



City of Carson Report to Redevelopment Agency

November 15, 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
Executive Director

I. SUMMARY

This appeal hearing has been continued from the prior City Council meeting to tonight's meeting at the request of the Office of the City Attorney and at no fault of Western Group, Inc. ("Western"). Public Works Project No. 1223 constitutes the implementation of the Carson Park Master Plan, one of the City's Capital Improvement Program (CIP) projects (the "Project") (Exhibit No. 1).

On September 6, 2011, the Agency awarded a construction contract for the Project, 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. ("CWS"), in the bid amount of \$9,351,000.00 (Exhibit No. 2).

Following the award of contract award to CWS a timely bid protest was submitted by Western, who was the lowest *monetary* bidder, but whose bid staff rejected as *non-responsive* and, hence, not eligible for consideration by the Agency Board.

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*.

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, and the oral argument of the representative(s) for Western.

At the close of the hearing, the Agency Board must then make its collective and *independent determination* whether to:

- (1) "overrule" the appeal (meaning up-hold the determination that Western did not submit a responsive bid); or
- (2) "sustain" the appeal (meaning grant Western's appeal and take appropriate action(s) in light of the same).

II. RECOMMENDATION

TAKE the following actions:

- 1. CONDUCT a hearing on the bid protest appeal submitted by Western for the Project and entertain the argument(s) of Western's representatives and other interested persons who wish to speak to the issues raised on appeal.
- 2. CLOSE the bid protest appeal hearing and then *EITHER*
 - 2(a) OVERRULE the appeal and affirm the determination that Western did not submit a responsive bid. In that case, the Agency Board must determine to *EITHER*
 - (i) authorize staff to issue a notice to proceed to CWS after the construction contract is executed *OR*
 - (ii) defer issuing the notice to proceed and executing the construction contract until all challenges to the award of contract have been exhausted; *OR ALTERNATIVELY*
 - 2(b) SUSTAIN the appeal, make the finding(s) necessary to determine that Western submitted a responsive bid *AND*
 - (i) void the award of contract to CWS, *AND*
 - (ii) direct staff to reevaluate all responsive bids submitted for the Project and return at the next Council meeting with a new recommendation for an award of contract in light of such reevaluation.
- 3. DIRECT the Office of the City Attorney to give written notice of the determination(s) of the Agency Board along with the notice required by Code of Civil Procedure § 1094.6.

III. ALTERNATIVES

TAKE such other action, consistent with law, as the Agency Board determines is warranted by the facts and arguments raised during the appeal hearing.

IV. BACKGROUND**A. PROJECT NO. 1223, CARSON PARK MASTER PLAN.**

The City's CIP calls for the construction of Project No. 1223, Carson Park Master Plan, 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 Agency approved a Professional Services Agreement with Westberg and White, Inc. for the preparation of the construction plans and specifications ("PS&E") for the Project for a negotiated fee not-to-exceed \$707,609. The Agency subsequently entered into an agreement with this firm, and PS&E 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. 3).

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. (*See*, Endnote 1.)

Bidders were also advised that their bids would be awarded in two steps. First, the Agency would determine whether to award this bid subject to the 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 would be awarded to the lowest responsive and responsible bidder in the category selected by the Agency. In the Bid Documents, the Agency reserved 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 Agency.

On August 1, 2011, fifteen bids were received and opened by the Agency Secretary. The 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. AGENCY REJECTION OF WESTERN BID AS NON RESPONSIVE.

The bid specifications issued by the Agency 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"

Accordingly, at the close of bidding, all bids were evaluated for responsiveness by the City Engineer, his support staff, and the design architect.

In the judgment of Agency staff, after reviewing the bid submitted by 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.*
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.

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. (Exhibit No. 4)

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, regarding the validity of Western's claims. Western's bid and bid protest were reevaluated by these parties. At the conclusion of that reevaluation, 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. 5) 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 & Esenstein, L.L.P. (Exhibit No. 6) This matter was originally scheduled for hearing at the November 1, 2011, City Council meeting. At no fault of Western, it became necessary to continue the appeal hearing to tonight's City Council meeting.

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. ISSUE #1: WESTERN'S FAILURE TO IDENTIFY THE "PORTION OF THE 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 subcontractor. Each of these items was listed as a separate line item with a space in which the bidder was to fill in the requested information. (See, "Exhibit A" to Exhibit No. 4, Western's Designation of Subcontractors Form.) However, Western did not complete the line item on which they were asked to identify the "portion of work (%)" to be performed by each subcontractor.

a) *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. (*See*, Endnote 2.)

