



City of Carson Report to Mayor and City Council

November 1, 2011
Special Orders of the Day

SUBJECT: CONSIDERATION OF THE APPEAL FILED BY WESTERN GROUP INC. FROM THE DENIAL OF A BID PROTEST FOR PUBLIC WORKS PROJECT NO. 1223, THE CARSON PARK MASTER PLAN

Submitted by William W. Wynder
Agency Counsel

Approved by David C. Biggs
City Manager

I. SUMMARY

Public Works Project No. 1223 constitutes the implementation of the Carson Park Master Plan, one of the City's Capital Improvement Program (CIP) projects (Exhibit No. 1).

On September 6, 2011, the Redevelopment Agency awarded a construction contract for Project No. 1223, subject to the existing PLA in effect for certain projects undertaken by the City of Carson (even though not required by the Redevelopment Agency), to the firm staff recommended to be the lowest monetary *and* responsive bidder, CWS Systems, Inc., in the bid amount of \$9,351,000.00 (Exhibit No. 2).

Following the award of contract award to CWS Systems, Inc. a timely bid protest was submitted by Western Group, Inc. ("Western"), who was the lowest *monetary* bidder, but whose bid staff deemed to be *non-responsive* and, hence, not eligible for consideration by the Agency Board in its deliberations on whom to award this public works project to.

As required by the bid specification documents, the bid protest was then reevaluated by the Office of the City Attorney, the approved construction management firm engaged by the Agency, and Agency senior staff. At the conclusion of that reevaluation, the bid protest was overruled, and the determination that Western did not submit a responsive bid was reaffirmed.

Again, as required by the bid specifications, Western was advised of its right to appeal this determination directly to the Agency Board of Directors. Western has timely perfected its appeal to the Agency Board who must now consider the same *de novo* (Exhibit Nos. 3, 4 and 5).

What follows is an articulation of the basis for each ground for appeal and the staff response to each ground for appeal. As noted, the Agency Board is charged to *independently* evaluate the grounds for appeal, the argument(s) and facts submitted in support of the same, staffs' response to each ground of appeal,

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warranted by the facts and arguments raised during the appeal hearing.

IV. BACKGROUND

A. PROJECT NO. 1223, CARSON PARK MASTER PLAN ("THE PROJECT")

The City's CIP calls for the construction of Project No. 1223, Carson Park Master Plan ("the Project"), located at 21411 S. Orrick Avenue. Carson Park occupies 10.9 acres and is developed with ball fields, 2 basketball courts, a children's play area, a horseshoe area, meeting/craft rooms, picnic areas, a snack bar, volleyball courts and a swimming pool.

The Project proposes construction of a 21,210 square foot building for a gymnasium, activity room, dance room, computer room, workout area, childcare facility and concession area. The existing community center building and the remote restroom building within Carson Park will be demolished and reconstructed as part of these improvements. The proposed improvement plan also includes upgrades or enhancements to the basketball courts, ball fields, and other park facilities. To support the expanded park uses, 41 parking spaces will be added for a total of 139 on-site parking spaces.

On December 1, 2009, the Redevelopment Agency approved a Professional Services Agreement with Westberg and White, Inc. for the preparation of the construction PS&E for the Project, for a negotiated fee not-to-exceed \$707,609.00. The Redevelopment Agency entered into an agreement with Westberg and White, Inc., and plans and specifications were prepared and completed for the construction of the Project.

On June 7, 2011, the Redevelopment Agency approved the PS&E, and instructed staff to advertise the work and call for bids for the Project's construction (Exhibit No. 6).

During the advertisement period, bidders were advised that in order for their bids to be considered "responsive," they must be presented in both of the described separate categories: (1) the bid shall be submitted without regard to whether the contract awarded is subject to the existing PLA in effect for certain projects in the City of Carson, and (2) an alternate bid must be submitted taking into account the requirements of the existing PLA in effect for certain projects in the City of Carson.

Bidders were also advised that their bids will be awarded in two steps. First, the Redevelopment Agency will determine whether to award this bid subject to the

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existing PLA in effect for certain projects in the City of Carson, or without regard to the existing PLA. Second, following that determination, the bid shall then be awarded to the lowest responsive and responsible bidder in the category selected by the Redevelopment Agency. The Redevelopment Agency reserves the right, in its sole and unfettered discretion, to award the contract to the lowest responsive and responsible bidder in either of the categories selected by the Redevelopment Agency.

On August 1, 2011, fifteen bids were received and opened by the Agency Secretary. The two firms which submitted the two lowest monetary bids are listed below:

	<u>Bidder</u>	<u>Place of Business</u>	<u>Non-PLA Bid</u>	<u>PLA Bid</u>
1.	CWS Systems, Inc.	Pasadena, CA	\$8,841,000.00	\$9,351,000.00
2.	Western Group, Inc.	Woodland Hills, CA	\$8,888,800.00	\$9,000,000.00

B. CITY REJECTION OF WESTERN BID AS "NON-RESPONSIVE"

The bid specifications issued for the Project (the "Bid Documents") clearly informed potential bidders that the City would evaluate all bids for "responsiveness" and that bids could be rejected if they did not conform to all aspects of the Bid Documents:

"The Owner will evaluate Bids for responsiveness at the time of the Bid opening and before award is made. A Bid must be in strict compliance with the commercial and technical specifications, without exception. Only Bids which conform in all material respects to the Bid Documents can be eligible for award. A Bid not meeting the requirements of the responsiveness checklist may be rejected immediately"

At the close of bidding, all bids were evaluated for responsiveness by the City Engineer, his support staff, and the design architect, all of whom are involved in the daily operations and have first hand knowledge of the Bid Documents issued for the Project.

