7 seal work.⁴⁶ In the previous project, if the Prime Contractor failed to specifically identify
8 the bid items or work which it would perform, and if the subcontractor information was set forth,
9 based on the nature of the multiple components of the project, it would be more apparent as to
10 which items or work were to be performed by the Prime Contractor. Here, since the work is
11 primarily slurry seal related, it would be difficult for City to determine which work would be
12 performed by the prime contractor if only work by subcontractors was listed. Thus, although
13 Appellant claims City’s past practice of accepting its letters has set precedence, City has not done
14 so.⁴⁷ Based on the type of work for this project, it is not readily determinable which bid items or
15 work would be performed by the prime contractor if not specifically identified by the bidder.

16 5. Appellant’s failure to comply with the BF 2765 requirement that the letter identify the bid
17 items or work to be done by the Prime Contractor rendered Appellant’s bid nonresponsive.

18 Appellant’s failure to identify in its letter the bid items or work to be done by Appellant as
19 the Prime Contractor is a material discrepancy affording Appellant a competitive advantage over the
20 other bidders. Appellant’s failure to identify the bid items or work it would perform gave Appellant
21 a competitive advantage in the form of an opportunity to be awarded a contract based upon a
22 nonresponsive bid. Appellant’s failure to identify the bid items or work it would perform gave

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24 ⁴³ Declaration of Jason MacDonald in Support of Respondent’s Brief.

25 ⁴⁴ Appellant’s Letter of Appeal of Determination of Non-Responsive Bid.

26 ⁴⁵ *Ibid.*

27 ⁴⁶ Declaration of Jason MacDonald in Support of Respondent’s Brief.

28 ⁴⁷ Appellant’s Letter of Appeal of Determination of Non-Responsive Bid.

1 Appellant a time advantage because Appellant did not timely submit a fully complete bid
2 proposal. Staff determined awardee of BF 2765, Seal Rite Paving & Grading, timely submitted a
3 complete bid proposal form, including a letter identifying those bid items or work to be done by
4 Seal Rite Paving & Grading.⁴⁸ An award of BF 2765 to Appellant based upon a partially complete
5 bid proposal could be a vehicle for favoritism because such an award is not supported by City
6 requirements. Additionally, awarding BF 2765 to Appellant after not fully complying with the
7 specifications may influence potential bidders to refrain from bidding on future City projects.
8 Further, Appellant's failure to timely identify the bid items or work it would perform in its letter
9 affected the ability of City to compare Appellant's proposal with that of other bidders.

10 6. City's staff determination to Bypass Appellant's incomplete Bid Proposal is supported
11 by Substantial Evidence.

12 The standard for review upon administrative mandate is whether the decision is supported
13 by substantial evidence in light of the entire record.⁴⁹ Abuse of discretion can be supported only
14 where (i) the City did not proceed in manner required by law, (ii) the City's determination is not
15 supported by findings, and (iii) such findings are not supported by the evidence.⁵⁰

16 For the reasons discussed above, the staff determination to bypass Appellant's incomplete
17 Bid Proposal Form for failure to identify in its letter the bid items or work to be done by
18 Appellant is entirely consistent with the requirements of BF 2765 and is supported by the
19 underlying facts.

20 Alternatively, even if Appellant's failure to identify the bid items or work to be done by
21 Appellant in its letter could somehow be viewed as "inconsequential", the City nonetheless has
22 complete discretion whether to waive inconsequential bid discrepancies. The City staff
23 recommendation to award to Seal Rite Paving & Grading is a lawful and reasonable exercise of

24

25 ⁴⁸ Declaration of Jason MacDonald in Support of Respondent's Brief.

26 ⁴⁹ Cal. Civ. Proc. Code Section 1094.5; see also *Topanga Assn. For a Scenic Community v. County of Los*
27 *Angeles* (1974) 11 Cal. 3d. 506, 515.

28 ⁵⁰ *Ibid.*

1 discretion vested solely and entirely in the City.

2 CONCLUSION

3 1. Appellant failed to timely identify in its letter those bid items or work to be done by
4 Appellant.

5 2. Appellant's failure to timely identify the bid items or work to be done by Appellant is not a
6 minor irregularity or inconsequential discrepancy because it affords a competitive advantage to
7 Appellant. Staff's determination to bypass Appellant's incomplete Bid Proposal is required under
8 City's procedure for local municipal affair public works projects.

9 3. Appellant's failure to timely identify the bid items or work to be done by Appellant does
10 afford Appellant a time advantage and prevents bid comparisons. An award to Appellant in such
11 situation could be a vehicle for favoritism of the local contracting community and could dissuade
12 the bidding community from submitting bids for future City projects.