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).)

Western argues that this definition indicates 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 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."

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)." In their bid protest letter, 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*?"

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."

b) 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:

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

First, staff notes that this requirement was not ambiguous. Rather, *several* sections of Bid Documents 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:

(a) Designation of Subcontractors form, Paragraph 1.

This section states that: "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.

(b) Instructions to Bidders, Paragraph 16.

This section states that: "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."

(c) *General Conditions; Article 5.2. ("AWARDS OF SUBCONTRACTORS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK")*

This section states that: *"The Contractor shall also list the portion of the Work that will be done by each subcontractor."*

(2) **The "portion of work (%)" line item is not ambiguous.**

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." (Exhibit 4). However, contrary to this assertion, Agency staff notes 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. For example:

- 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.

(3) **This is not a waivable defect, as 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 percent of the contract price. In other words, the percentage of work to be performed by each subcontractor (as a percentage of the total contract price) may not exceed 50 percent. 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, which states that:

"[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 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."

- (4) Accordingly, it is staffs' position that Western's failure to provide this information is a non-waivable defect that renders Westerns 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. ISSUE #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.

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.

a) 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.

Specifically, they note that Paragraph 16 of the Instructions to Bidders portions of the Bid Documents requires that all Bidders "designate the name and location of each subcontractor who will . . . render services to the prime bidder in an amount that exceeds one-half of one percent (0.5%) of the Bidder's Total Price . . ." As such, Western contends that because this \$40,000 fire sprinkler bid is less than ½ of 1% of Western's total contract price, pursuant to the Bid Documents, Western did not need to list this subcontractor.

b) Staff's Arguments.

Among other reasons, staff rejected Western's bid because it failed to identify a fire sprinkler subcontractor – rendering its bid non-responsive to the above-detailed portions of the Bid Documents regarding the same.

Moreover, staff notes that 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).

Western does not possess 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.

Furthermore, staff believes that this error is not waiveable (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 Western'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 waster 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."

c) Western's Supplemental Arguments.

After reviewing the above-detailed response by staff, on November 2, 2011, Western submitted a supplementary letter to Agency staff regarding the above-detailed fire sprinkler issue. (Exhibit 7)

In this letter, Western again re-iterates its argument that it was not required to list the fire sprinkler subcontractor, because the bid amount was \$40,000 - i.e. less than one-half of one percent of the bid price. In addition, Western notes that although they listed a bid amount of \$100,000 for "fire protection" work in their bid breakdown, they contend that this \$100,000 quote represents (1) \$40,000 for fire sprinkler work and (2) \$60,000 for "site work to be self-performed by Western."

d) Staff's Response to Western's Supplemental Arguments.

After receiving and reviewing these responses, staff's response is three-fold:

First, pursuant to the Bid Documents, the price for fire installation work *and nothing else* should have been listed under Item 13 of a responsive bid. This line item of the bid documents strictly defined in the Bid Documents at Section 15305 (set forth in subsection (b) above). Staff specifically limited the definition of this line item so that they could get an accurate picture of the cost of this work, and nothing else, in the breakdown. As such, Western's bid would still be non-responsive if they, as they argue, included both site work and fire installation work under this line item.

Second, staff cannot be sure what Western means when it states that the other \$60,000 of this line item represents "site work to the self-performed by Western," because Western does not go into detail as to what this alleged "site work" entails. However, staff notes that any "site work" related to fire sprinkler installation should have been included in the bid breakdown either under Item 14 (Plumbing), Item 20 (Utilities) or Item 21 (Exterior Improvements), but certainly *not* under Item 13, which is strictly defined in scope.

Third, staff believes that a \$40,000 fire sprinkler bid is not sufficiently high to be an accurate or responsible subcontractor bid. Given that all other bids for this worked ranged from \$190,000 to \$53,000, the next lowest bids being between \$54,000 and \$58,000, this number simply seems too low.

As such, even if this \$40,000 Smartfire proposal *had* been included in Western's bid, staff still would have rejected this bid as non-responsive and/or non-responsible based upon this number. Staff would have the authority to reject on these grounds pursuant to Paragraph 20 of the Instructions to Bidders, which states that: "*The Owner may reject bids which, in its opinion when compared to other bids received or the Owner's internal estimates, does not accurately reflect the cost to perform the work.*"

3. ISSUE #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.

a) 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, Western contends 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.

b) 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 waiveable 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. (*See*, Endnote 3.)