In the judgment of Agency staff, after reviewing the bid documents submitted by Western Group, Inc. ("Western"), Western's bid was deemed "non-responsive" for (at least) three (3) reasons:

1. *Western failed to identify the "portion of work" to be performed by each subcontractor.*
2. *Western failed to designate a C-16 licensed subcontractor for the installation of a fire sprinkler.*

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3. *Western erroneously listed an "inactive" license number for one of its designated subcontractors.*

In light of these identified deficiencies, on September 6, 2011, Western's bid was rejected as "non-responsive" by Agency staff and the construction contract for the Project was awarded to the second-highest bidder, CWS Systems, Inc. ("CWS").

C. WESTERN BID PROTEST SUBMITTED TO AGENCY STAFF

On September 12, 2011, Agency staff received a bid protest from counsel for Western which (i) alleged that Western's bid *was* responsive to the Agency's Bid Documents and (ii) demanded that the contract be awarded to Western as the lowest monetary bidder.

Upon receipt of this bid protest, Agency staff consulted with the office of the City Attorney and the approved construction management firm engaged by the Agency, Vanir Construction Management, Inc., regarding the validity of Western's claims. Western's bid and bid protest were re-evaluated by these parties. At the conclusion of that re-evaluation, the bid protest was overruled, and the determination that Western did not submit a responsive bid was reaffirmed.

This determination was communicated to Western in a letter from Agency counsel, dated September 19, 2011 (Exhibit No. 4). At this time, Western was advised of its right to appeal this determination directly to the Agency Board of Directors.

On October 14, 2011, Western submitted a timely bid protest appeal to Agency Counsel through its counsel, the Law Office of Wasserman Comden, Casselman & Esensten, L.L.P (Exhibit No. 5).

What follows is an outline of each of the ground for appeal, the arguments in support of the appeal and the staff and legal counsel's response to each argument:

1. WESTERN'S FAILURE TO IDENTIFY THE "PORTION OF WORK" TO BE PERFORMED BY EACH SUBCONTRACTOR.

First, Agency staff rejected Western's bid as "non-responsive" because Western did not identify the "portion of work" to be performed by each subcontractor.

The Bid Documents included a "Designation of Subcontractor" form. On this form each bidder was asked to list all of its proposed subcontractors for the Project and to provide the following information regarding each: name, address, license number, class and the *portion of work (%)* to be performed by that

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subcontractor. Each of these items was listed as a separate line item with a space in which the bidder was to provide the requested information. (See, "Exhibit A" (Western's Designation of Subcontractors Form) to Exhibit 3 (Western Protest Letter).)

Western did not complete the line item on which they were asked to identify the "portion of work (%)" to be performed by each subcontractor.

WESTERN'S ARGUMENTS

Western argues the "portion of work" requirement was ambiguously phrased in the Bid Documents, such that they did not know that this requirement was a mandatory prerequisite for a responsive bid.

Specifically, Western's bid protest cites Paragraph 29 of the "Instructions to Bidders," which states that the "'List of Proposed Subcontractor' form must be completed as set forth below: (1) Name ... (2) Location ... (3) Work. For each listed Subcontractor, identify the *type/portion* of work to be performed in the Contract."

Western interprets this "type/portion" language in Paragraph 29 to mean that it is sufficient for a bidder to identify *either* the type *or* the portion of work to be done by each subcontractor. This is because this slash ("/") separating the words "type" and "portion" in Paragraph 29, also known as a virgule, is defined as follows:

- "a short stroke (/) between two words indicating that *whichever is appropriate may be chosen* to complete the sense of the text in which they occur" (*Webster's Encyclopedic Unabridged Dictionary of the English Language*, (1989))
- "a short diagonal line (/) placed between two words to indicate that *either word can be used* in interpreting the statement." (*Webster's New Twentieth Century Dictionary*, 2nd Edition, (1966))
- "Slashes (virgules) are used ... occasionally to separate *alternative words*..." (*MLA Handbook*, (1982))
- "A slash or slant or solidus or virgule [/] ... is used to indicate *a choice between* the words it separates. The slash can be translated as "*or*" and *should not be used where the word "or" could not be used in its place.* (<http://grammar.ccc.commnet.edu/grammar/marks/slash.htm>)

Western argues that the above definitions indicate that Paragraph 29 of the Instructions to the Bidders allowed the bidders to identify *either* the "type" of work *or* the "portion" of work to be performed by the listed subcontractors and

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that the Instructions to Bidder implied that "portion" was synonymous with "type."

Because of this ambiguity, Western argues that it included the type of work to be performed by each subcontractor under the "Description of Work" column of the "Designation of Subcontractor Form," but did not know that it also needed to complete the line item regarding "portion of work (%)" to be performed by each subcontractor. Western believes that this was sufficient because "often, the nature of work to be performed, i.e. electrical, mechanical, roofing, etc., is generically characterized as the "type" of work to be performed, or alternatively, as the "portion" of work to be performed." (See, Exhibit 3, p.4.)

Also, Western also argues that it did not fill out the "portion" line item on the Designation of Subcontractor form because they believed that the form "created an ambiguous situation by seeming to define "Portion" as "%" (percentage)." They go on to state that this "created additional ambiguity because the Designation of Subcontract form did not define what was meant by '%.' Was the Form seeking the percentage of that particular subcontractor's work as compared to the *entire Project scope*, or was it seeking the percentage of that particular subcontractor's work as compared to the total scope of *work subcontracted*?" (Id.)