13 4. Appellant's failure in its letter to the City to timely identify the bid items or work to be done
14 by Appellant rendered Appellant's bid nonresponsive.

15 5. Appellant is ineligible for the award.

16
17 DATED: December 17, 2008.

Respectfully submitted,

18 JAMES C. SANCHEZ
19 City Attorney

20 By: Stacie L. Melikian
21 Stacie L. Melikian
22 Deputy City Attorney
23 City of Fresno
24
25
26
27
28

DATE: JANUARY 12, 2009

TO: ANDREW T. SOUZA, Fresno City Manager

FROM: ALAN YENGOYAN, Appeal Hearing Officer

SUBJECT: FINDINGS AND RECOMMENDATIONS FROM THE APPEAL OF
CRUCO CONSTRUCTION GROUP, INC. OF FRESNO ON BID FILE
NO. 2765-11103 (FRUIT AVENUE BIKE LANE PROJECT)

This appeal hearing was held on December 22, 2008 on the appeal filed by Cruco Construction Group, Inc., (hereinafter, "Cruco"), the lowest bidder on the subject bid proposal, in regard to the City's Purchasing Division of the General Services Department's determination that Cruco was a 'non-responsive bidder' for having failed to provide a letter that the bidder will perform not less than 30% of the total net bid amount and further identifying those bid items that would be done by the prime contractor. Cruco has appealed the final determination of the Purchasing Division to award the bid to Seal Rite Paving and Grading (hereinafter, "Seal Rite").

The City was represented by Nancy Algier, Senior Deputy City Attorney and Stacie Melikian, Deputy City Attorney, and those in attendance and speaking at the hearing on behalf of the City were: Jason McDonald, Purchasing Manager, Paul Schramm, Supervising Buyer, Efren Banuelos, Assistant Public Works Director, Mark Johnson, Project Manager, and Steven Son, Capitol Project Manager.

Representing Cruco was David Cruce and Keith Puet, owners of Cruco, and Cindy Schroeder, Project Administrator. Representing Seal Rite was Brooke Ashjian, Chief Executive Officer and Mon San Lee, estimator and project manager for Seal Rite. Seal Rite, as the awarded bidder, was invited to present relevant evidence in defense of the award of the bid, pursuant to provisions of City Resolution No. 2003-129

Summary of Facts:

The background facts as stated in the City Respondent Brief by Ms. Melikian accurately state the background of the matter of this appeal. The relevant facts that this hearing officer finds as it relates to the decision by this hearing officer are as follows: Following the only two bids to be submitted on this project, Cruco and Seal Rite were asked to submit a letter stating that each bidder was going to itself perform no less than 30% of the total net bid amount (original contract amount), excluding specialty items.

(hereinafter, "30% requirement"). This was a requirement of this project for funding purpose by the Federal Highway Administration (FHWA). The federal requirement (see page 3.9 of the Specifications for the subject project (City Exhibit "10") was only a requirement as to the work that would be performed. It did not request a letter of affirmation that such in-house work would be done as part of any submitted bid. However, in order to protect itself from a federal audit regarding compliance, the City required that bidders provide a letter affirming the bidder's compliance to that requirement would be fulfilled and additionally requested that the letter "identify those bid items or work to be done by the Prime Contractor". Such a requirement in the bid specification is indeed reasonable and necessary for the City to determine how in fact the prime contractor was going to comply with this requirement.

Cruco timely complied to this requirement by its letter of September 16, 2008 (City Exhibit "12a") wherein it referenced the Sub-Contractor Detail Sheet it had submitted in its bid and on September 15, 2008 (see City Exhibit "5" (Attachments 2 &3)). Likewise, Seal-Rite submitted its letter and its sub-contractors (City Exhibit "12b").

As early as on or about September 12, 2008, Seal-Rite was objecting to Cruco's bid proposal upon the matter of the 30% requirement in a memorandum to Ron Baughman (City Exhibit "16"). After Cruco's letter of September 16, Paul Schramm requested further documentation from Cruco of the 30% requirement in an e-mail to Cindy Schroeder. Ms Schroeder responded back with a brief effort of clarification by an email to Mr. Schramm (City Exhibit "15"). On September 29, 2008, the Purchasing Division staff determined that Cruco was the lowest responsible bidder to which determination Seal Rite appealed on September 30, 2008 (City Exhibit "14").

On November 13, 2008, the City postponed Seal Rite's appeal hearing based upon additional information that had surfaced (see City Exhibit "14": letter from Jason McDonald to Seal-Rite dated November 13, 2008). Then on November 21, Cruco was notified by letter from Jason McDonald of the Purchasing Division intent to reverse its position and to now determine that Cruco's bid was non-responsive because Cruco's letter "did not identify the bid items or the work that would be performed by your firm." (City Exhibit "4"). No other reason was provided. Cruco appealed.