D. AGENCY BOARD DETERMINATION REGARDING WESTERN BID PROTEST APPEAL.

In light of these arguments, the Agency Board must now 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.

ENDNOTES TO BACKGROUND:

Endnote 1. Another issue noted by Agency staff during its review of the Western bid (though not discussed in detail herein) is the fact that except for the "General Requirements" line item of the bid breakdown (Item 1), all other items in Western's bid breakdown (i.e. Items 2-21) provide the same bid price for PLA and non-PLA. This indicates to staff that Western's bid may also be "non-responsible" as well as non-responsive, because project labor agreements typically increase costs, and it is uncommon for PLA and non-PLA bids to provide the same bid prices for most line items.

Endnote 2. These arguments are set forth in detail in Exhibits 4 and 6 to this staff report (i.e. Western's Bid Protest Letter and Appeal Letter), from which all quotes in this portion of the staff report are taken.

Endnote 3. After reviewing the above-detailed response by staff, on October 1, 2011, Agency staff received two supplementary letters regarding this issue from both CWS Systems, Inc. (*see, Exhibit 8, CWS Letter*) and Western (*see, Exhibit 9, Western 11/1/11 Letter*). In these letters, which are incorporated herein by this reference, Western argues (and CWS refutes) that because one of the CWS subcontractors also listed an inaccurate license number, either both bids or neither bid should be rejected as non-responsive on this ground.

Counsel and staff do not believe that this supplementary argument is notable for two reasons. First, the only party that has standing to raise this alleged CWS defect is another *responsive* bidder. To date, this issue has not been raised by a responsive bidder, and Western does not have such standing. Second, this defect in the CWS bid is likely waiveable, as all other aspects of the information provided for the affected CWS subcontractor conformed with statute and provided staff with enough information to confirm that this subcontractor was licensed.

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. Project Location Map (pg. 19)
2. September 6, 2011, Agency Board Meeting Minutes, Item No. 4. (pg. 20)
3. June 7, 2011, Agency Board Meeting Minutes, Item No. 4 (pgs. 21)
4. Western Bid Protest Letter, dated September 12, 2011. (pgs. 22-43)
5. Agency Bid Protest Rejection Letter, dated September 29, 2011. (pgs. 44-50)
6. Western Appeal Letter, dated October 12, 2011. (pgs. 51-96)
7. Western Letter, dated November 2, 2011. (pgs. 97-99)
8. CWS Letter, dated November 1, 2011. (pgs. 100-103)
9. Western Letter, dated November 2, 2011. (pgs. 104-108)

G:\ENGINEERING DIVISION\PROJECTS\1223 Carson Park Master Plan\Agendas\11-01-11 CRA Project 1223 CARSON PARK Apeal.docx