As such, Western argues that they "complied fully with the bid instructions authorizing it to list either the "type" or "portion" of work. . . [and that it] was error to disqualify the bid of Western because it identified the type of work to be performed, as opposed to the portion/percentage of work to be performed by each subcontractor." (Id.)

STAFF'S ARGUMENTS

Agency staff feels that Western's omission of the "portion of work" to be performed by each subcontractor independently renders Western's bid "non-responsive for the following reasons:

(i) This "portion of work" requirement is stated in several sections of the Bid Documents.

Several sections of the bid specifications issued for the Project reiterate the requirement that the portion of work to be performed by that subcontractor must be included in all responsive bids. Specifically, the following portions of the Bid Documents mandated that the "portion of work" line item (left blank by Western) must be completed for each subcontractor listed in the bid:

- (1) The first paragraph of the "Designation of Subcontractors" form, states this requirement as follows:

"In compliance with the 'Subletting and Subcontracting Fair Practices Act' being Section 4100-4113 of the Government Code of the State of California, and any amendments thereto, each bidder shall set forth below the name and location of the place of the business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement in excess of one-half (1/2) of one percent (1%) of the prime contractor's total bid, ***and shall further set forth the portion of the work which will be done by each subcontractor.***"

This "portion of work" language is reiterated in paragraphs 2 and 3 of this Form. Moreover, it immediately precedes and is on the same page as the "List of Proposed Subcontractors" section of the bid documents, which Western left blank.

(2) Paragraph 16 of the "Instructions to Bidders" states as follows:

"Pursuant to state law, the Bidders must designate the name and location of each subcontractor who will perform work or render services for the prime Bidder in an amount that exceeds one-half of one percent (0.5%) of the Bidder's Total Price, ***as well as the portion of work each subcontractor will perform.*** Bidders must make these designations . . . on the document titled "List of Proposed Subcontractors," which has been included with the Contract Forms."

(3) Article 5.2.1 of the "General Conditions" section of the bid documents ("AWARDS OF SUBCONTRACTORS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK") states that:

"The Contractor shall also list the portion of the Work that will be done by each subcontractor."

(ii) This "portion of work (%)" line item is not ambiguous (as Western argues).

Western argues (as is detailed above) that the "portion of work (%)" line item is ambiguous because it does not state whether "%" meant "percentage of that particular subcontractor's work as compared to the entire Project scope" or "percentage of that particular subcontractor's work as compared to the total scope of work subcontracted." (See, *Exhibit 3* (Western Protest Letter), p.4, ¶ 5). However, contrary to this assertion, Agency staff noted that each of the above detailed portions of the bid documents clearly indicate that the percentage line item is defined as percentage of the total contract price:

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- The first paragraph of the Designation of Subcontractors form states that subcontractor "%" percentage indicates a percentage "of the *prime contractor's total bid*."
- Instructions to Bidders, Paragraph 16 specifies that percentage means percentage of the "*Total Bidder Price*."
- General Conditions, Article 5.2.1 states that "Contractor shall perform or provide, with its own organization, contract labor materials, and equipment amounting to at least 50 *percent of the Contract Price*."

Furthermore, Paragraph 28 of the "Instructions to Bidders," (titled "Bidders Responsiveness Checklist"), subsection (b), specifies that one of the criteria for bid "responsiveness" is "Completed Bid Data Forms (including Base Bid Price, Alternate Bid Price if any, valid and properly executed Bid Bond for 10% of the Total Bid Price and a complete List of Proposed Subcontractors)." However, Western's bid did not include a completed "List of Proposed Subcontractors" form, as both the "class" and "portion of work (%)" categories were left blank for every subcontractor designated in Western's bid. As such, Agency staff believes that this bid clearly fails one of the specified criteria for "responsiveness" and was properly rejected as "non-responsive."

(iii) This requirement is also codified in the Greenbook and California Law.

Moreover, Agency staff and counsel would note that this requirement is not only imposed by the Agency's Bid Documents, but is also information that the Agency *must have* in order to determine whether Western's bid conforms with California law. Accordingly, this is not a requirement that the Agency could waive, even if it chose to do so.

California law mandates that for all public works contracts, the general contractor must perform at least the amount of work equal to 50% of the contract price - i.e. the percentage of work to be performed by each subcontractor (as a percentage of the total contract price) may not exceed 50%. Therefore, without knowing the portion/percentage of work to be done by each of Western's contractors, Agency staff had no way of knowing whether the Western bid conformed to this state law requirement. As such, they felt bound to reject Western's bid as "non-responsive."

Specifically, this "portion of work" requirement is codified in California law at Public Contract Code § 4104, any board "taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement . . . that any person make a bid or offer to perform the work *shall* in his or her bid or offer, set forth: (a) [t]he name and location of the

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place of business of each subcontractor . . . ; [and] (b) *[t]he portion of work that will be done by each subcontractor under this act.*"

Application of this statute by California courts has affirmed that any deviation from this requirement (even those less egregious than Western's) render the bid "non-responsive" as a matter of law. For example, in *Valley Crest Landscapes, Inc. v. City Counsel of the City of Davis* (1996) 41 Cal.App.4th 1432, the Court of Appeal held that the failure to properly list the percentage of work to be subcontracted was a deviation from the bidding laws which could not be waived or corrected, even if the deviation was a clerical error. In *Valley Crest*, the bidder inadvertently wrote the wrong percentage for its subcontractors. Here, Western did not include any percentages at all.