Discussion of Issues

When Cruco and Seal Rite responded to the Purchasing Division's request for a letter in compliance of Bid Checklist item #18 (see City Exhibit #1), Cruco and Seal Rite did so by affirmatively stating that each was in compliance with the 30% requirement. Seal Rite however specifically listed by item number that work which subcontractors would perform and those items it would perform (see City Exhibit #12b). Cruco did not state affirmatively in its letter which work it would be performing but referenced its Sub-Contractor Detail Sheet submitted the day before (City Exhibit #12a). Cruco did list its subcontractors on page 1.7 of its bid (See City Exhibit #1). Arguably, it could be then said that such response by Cruco was not responsive to Bid Checklist Item #18 and the only matter to decide was whether such a response made the bid non-responsive.

Cruco would have argued that its letter should be interpreted to mean that the work not being subbed to others meant that it was going to perform. However, the Purchasing Department on September 24 sought more information and documentation regarding Cruco's claim that it would be in compliance (see City Exhibit #15: email to Cindy Schroeder from Paul Schramm). Schroeder responded the following day with a brief response that states \$91,100 of work will be self-performed. At the hearing, it appeared that the 30% threshold amount for Cruco was stated to approximately be \$80,185. There was no other evidence introduced regarding any further communications with Cruco on the 30% requirement prior to and with no further explanation, the Purchasing Division on September 29 determined that Cruco was the lowest responsive bidder. Seal Rite appealed.

During the pendency of Seal-Rite's appeal, on November 12, the Purchasing Division reversed itself to now conclude that Cruco's bid was not responsive in regard to its letter pertaining to Bid Checklist item #18. No additional reasons were given to Cruco by the Purchasing Division.

Seal Rite as the second lowest and successful bidder did argue that from the same subcontractors being used by both contractors, Cruco could not in its bid be complying with the 30% requirement. Seal Rite's full bid proposal was not in evidence at this hearing for a comparison of the two bids on this issue. However, it is clear from the City's Respondent Brief and to the little to no argument by Ms. Melikian regarding the ability of Cruco to comply with the 30% requirement, that this was not the issue at this hearing the City was relying upon to behold Purchasing Division's recommendation the Cruco as a non-responsive bidder.

Without any further evidence intervening and no evidence being presented by the City at this hearing as to how Cruco's bid was responsive on September 29, but was non-responsive on November 12, it is simply unfair and poor bidding practice to allow such a reversal of a determination by the staff on little or no new evidence. It smacks of unethical and even corrupt bidding practices even when there is none. The Purchasing Division was aware of this issue by Seal Rite on or about September 12, 2008 and could have demanded more and better explanations before finding Cruco's bid responsive on September 29.

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.

This hearing officer concludes that upon the arguments presented by the City, Cruco submitted a responsive bid. However, it further appears that there is a cloud upon this bid project in regard to Cruco's contention that it could and would be in compliance with the 30% requirement. I cannot make any judgment on Seal Rite's bid in this regard because it was not in evidence. It is this hearing officer's primary

recommendation that all bids (there being only two) be rejected and the project re-submitted for bid with specifications that demand more information and documentation of the bidder's claim that it can comply with the federal 30% requirement. As a secondary recommendation, it is recommended that the Cruco be found as the lowest responsive bidder

Dated January 12, 2009



Alan Yengoyan,
Appeal Hearing Officer

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PURCHASING DIV
CITY OF FRESNO



CRUCOCO CONSTRUCTION

2443 Foundry Park, Fresno CA 93706

P. 559.498.3639

F. 559.498.3527

Lic# 897282

November 10, 2008

Via Hand Delivery 11-10-08
Via Fax 488-1069

Jason MacDonald, Purchasing Manager
City of Fresno
2101 G St.
Fresno, CA

RE: FRUIT AVENUE BIKE LANE PROJECT #2765-11103 - 30% LETTER

LETTER OF APPEAL OF DETERMINATION OF NON-RESPONSIVE BID

Dear Mr. MacDonald:

Please accept this letter as our response and Crucoco Construction Group's formal APPEAL, in relation to the City Attorney's Office determination that our Bid submitted for the Fruit Avenue Bike Lane on Sept. 11, 2008 has been deemed non-responsive.

We have several objections to your determination that we base our appeal on, as follows:

1. The basis of this Non-Responsive Bid is that we did not identify items or the work that would be performed by our firm.