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

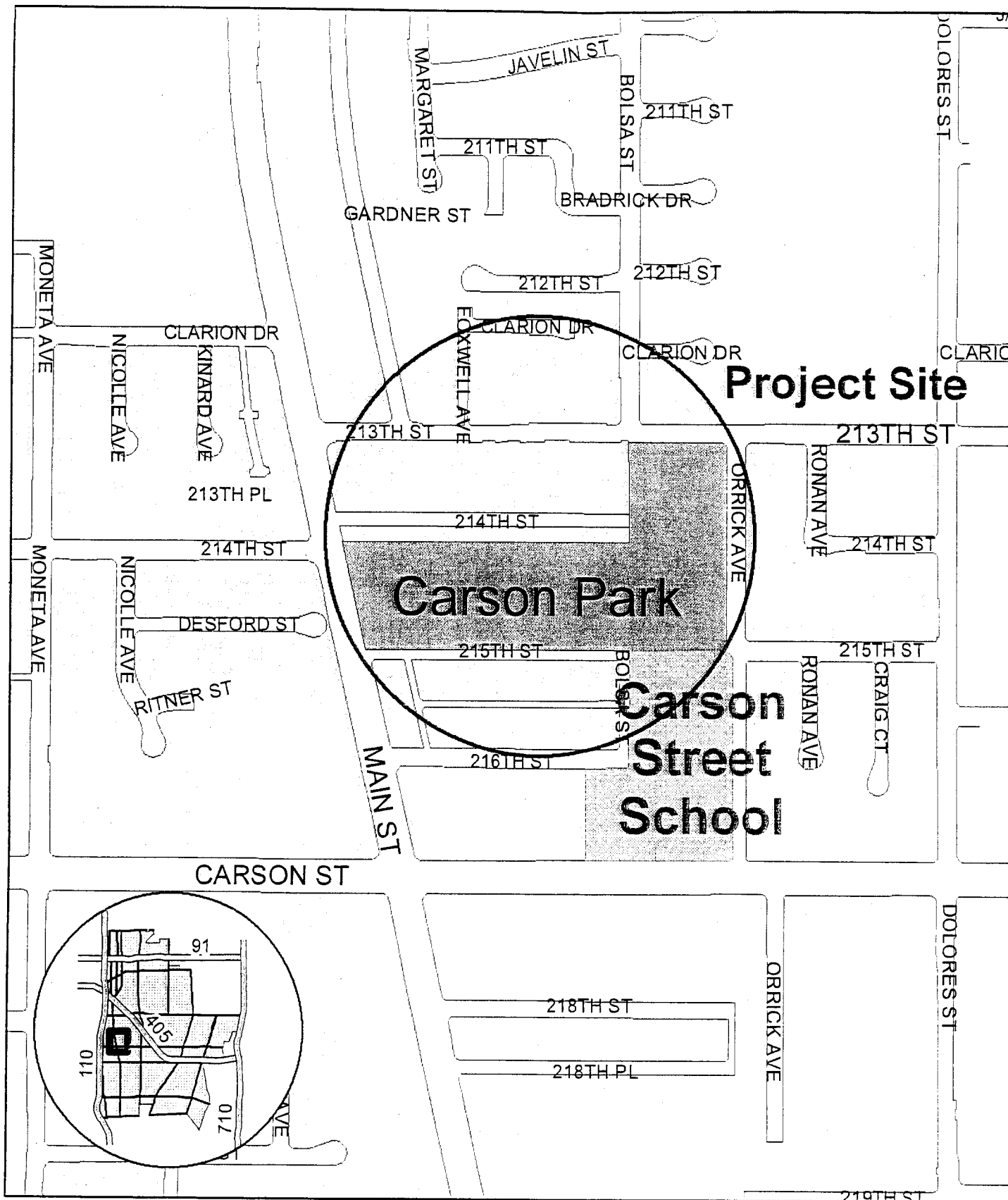
sf:Rev061902

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

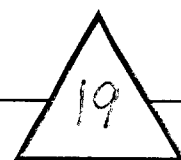


EXHIBIT NO. 1

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*
LEONARD J. COMDEN
ROBERT L. ESENSTEN*
CATHERINE S. GARCIA
MARK S. GOTTLIEB
MELISSA M. HARNETT
DAVID POLINSKY
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KATHERINE A. WINDER
DENNIS M. WU

OF COUNSEL

KATHRYN S. MARSHALL
MONTE SILVER*****

AFFILIATED OFFICES

BEIJING
SHANGHAI

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**ALSO ADMITTED IN NEW YORK
***ALSO ADMITTED IN WASH., D.C.
****ALSO ADMITTED IN HAWAII
*****ALSO ADMITTED IN ISRAEL

September 12, 2011

WRITER'S DIRECT CONTACT
DPOLINSKY@WCCELAW.COM

Mr. M. Victor Rollinger
City Engineer
City of Carson
701 E. Carson St.
Carson, Ca 90745

Mr. Gilbert Marquez
Senior Civil Engineer
City of Carson
701 E. Carson St.
Carson, Ca 90745

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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September 12, 2011
Page 2

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 test 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,

Mr. Gilbert Marquez
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Page 6

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

Mr. Gilbert Marquez

September 12, 2011

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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*.

Mr. Gilbert Marquez

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Page 9

E. Clearly identify the specific Owner Staff/Board recommendation being protested.

F. Specify, in detail, the grounds of the protest and the facts supporting the protest.

G. Include all relevant, supporting documentation with the protest at time of filing."

Western herein complies as directed with the above items and includes as relevant supporting documents the following:

- Exhibit A – Designation of Subcontractor forms submitted by Western at bid opening
- Exhibit B – Printout from the CSLB demonstrating the active status of the Western Roofing license

Exhibit C – Copy of the August 1, 2011 bid proposal by Western Roofing System received by Western Group, Inc.

5. CONCLUDING REMARKS

In that Western's bid beat that of the next lowest bidder by over \$350,000.00, Western is clearly the lowest bidder. Its bid submission adequately demonstrates its responsibility and responsiveness.

The Bid submitted by Western substantially conformed to the City's call for bids, and may still be accepted since none of the variances could have affected the amount of the bid. *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 905 (47 Ops. Cal. Atty. Gen. 129, 130 (1966), quoted with approval in *National Identification Systems, Inc. v. State Bd. of Control*, 11 Cal. App. 4th at p. 1453, and *Konica*, 206 Cal. App. 3d at p. 454.) As such, these particular grounds should not prevent award of the Contract to Western.