In addition, in *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, the Court of Appeal reviewed the responsiveness of a bid which failed to designate the price to be paid to seven of the nine specified subcontractors (i.e. the portion of the total contract price which would represent the work of those seven subcontractors was missing from the bid). The Court of Appeal again affirmed the City's determination that the bid was non-responsive and noted that this was a "material deviation" that the City could not have waived, *even if it wanted to*.

Furthermore, the "Greenbook," which sets forth the standards for all Public Works Construction in the state of California, also codifies this requirement. Specifically, Section 2-3 of the Greenbook ("Subcontracts"), subsection 2-3.2, provides that "[t]he contractor shall perform, with its own organization, contract work amounting to at least 50 percent of the contract price"

These state law requirements were incorporated into the Bid Documents for the Project at Article 5.2.1 of the "General Conditions" section of the same, which specifies that "Contractor shall perform or provide, with its own organization, contract labor materials, and equipment amounting to at least 50 percent of the Contract Price."

(iv) Accordingly, Western's failure to provide this information is a non-waivable defect that renders Western's bid "non-responsive."

In sum, Agency staff believes that Western's failure to complete the "Portion of Work (%)" section of the Bid Documents made it impossible for the City to determine (1) the percentage of work to be performed by the prime contractor and (2) whether that percentage of work represents less than 50% of the total bid price (as required by the Bid Documents, California law and the Greenbook). Accordingly, because Western's compliance with both the subcontractor bid specifications and California law regarding the same could not be verified,

Agency staff believes that Western's bid was properly rejected as "non-responsive."

2. WESTERN'S FAILURE TO DESIGNATE A C-16 LICENSED SUBCONTRACTOR TO PERFORM THE INSTALLATION OF A FIRE SPRINKLER

In addition, Western's bid was deemed "non-responsive" by Agency staff because Western failed to submit a fire sprinkler contractor as a part of its bid in compliance with the Bid Documents.

WESTERN'S ARGUMENTS

Western argues that it was not required to list its fire sprinkler subcontractor – Smart Fire & Electrical Technology – because that subcontractor submitted a bid of \$40,000 for all work pertaining to fire sprinkler installation. They further argue that because this amount is less than 1/2 of 1% of the total contract price, pursuant to the Bid Documents, Western did not need to list this subcontractor.

STAFF'S ARGUMENTS

In staff's opinion, this issue is summarized as follows:

Pursuant to the Technical Specifications, construction plans and general building and safety requirements, the Project required installation of a fire sprinkler system, and all responsive bids therefore required that a subcontractor licensed to install such a system be included in the bid.

Specifically, Section 15305, paragraph 1.06(A) of the "Technical Specifications" portion of the Bid Documents requires the following work be performed as a part of the Project: "Installation and alternations of fire protection piping, equipment, specialties and accessories, and repair and servicing of equipment shall be performed only by a qualified installer." This fire sprinkler system is also set forth in the construction plans for the Project.

Western's bid (unlike the winning bid submitted by CWS) failed to identify a fire sprinkler subcontractor – rendering its bid non-responsive to this requirement.

Moreover, the installation of this fire sprinkler system requires a specialty license – i.e. the work must be performed by a specially licensed contractor. Pursuant to California law and the requirements imposed by the California

State License Board, fire sprinkler systems may only be installed by a contractor or subcontractor possessing a "C-16" fire protection license.

Specifically, California Code of Regulations, Title 16, Division 8, Article 3 provides that "[t]he installation of a fire protection system, including an electrical alarm system, shall be performed only by a contractor holding a fire protection contractor classification" (i.e. a C-16 license).

As such, Western could not cure this defect by performing the work itself, as Western's license classes are A, B, C-10 & C-39 and does not possess a C-16 license.

Furthermore, staff believes that this error is not waivable (even if the Agency wanted to waive it), as it would affect both the contract price (because this work is not factored into Western's contract price, and should be) and the percentage of work to be done by subcontractors (because this work represents more than one-half of one percent of the total contract price and so affects the calculation of total subcontractor work).

As such, even if the City was to waive the other defects and permit reconsideration of the Western bid, this fatal omission renders your client's bid incurably non-responsive such that the City would still be bound to reject to same upon re-review.

Finally, Agency staff believes that Western's argument that it was not required to list a fire sprinkler contractor because its bid was less than ½ of 1% of the Contract Price (i.e. \$40,000) is wholly inaccurate *based on Western's own bid documents*.

Rather, Item #13 (Fire Protection) of Western's bid breakdown states that the "fire protection" work will be performed for **\$100,000**. Section 15305, Part 1, subsection 1.04 of the Bid Documents defines "fire protection" as "a 'Wet-Pipe' system employing automatic sprinklers attached to a piping system containing water and connected to a water supply so that water discharges immediately from sprinklers opened by fire."

In other words, "fire protection" equals "fire sprinkler installation" pursuant to the Bid Documents, and Western has stated that they will perform "fire protection" for \$100,000. Therefore, any claim that this will be done for \$40,000 seems to be an impossibility, given Western's own bid documents. Moreover, based upon their experience with such work, this does not seem an accurate representation of the actual cost of installing a fire sprinkler. As such, Agency staff continues to believe that this was a justifiable basis for rejecting Western's bid as "non-responsive."

(3) Western's Erroneous Listing Of An "Inactive" License Number For One Of Its Designated Subcontractors

Third, Western's bid was rejected as "non-responsive" because it cited an inactive license number for one of its subcontractors. Specifically, inaccurate license information was provided for Western Roofing, the subcontractor identified for performance of the metal roof work required by the Project.