Item 18 on the Bidders Checklist states: LETTER FROM BIDDER THAT HE/SHE WILL PERFORM NOT LESS THAN 30% OF THE TOTAL BID AMOUNT (ORIGINAL CONTRACT PRICE), excluding speciality items designated by the City on the bid proposal, page viii, to be submitted within three working days from the date of the bid opening.

The City acknowledges that we did submit within the allotted time frame, however did not identify items to be performed. As the statement reads, it requests a letter "stating that we will perform not less than 30% of the total bid amount", which we did. It does not request that we identify which items we will be performing, only that we will be performing at least 30%. As a foot note however, 1 day prior to submission of the 30% letter a Subcontractor Detail Sheet was submitted to Ron Baughman, City of Fresno, as also required by the Bidders Checklist Item 17, that outlines which items are to be Subcontracted. This document in conjunction with the 30% letter, determines which work will be completed by the General Contractor and which work is subcontracted. (Please see Attachment 1. Cover Bidders Check List; Attachment 2. 30% Letter; Attachment 3. Subcontractor Detail Sheet).

2. We have bid numerous projects with the City of Fresno. One of which was the No Neighborhood Left Behind Area 25 & 28, which we were the successful low bidder, performed

and completed. This particular project required a 50% letter, which we submitted. There was no objection to this letter, which was accepted by the City of Fresno as being compliant along with the Subcontract Detail Sheet. This in itself, sets precedence and a standard for which Cruco Construction has, and continues to, submit its bid documents. We would not change our procedures when these procedures have been in place and accepted by the City of Fresno on such previous occasions. (Please see Attachment 4. NNLB Area 25 & 25 50% Letter (Accepted by City of Fresno); Attachment 5. NNLB Area 59 30% Letter (Accepted by City of Fresno)).

Based on what we have summarized, and per previous bidding experiences with the City of Fresno, Cruco Construction therefore requests an Appeals Hearing to be set as per Resolution 2003-129. It is our understanding that the City of Fresno has 7 to 20 calendar days to do so, however Cruco Construction would greatly appreciate a timely response to this request - specifically due to our subcontractors, in a good faith effort, have been holding their pricing to assist the City of Fresno and Cruco Construction resolve this issue in a timely and most efficient manner.

Thank you.

Respectfully Submitted,
CRUCO CONSTRUCTION GROUP, INC.


Dave Cruce
Chief Operations Officer

*cc: Paul Williams
to Nancy Brown*

EVALUATION OF BID PROPOSALS

Page 1

FOR: FRUIT AVENUE BIKE LANE PROJECT

Bid File No. 2765
Bid Opening: 09/11/08

BIDDERS'S	TOTAL NET BID AMOUNT
1. Cruco Construction Group 2443 Foundry Park Ave Fresno, CA 93706	\$304,286.50
2. Withbro d.b.a Seal Rite Paving 959 Clovis Ave Clovis, CA 93612	\$336,197.00

Each bidder has agreed to allow the City sixty-two (62) 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, October 8, 2008, 5:00 P.M.

The Engineer's Estimate for this expenditure is \$481,165.00. The contract price is 37% above/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 Fruit Avenue Bike Lane Project from Ashlan Avenue to McKinley Avenue will remove the exiting Four lanes striping for two way traffic and install a Slurry Seal to prolong the life of the asphalt. The limits of the project will be re-striped with a road diet configuration combination of two lanes with a two-way left turn lane and bike lanes in both directions.

EVALUATION OF BID PROPOSALS

FOR: FRUIT AVENUE BIKE LANE PROJECT

Bid File No. 2765
Bid Opening: 09/11/08

DEPARTMENT CONCLUSIONS AND RECOMMENDATION:

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

Remarks:

Reject all bids. Reason: An Appeals Hearing was held on December 22, 2008, to determine if the lowest bidder was non responsive for having failed to provide complete documentation for the federal requirement to self-perform 30% of the project. In accordance with the recommendation set forth in the Hearing Officer's findings, staff recommends that all bids be rejected and the project be rebid.

Department Head Approval



Title Assistant Public Works Director

Date January 21, 2009

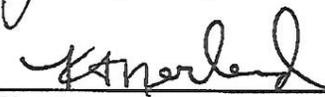
- | | |
|---|--|
| <input type="checkbox"/> Approve Dept. Recommendation | <input type="checkbox"/> Approve GSD/Purchasing Recommendation |
| <input type="checkbox"/> Disapprove | <input type="checkbox"/> Disapprove |
| <input type="checkbox"/> See Attachment | |

GENERAL SERVICES DEPARTMENT

CITY MANAGER

 1/23/2009
Purchasing Manager Date


City Manager or Designee Date

 1/23/09
Director Date