Should you require further information, please do not hesitate to contact either Western Group principals, Sion Shabo and Meir Levi, or myself.

Law Offices

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

Mr. Gilbert Marquez
September 12, 2011
Page 10

Thank you for your consideration.

Respectfully submitted,

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


DAVID POLINSKY

DP/alm
Enclosure

cc: S. Shabo
M. Levi

1000904.1

EXHIBIT A

BID

PROJECT NO. 1223

CARSON PARK MASTER PLAN

DESIGNATION OF SUBCONTRACTORS

In compliance with the "Subletting and Subcontracting Fair Practices Act" being Sections 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 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 an amount 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. Only one subcontractor for each such portion shall be listed.

If the contractor fails to specify a subcontractor for any portion of the work to be performed under the contract, he shall be deemed to have agreed to perform such portion himself, and he shall not be permitted to subcontract that portion of the work except under the conditions hereinafter set forth.

Subletting or subcontracting of any portion of the work to which subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the legislative body of the Owner.

LIST OF PROPOSED SUBCONTRACTORS

["Duplicate Next Page if needed for listing additional subcontractor."]

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: ENKAY

Abatement

Address: COSTA MESA

License Number: 509785

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: SHAW'S SON

Lithoconcrete

Address: COSTA MESA

License Number: 274144

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: ACE FENCE

Fencing

Address: LA PUENTE

License Number: 801674

Class ~~801674~~ ^{all} C-13

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: MCWILL

~~ALL~~

Hardwood Floor

Address: GARDENA

License Number: 676605

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: RAINBOW GLAZING

Glazing

Address: GREENSBORO

License Number: 863691

Class _____

Portion of Work (%) _____

~~Name and Address
of Subcontractor~~

~~Description of Work
to be Subcontracted~~

~~Name: TRIUMPH PAINTING~~

~~Painting~~

~~Address: RIVERSIDE~~

~~License Number: 440957~~

~~Class _____~~

~~Portion of Work (%) _____~~

*M.C.
5-1-11*

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: N M C

Masonry

Address: LANCASTER

License Number: 388218

Class _____

Portion of Work (%) _____

LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: SADDLES Plumbing

Plumbing

Address: Chatsworth

License Number: 268688

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: SILVESTER Roofing

Roofing / PVC

Address: ESCONDIDO

License Number: 516696

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: WESTERN Roofing

Metal Roof

Address: Los Angeles

License Number: 914839

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Sal Cal

Struc. Steel

Address: SUN MARCS

License Number: 847158

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: THE BARBER-WEBS

Methane Gas

Address: Los Angeles

License Number: _____

ANALYSIS

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Air Design Solution

HVAC

Address: Montebello

License Number: 953818

Class _____

Portion of Work (%) _____

LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: J. Kel Painting

Painting

Address: Carona

License Number: 754163

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Bennett Landscape

Landscape

Address: Los Angeles/Harbor City

License Number: 479003

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: _____

Address: _____

License Number: _____

Class _____

Portion of Work (%) _____



EXHIBIT B

Department of Consumer Affairs Contractors State License Board



Contractor's License Detail - License # 675902

DISCLAIMER: A license status check provides information taken from the CSLB license database. Before relying on this information, you should be aware of the following limitations.

CSLB complaint disclosure is restricted by law ([B&P 7124.6](#)) If this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.

Per [B&P 7071.17](#) , only construction related civil judgments reported to the CSLB are disclosed.

Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.

Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

License Number	675902	Extract Date: 9/10/2011				
<hr/>						
Business Information	POPA ROOFING INC dba WESTERN ROOFING SYSTEMS					
Entity:	Corporation					
Issue Date	08/24/1993					
Expire Date	08/31/2013					
License Status	This license is current and active. All information below should be reviewed.					
Additional Status:						
Classifications:	<table border="0" style="width: 100%;"> <thead> <tr> <th style="text-align: left;">CLASS</th> <th style="text-align: left;">DESCRIPTION</th> </tr> </thead> <tbody> <tr> <td>C39</td> <td><u>ROOFING</u></td> </tr> </tbody> </table>		CLASS	DESCRIPTION	C39	<u>ROOFING</u>
CLASS	DESCRIPTION					
C39	<u>ROOFING</u>					
Bonding:	CONTRACTOR'S BOND This license filed Contractor's Bond number 122569 in the amount of \$12,500 with the bonding company <u>AMERICAN CONTRACTORS INDEMNITY COMPANY.</u> Effective Date: 01/01/2007 <u>Contractor's Bonding History</u>					
Workers' Compensation:	This license has workers compensation insurance with the <u>COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY</u>					

Policy Number:CPCA12495

Effective Date: 04/15/2011

Expire Date: 04/15/2012

[Workers' Compensation History](#)

Personnel listed on this license (current or disassociated) are listed on other licenses.