WESTERN'S ARGUMENTS

Western admits that it designated "Western Roofing" as the subcontractor identified for performance of the "Metal Roof" work to be performed for the Project and that the bid sheet includes the license No. for Western Roofing as "814839."

Western's bid protest also admits that Agency Staff correctly noted that this is an "inactive" license number.

However, they state that the license number that was *erroneously* listed next to Western Roofing is in fact the inactive license number for an unrelated subcontractor, "United Roofing," which was not listed to perform the work on the Project.

The correct license number for "Western Roofing," who is a license subcontractor, is "675902." This correct number was included in the bid proposal submitted by Western Roofing to Western Group (but was not provided to the Agency with Western's bid).

Western argues that if it had actually listed a subcontractor with an "inactive" license, then the Agency would have been within its rights to deem Western's bid non-responsive under Paragraph 17 of the Instructions to Bidders. However, they believe that because the specific subcontractor listed was in fact properly licensed, this is grounds for reject their bid as non-responsive.

STAFF'S ARGUMENTS

Agency staff believes that this error on the part of Western renders its bid "non-responsive" for the following reasons:

The Bid Documents state that the license number for each proposed subcontractor must be provided on the "license number" line item of the "Designation of Subcontractors" form.

The Bid Documents also warn bidders that bids which fail to include a valid license number for all contractors and subcontractors will be deemed non-responsive and rejected:

"[T]he possession of a valid license by each subcontractor is subject to strict compliance under state law. Pursuant to Section 7027.15 of the Business and Professions Code and Section 3300 of the Contract Code, all subcontractors must possess the appropriate licenses for each specialty subcontracted. Pursuant to Section 7028.5 of the Business and Professions Code, the Owner shall consider any bid submitted by a contractor not licensed in accordance with state law and pursuant to the requirements found in the bid documents to be non-responsive, and the Owner shall reject the bid." (Instructions to Bidders, Paragraph 17 ("License Requirements").)

The bid submitted by Western cited a subcontractor listed as "Western Roofing, Los Angeles, License No. 814839" as the subcontractor to perform the "metal roof" component of the Project.

As such, Western's bid was rejected by Agency staff for failure to comply with the above-detailed Bid Document specifications.

Western argues that this was a waivable clerical error, because the subcontractor in question did in fact possess a valid license, but that the wrong license number was listed in its bid due to clerical error.

However, Agency staff notes that there was no way for them to know this at the time the bid was rejected, because even if the Agency had conducted a further assessment of this license issue (which it is not required to do), it still would not have been able to verify that Western Roofing possessed a valid license.

Rather, a review of the California State License Board website would have revealed that there are over thirty licenses for companies titled "Western Roofing." Two (2) of these are based in Los Angeles, both with expired licenses. Moreover, the "Western Roofing" in possession of License No. 675902 (referenced in Western's protest letter), which Western asserts is the subcontractor that it meant to include in its bid, is registered with the California State License Board as "Popa Roofing, Inc. dba Western Roofing Systems."

Furthermore, the registered business location for "Popa Roofing, Inc. dba Western Roofing Systems" (another essential component of the Bid Documents) is an Irvine location – 13672 Onkayha Circle, Irvine, CA 92620. However, the "Western Roofing" bid to Western Group, submitted as Exhibit C to Western's protest letter, identifies this subcontractor as "Western Roofing Systems" located in Anaheim at 2031 East Cerritos Avenue, Suite 7E, Anaheim, CA 92805.

California courts have reviewed this same factual situation and agree with staff's evaluation. For example, in a case entitled *D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 149 Cal.App.4th 757, the Court of Appeal was asked to address a circumstance in which bid was rejected for listing an

unlicensed subcontractor. The Court enforced strict adherence to the bidding instructions in that case, which required that a valid license be listed, and affirmed the City's determination that the bid was non-responsive.

Here, given that the license number, business name and business location submitted by Western are all inconsistent with the registered information for this subcontractor, and that the Bid Documents required the listing of a valid license for each subcontractor, Agency staff rejected this bid as non-responsive.

D. AGENCY DETERMINATION REGARDING BID PROTEST APPEAL

In light of these arguments, the Agency Board must consider the validity of Western's bid protest *de novo* and make one of the following determinations:

1. If the Agency Board finds that *any one* of the three grounds cited by Agency staff render Western's bid "non-responsive," then the Agency may *overrule the appeal* and affirm Agency's staff's determination that Western did not submit a responsive bid.
2. If the Agency Board finds that *none* of the three grounds cited by Agency staff render Western's bid "non-responsive," then the Agency may *sustain the appeal*, overrule Agency's staff's determination that Western did not submit a responsive bid and make finding(s) necessary to determine that this firm submitted a responsive bid.

V. FISCAL IMPACT

Funds for the Project in the amount of \$10,000,000.00 were included in the FY 2010/11 Carson Consolidated Project Area budget, account no. 30-70-710-996-8004/0122301. Additionally on September 6, 2011, the budget was increased by \$2,327,799.00 to augment the total project cost of \$12,327,799.00.