Personnel List	Salesperson List	Other Licenses
--------------------------------	----------------------------------	--------------------------------

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EXHIBIT C



Contractors Lic. No. 676902

Western Roofing Systems

2031 East Cerritos Avenue, Suite 7E, Anaheim, CA 92806
 Office (714) 778-5163 Fax (714) 778-0248
 Regional Office: (800) 766-8000

Gerald H. Calderone Jr. (818) 314-0377 geraldcalderone@sbcglobal.net

Date: 1 August 2011

From: GH Calderone

Subject: Standing Seam Roof Proposal and Specification for the Carson Park Master Plan: Rec Bldg. with Gymnasium 1223

To: Bidders

We are pleased to offer the following proposal for your standing seam roof system:

Subject to compliance with specified requirements, standing seam metal roofing products shall be R-MER, manufactured by the Garland Company or equivalent. Work to comply with Section(s) 07411, Specification pages 1-10 and Plan Pages: elevations and details.

Galvalume (Zincalume): Provide steel sheets coated with 55% aluminum and 45% zinc/mischmetal by weight, conforming to ASTM A 782, 0.55 ounces per square foot. 24ga.

- COLOR: STANDARD.
- UNDERLAYMENT: HPR Fire-Tite FR Base Sheet
- PRODUCT: SPAN SYSTEM, 22" o.c., 24 GA. Mesas every 2' o.c.
- Panel Width: 18' with stiffening ribs.
- Seam Cap: Snap on.
- Bearing Plates.
- Rain gutters and Downspouts, in accordance with plans and specifications. Includes leaderheads.
- ACCESSORIES: ALL ROOFING RELATED.
- CLEANING: Remove rubbish, debris and waste materials. Legally disposing of off the Project site.
- PROTECTION: Protect the Work of this section until Substantial Completion.
- WARRANTIES: 5 YEARS watertightness and installation. 20 year finish warranty.
- ESTIMATED NUMBER OF WORKING DAYS REQUIRED TO COMPLETE: 21

COST (FINAL PRICE TO BE ADJUSTED AFTER PHYSICAL MEASUREMENT OF ROOF DECK IS COMPLETED BY WESTERN ROOFING SYSTEMS. ANY CHANGES TO ROOFING STRUCTURE WILL BE CONSIDERED A CHANGE ORDER. PRICE WILL BE ADJUSTED ACCORDINGLY.):

Metal Roof and Rainoutter System: \$195,660

Rigid Insulation System: \$53,975

Western Roofing Systems Inc., will not be subject to a higher retention than that retention being withheld by the owner. The retention will not exceed : 10% up to 60% ; 0% thereafter. Any retention reductions received by contractor will be passed along to Western Roofing Systems Inc. when they are received from the own.

Please contact me at 818-314-0377 with any questions. Thank you, for considering Western Roofing Systems.

Regards,

GH Calderone



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WYNDER, LLP**
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September 29, 2011

David Polinsky, Esq.
Wasserman, Comden, Casselman & Esensten, LLP
5567 Reseda Blvd.
Suite # 330
Tarzana, CA 91356

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

Dear Mr. Polinsky:

We are the City Attorney for the City of Carson. In that capacity, your letter of September 12, 2011 has been referred to us for an independent review and response. For the reasons that will follow, we are satisfied that City staff acted legally and appropriately in deeming the bid submitted by your client, Western Group, Inc. ("Western"), non-responsive and hence your client's bid was not eligible for being awarded this public works project. Accordingly, your bid protest is, respectfully, overruled.

The specifications issued for Project No. 1223, Carson Park Master Plan (the "Bid Documents") clearly informed potential bidders that the City would evaluate all bids for responsiveness:

"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"

We are advised that 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 Project No. 1223, Carson Park Master Plan (the "Project"). In addition, upon receipt of your bid protest, the aforementioned City staff, the City's Construction Management Team and the City Attorney's office carefully re-reviewed the Project specifications and your client's response to the same.



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In the judgment of these bid evaluators, and in our legal opinion, your bid was properly deemed "non-responsive" for at least the following reasons:

A. **Failure To Identify Portion Of Work To Be Performed By Each Subcontractor.**

First, as you admit, on the "Designation of Subcontractor" form (a form which the Bid Documents say must be fully completed in order for a bid to be deemed "responsive"¹), "Western did not fill out the line item regarding the 'Portion of Work (%)' to be performed by each subcontractor." (Western Protest Letter, p.3, ¶ 1.) Contrary to the position asserted in your letter, the specifications issued for the Project *make abundantly clear, in several sections thereof, that both the name of each subcontractor and the portion of work to be performed by that subcontractor must be included in all responsive bids.*

Even accepting, for the purposes of argument, your contention that the "type/portion" language included in Paragraph 29 of the "Instructions to Bidders" was ambiguous (which the City does not concede), this requirement was specifically repeated no less than *three times* and in *three separate portions* of the Bid Documents. Citing to the one phrase of the Bid Documents which tenuously supports your argument is convenient, but presents an inaccurate picture of the requirements mandated by the City *and by State law.*

The following portions of the Bid Documents clearly mandated that the "portion of work" line item (left blank by your client) must be completed for each subcontractor listed in the bid:

(1) ***The very first paragraph of the "Designation of Subcontractors" form, which you yourself attach as an exhibit to your demand letter, clearly 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.***"

¹ See, "Instructions to Bidders," Paragraph 28, ("Bidders Responsiveness Checklist"), subsection (b) ("Completed Bid Data Forms").



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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, on which your client left the "portion of work" line item blank in direct contradiction to these explicit instructions.

(2) Paragraph 16 of the "Instructions to Bidders" ("Designation of Subcontractors") 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 Subcontractors²," 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."

Moreover, you argued that the "%" line item of the Designation of Contract Form is unclear 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, Western Protest Letter, p.4, ¶ 5). However, contrary to this assertion, it should be 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*:

- 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*."

² This language makes it *mandatory* that this information be included on the "List of Proposed Contractors" portion of the "Designation of Subcontractors" form – which your client left blank.



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- 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**)." Your client'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, this bid clearly fails one of the specified criteria for "responsiveness" and was properly rejected as "non-responsive."

Finally, it should be noted that this requirement is not waiveable, as it is not only imposed by the City of Carson's Bid Documents³, but is also required by the Greenbook – which sets forth the standards for all Public Works Construction in the state of California. 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**"

In sum, Western's failure to complete the "Portion of Work (%)" section of the Bid Documents makes 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, the Greenbook and California law). Accordingly, because Western's compliance with both the subcontractor bid specifications and California law regarding the same could not be verified, Western's bid was properly rejected as "non-responsive" by the City.

B. Listing Of Inactive License For Subcontractor.

Second, as you also admit, Western's bid 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. This error on the part of your client also renders its bid non-responsive for the following reasons:

³ Article 5.2.1 of the General Conditions section of the bid documents specifies the California law requirement that the "Contractor shall perform or provide, with its own organization, contract labor materials, and equipment amounting to at least 50 percent of the Contract Price."



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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 your client cited a subcontractor listed "Western Roofing, Los Angeles, License No. 814839" as the subcontractor to perform the "metal roof" component of the Project. As such, your client's bid was properly rejected for failure to comply with the above-detailed Bid Document specifications.

In your protest letter, you argue that it was "error for the City to disqualify the bid of Western on this basis" – *i.e.* that the City erred by noting the error of *your client*. Why is your client's mistake the City's mistake? Because the City should have done the extra detective work necessary to discover that the license listed was the inactive license of another subcontractor?

Even if, *arguendo*, the City *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 your protest letter), which you assert is the subcontractor that your client 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 your protest letter, identifies this subcontractor as "Western Roofing Systems" located in Anaheim at 2031 East Cerritos Avenue, Suite 7E, Anaheim, CA 92805.



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Given that the license number, business name and business location submitted by your client are *all* inconsistent with the registered information for this subcontractor, it is rather audacious for your client to assert that the *City* erred by failing to uncover and address this mistake before rejecting your client's bid. Moreover, even if the City had discovered this inaccuracy, or permitted your client to correct it after the fact, the "portion of work" error (detailed above) compounded by the fire sprinkler issue (detailed below) would have rendered this a futile exercise.

C. Failure To Submit A Fire Sprinkler Subcontractor.

Finally, Western's bid was also deemed non-responsive because your client failed to submit a fire sprinkler contractor as a part of its bid in compliance with the Bid Documents. 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.