VI. EXHIBITS

1. Location Map (pg. 17)
2. Minutes, September 6, 2011, Item No. 4. (pg. 18)
3. Western Group, Inc. letter dated September 12, 2011 (pgs. 19-40)
4. Agency Counsel Letter Dated September 29, 2011 (pgs. 41-47)
5. Western Group, Inc. Appeal letter dated October 12, 2011 (pgs. 48-76)
6. Minutes, June 7, 2011, Item No. 4. (pgs. 77-78)

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Prepared by: Lindsay M. Tabaian, Deputy City Attorney & Special Litigation Counsel

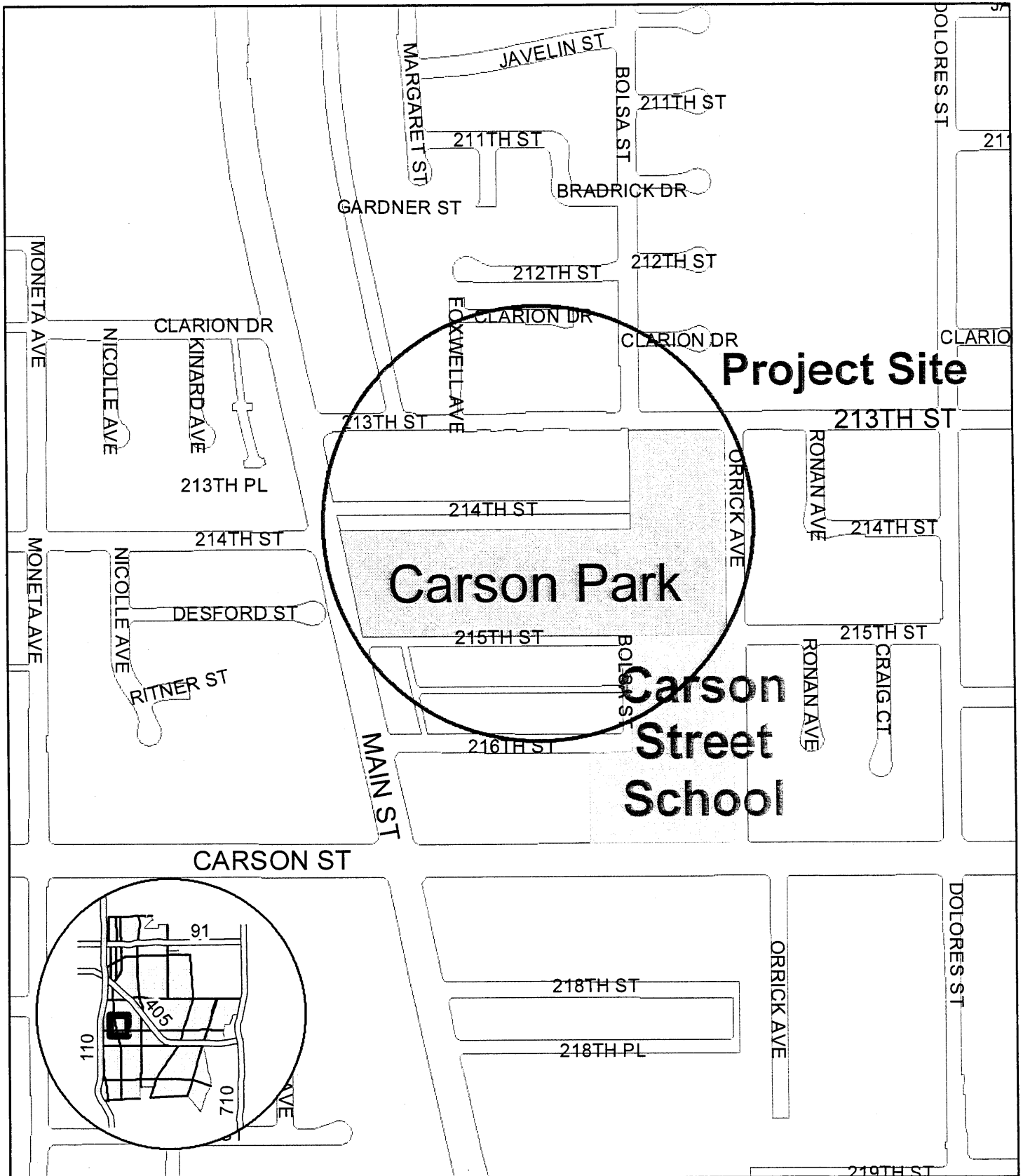
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Reviewed by:

City Clerk	City Treasurer
Administrative Services	Development Services
Economic Development Services	Public Services

Action taken by City Council

Date _____ Action _____



Location Map
Project No. 1223
Carson Park Master Plan



EXHIBIT NO. 1

ITEM NO. (4) CONSIDERATION OF A PROFESSIONAL SERVICES AGREEMENT WITH WESTBERG AND WHITE, INC. TO PREPARE PLANS, SPECIFICATIONS AND ESTIMATES FOR PROJECT NO. 1223: CARSON PARK MASTER PLAN (DEVELOPMENT SERVICES)

RECOMMENDATION for the Redevelopment Agency:

TAKE the following actions:

1. APPROVE a Professional Services Agreement with Westberg and White, Inc. to prepare plans, specifications and estimates for Project No. 1223: Carson Park Master Plan, for a negotiated fee not to exceed \$707,609.00.
2. AUTHORIZE the Agency Chairman to execute the Professional Services Agreement following approval as to form by the Agency Counsel.

ACTION: Item No. 4 was approved on the New Business Consent Calendar on motion of Dear, seconded by Gipson and unanimously carried by the following vote:

Ayes: Chairman Dear, Chairman Pro Tem Davis-Holmes, Agency Member Santarina,
 Agency Member Gipson, and Agency Member Ruiz-Raber
Noes: None
Abstain: None
Absent: None

WASSERMAN, COMDEN, CASSELMAN & ESENSTEN, L.L.P.

DAVID B. CASSELMAN
TIM T. CHANG*
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September 12, 2011

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Re: Carson Park Master Plan, Project No. 1223
Bid Protest of Western Group, Inc.

Dear Gentlemen:

This office represents Western Group, Inc. ("Western"), with respect to the Carson Park Master Plan, Project No. 1223 ("Project"). The purpose of this letter is to submit a bid protest on behalf of Western, pursuant to Paragraph 21 of the Instructions to Bidders, for the above referenced Project.

1. INTRODUCTION

On Monday August 1, 2011, the City of Carson opened bids for the Project. The City received fifteen bids, each one including a bid on the base contract work, as well as an alternative bid including Project Labor Agreement ("PLA") categories.

On September 6, 2011, following publication of the City Council Agenda, Western became aware that all of its bids had been deemed "non-responsive" and that CWS Systems Inc. ("CWS") was deemed to have submitted the lowest responsive bid, with respect to its base bid and its alternate bid. In that the City award was based upon



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the alternate PLA bid, and given that the Western bid was actually \$351,000 less than the CWS bid,¹ Western hereby submits this bid protest, pursuant to Paragraph 21 of the Project Instructions to Bidders.

The grounds for the protest are as follows:

- Western's bid, which was the lowest bid submitted by the responding contractors, was erroneously disqualified;
- The bid submitted by CWS contained defects, such that it should have been disqualified;
- Accordingly, as the lowest responsive and responsible bidder, Western should have been awarded the Contract.

The relevant facts are as follows:

2. ERRONEOUS DISQUALIFICATION OF WESTERN BID

a. Failure to Identify Type/Portion of Work

Paragraph 29 of the Instructions to Bidders, sets forth the requirements for the proper listing at bid time of proposed subcontractors. It states in relevant part as follows:

"The List of Proposed Subcontractor Forms must be completed as set forth below:

- (1) Name ...
- (2) Location ...
- (3) Work. For listed Subcontractor, identify *the type/portion* of work to be performed in the Contract.²

¹ Western bid \$9,000,000 for the alternative PLA-based scope of work. CWS bid \$9,351,000 for the alternative PLA-based scope of work.

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(4) License. For listed Subcontractors, list current valid license number."

As can be seen on the attached listing sheets submitted by Western (Exhibit A), Western properly listed the *type of work* to be performed by each subcontractor, under the "Description of Work" column on the "Designation of Subcontractor" form. Western did not however, fill out the line item regarding the "Portion of Work (%)" to be performed by each subcontractor.

On September 6, 2011, Western learned from its review of the City Council Agenda, that its bid had been disqualified on the following grounds:

"In reviewing the bid documents submitted by Western Group, Inc. staff determined that Western Group Inc.:

1. Failed to meet the requirements of the Standard Specifications for Public Works Construction requiring that the General Contractor shall set forth in the bid *the type and portion* of the work to be performed by his listed subcontractors.

Western maintains that City Staff incorrectly interpreted the listing requirements to mandate inclusion of information regarding *both* the type *and* the portion of work to be performed. However, the bid instructions simply dictate that the bidder identify "*type/portion*", suggesting that identification of *either* the type *or* the portion was sufficient.

In Paragraph 29 of the Instructions to Bidders, the forward slash ("/") separating the words "type" and "portion" is also known as a "virgule." Definitions of a virgule include the following:

- "a short oblique stroke (/) between two words indicating that *whichever is appropriate may be chosen* to complete the sense of the text in which they occur" (*Webster's Encyclopedic Unabridged Dictionary of the English Language*, (1989))

² Unless otherwise indicated, all emphasis to quoted material has been added.

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- “a short diagonal line (/) placed between two words to indicate that *either word can be used* in interpreting the statement.” (Webster’s New Twentieth Century Dictionary, 2nd Edition, (1966))
- “Slashes (virgules) are used ... occasionally to separate *alternative words*...” (MLA Handbook, (1982))
- “A slash or slant or solidus or virgule [/] ... is used to indicate *a choice between* the words it separates. The slash can be translated as “*or*” and *should not be used where the word “or” could not be used in its place.* (<http://grammar.ccc.commnet.edu/grammar/marks/slash.htm>)

As the above definitions clearly indicate, Paragraph 29 of the Instructions to the Bidders allowed the bidders to identify *either* the "type" of work *or* the "portion" of work to be performed by the listed subcontractors. The Instructions to Bidder implied that "portion" was synonymous with "type." Often, the nature of work to be performed, i.e. electrical, mechanical, roofing, etc., is generically characterized as the "type" of work to be performed, or alternatively, as the "portion" of work to be performed.

Western opted to fill in the type of work, under the description column, because as the "/" implied in the Instructions to Bidders, Western believed that "type" and "portion" were interchangeable. Also, Western did not fill out the "Portion" line item on the "Designation of Subcontractor" Form because that form created an ambiguous situation by seeming to define "Portion" as "%" (percentage) Not only did this definition conflict with the Instructions to Bidders, it created additional ambiguity because the "Designation of Subcontract" Form did not define what was meant by "%." Was the Form seeking the percentage of that particular subcontractor's work as compared to the *entire Project scope*, or was it seeking the percentage of that particular subcontractor's work as compared to the total scope of *work subcontracted*?

The Introductory paragraph to the Instructions to Bidders requires that:

"All Bids must be made in accordance with these Instructions to Bidders ('ITB')."

In that the Bid Form created an ambiguity, Western submitted its bid in conformity with the Instructions to Bidders. Western left the line item regarding "Portion of Work (%)" blank, as it believed that it had complied fully with the bid instructions authorizing it to

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list either the "type" or "portion" of work. Accordingly, it was error to disqualify the bid of Western because it identified the type of work to be performed, as opposed to the portion/percentage of work to be performed by each subcontractor.

b. Inactive License

The September 7, 2011 notification Western received identified a second reason for disqualification of the Western bid:

"2. Sub-Contractor has 1 license out of the 14 that is in 'inactive' status."

This comment refers to the entry for "Western Roofing", the subcontractor identified for performance of the "Metal Roof" work to be performed. The bid sheet includes the license No. for Western Roofing as "814839."

The City Staff correctly noted that this is an "inactive" license number. However, it is the inactive license number for an *unrelated subcontractor*, "United Roofing," which was not listed to perform the work on the Project. Western erroneously included the wrong license number on its bid form.

The correct license number for "Western Roofing," the subcontractor specifically identified and listed on the bid forms, is "675902." Enclosed as Exhibit B, is a print out from the Contractors State License Board confirming that Western Roofing possesses a "current" and "active" license.

Also attached, as Exhibit C is a true and correct copy of the actual bid proposal of Western Roofing, submitted to Western Group immediately prior to bid opening. This bid proposal includes the correct, active license number of the subcontractor specifically listed on the bid form. United Roofing, the subcontractor with the inactive license, had never been listed by Western for this Project. Neither had Western ever received a bid proposal from United Roofing for this Project.

Were Western to have actually listed a subcontractor with an "inactive" license, then the City would have been within its rights to deem Western's bid non-responsive, under Paragraph 17 of the Instructions to Bidders. However, the specific subcontractor listed was in fact properly licensed. Accordingly, whereas the accidental inclusion of the erroneous license number by Western on the bid form may have caused some confusion,



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the actual subcontractor identified to perform the work was listed and does possess a valid, active license. Thus, it was error to disqualify the bid of Western on this basis.

c. Harmless Error

The types of defects identified in the September 6, 2011 City Council Agenda were inconsequential, at most. It is within the power of the City to waive inconsequential deviations in the bid, which do not give the bidder an unfair advantage. As noted in *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897:

"In this case we hold that *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."
(Id. at 900.)

In *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal. App. 4th 359, it was noted:

"Other cases ... for the proposition that a deviating bid must be set aside despite the absence of corruption or actual adverse effect on the bidding process make it clear that *the deviation must be capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders*. [Citations.] These considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case.

The right of the City to waive minor defects is manifest in the permissive language of Paragraph 12 of the Instructions to Bidders (and repeated verbatim in Paragraph 15), which states in relevant part that:

"Owner reserves the right to reject any or all Bids, to waive any informality or irregularity in any Bid received where such

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waiver is in the best interests of the Owner, and to be the sole judge of the merits of the respective Bids received.”³

Regardless of the fact that the Western bid (i) did not identify the percentage of work to be performed by each subcontractor; and (ii) included the erroneous license number of a properly licensed subcontractor, none of these issues has an impact on the bid price or the manner in which that price was developed. No competitive advantage, nor corruption in the bidding process resulted from these issues. As such, Western’s low bid should not have been disqualified.

3. DEFECTIVE BID SUBMITTED BY CWS

A review of the bid submitted by CWS evidences defects in its bid, which make it ineligible for contract award. Specifically, CWS failed to list subcontractors to perform the following specified work

- Methane gas design and build (Note A, Sheet C.100): C61/D12 license requirement. Neither is CWS capable of self-performing this work, as it only has Class, A, B, C39 and C53 licenses.
- Glazing (Spec Section 08800): C17 license requirement. Again, CWS does not possess this license and thus, cannot self-perform this work.

³ The City actually demonstrated the latitude of its authority when CWS failed to include the "Letter of Assent" as required under the PLA category, but was afforded an opportunity by the City to cure this defect in its bid. Paragraph 17 of the Instructions to Bidders allows the bidder a brief period of time to provide "evidence satisfactory to the Owner of all valid license(s) currently held by that Bidder and each of the Bidder's subcontractors, before awarding the Contract." In the interest of equity, Western should have been afforded an opportunity to cure any perceived defects in its bid, especially in light of the fact that each of the issues cited against Western in the September 6, 2011 City Council Agenda, are less significant or consequential than the failure of CWS to include the Letter of Assent in its bid submission.

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- Lithocrete (Sheet L-3): the installer must be manufacturer-approved. Shaw & Sons is the only manufacturer-approved contractor, and was not listed by CWS.
- Resilient Wood Flooring Assemblies (Spec Section 09645, 1.03B Qualifications): (i) the supplier must have been regularly engaged in the manufacture of the type of material specified, for at least 5 years; and (ii) the installer must have been trained and certified by the manufacturer. No listings were included by CWS for these categories.

In that CWS neglected to list these subcontractors, which each represent greater than ½ of a percent of the work to be performed, and given that CWS is not licensed/qualified to perform this work, its bid is not responsive and it should therefore be disqualified.

4. BID PROTEST

The administratively amended Paragraph 21 of the Instructions to Bidders states that:

"Bidders may file a 'protest' of a contract award with the Owner's City Engineer. In order for a Bidder's protest to be considered valid, the protest must:

C. Be filed in writing within five (5) business days after the City Council's award of the construction contract to the lowest responsive and responsible bidder.⁴

D. Clearly identify the specific accusation involved.

⁴ Western previously served a preliminary bid protest on August 5, 2011, in compliance with the pre-amended version of Paragraph 21, which required (per Item C) that the protest be filed within 5 days after the *bid opening*.