Your client'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, this error is clearly not "harmless," 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



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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.

Accordingly, we are satisfied that the City acted within the bounds of the Bid Documents, the Carson Municipal Code, and applicable state law in rejecting your client's bid. Therefore, the City hereby overrules your protest. Pursuant to bid protest procedures specified at Paragraph 21 of the Instructions to Bidders contained in the Bid Documents, your client will have the right to appeal this decision to the City Council *within 10 business days of the receipt of this letter*, should it deem such an appeal appropriate.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Lindsay M. Tabaian'.

Lindsay M. Tabaian
of ALESHIRE & WYNDER, LLP

cc: Mr. M. Victor Rollinger,
City Engineer
Mr. Gilbert Marquez,
Senior Civil Engineer
Mr. David Biggs,
City Manager
Mr. William Wynder,
City Attorney

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October 12, 2011

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Mr. Gilbert Marquez
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701 E. Carson St.
Carson, Ca 90745

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

Dear Gentilepersons:

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 appeal to the City Council, the September 29, 2011 denial of the September 12, 2011 Bid Protest submitted by Western, pursuant to Amended 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

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EXHIBIT NO. 6



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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 the alternate PLA bid, and given that the Western bid was actually \$351,000 less than the CWS bid,¹ Western submitted a Bid Protest on September 12, 2011, pursuant to Paragraph 21 of the Project Instructions to Bidders.² The grounds for the protest were 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.

By way of letter dated September 29, 2011³, the City Attorney rejected Western's bid protest, stating in summary, that the bid was not responsive because: (i) Western failed to indicate the percentage of the total contract work to be completed by each subcontractor listed; (2) Western included an erroneous license number for its Metal Roofing subcontractor; and (3) Western failed to list a fire sprinkler subcontractor. These grounds, as articulated by the City Attorney letter, are insufficient to overcome the Western Bid Protest, as discussed below.

2. FAILURE TO IDENTIFY TYPE/PORTION OF WORK

As more fully set forth in the Bid Protest letter, attached hereto as Exhibit A, Western's bid was disqualified because, according to the City, Western failed to identify both **the type and portion** of the work to be performed by its listed subcontractors. Western disputed this finding on the following grounds:

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

² A copy of the September 12, 2011 Bid Protest letter is attached hereto as Exhibit A.

³ A copy of the September 29, 2011 City Attorney letter is attached hereto as Exhibit B.

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- The verbatim Instruction to Bidders⁴, that the bidder specify the "**type/portion**"⁵ of work to be performed by the listed subcontractor, suggests that the two words, "type and "portion", are synonymous and/or interchangeable. This is evidenced by the "virgule" or "/" which separates the two words and which is expressly defined as "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)) In that Western's bid specified the exact "type" of work to be performed by each listed subcontractor, it complied with the bid instructions.
- The term "portion" is not defined in the Instructions to Bidders, in the General Conditions, or in any Contract document. At a minimum, the term "portion" is ambiguous. The City contention that "portion of work" undeniably means "percentage of work" is not supportable, when the terms is read within the context of the Contract Documents.
- If, as the City argues, "portion" means "percentage" of work, as opposed to "type" of work, Western is still in compliance because the Instructions allowed it to identify either the type of work to be performed or the percentage of work to be performed by the listed subcontractors.

The City's September 29th denial letter absolutely ignores the first point – namely that the Instructions to Bidders expressly authorized a bidder to identify either the type of work to be performed or the percentage. The City's only comment on the subject is as follows:

"Citing to the one phrase of the Bid Documents which tenuously supports your argument is convenient, but presents an inaccurate picture of the requirements mandated by the City and by State law."

⁴ Located in Paragraph 29 of the Instructions to Bidders

⁵ Unless otherwise indicated, bolding represents emphasis added by the author, while italics represents emphasis in the original.

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This City comment is dismissive – however, it is not responsive to Western's position. Western did identify binding language in the Contract Documents which is supportive of its position. That is not a matter of "convenience", but rather one of factual accuracy – a point which the City does not and cannot refute. Thus, further discussion as to the meaning of the ambiguous term "portion" is irrelevant. Having properly identified the type of work to be performed by each listed subcontractor, Western satisfied its bid requirements.

Nonetheless, the City insists that: (i) the terms "portion of work" are not synonymous with the terms "type of work" and; (ii) the term "portion" is not ambiguous. The City identifies several locations in the Contract Documents (citing verbatim language at those locations) where the bidder is directed to "*set forth the portion of the work which will be done by each subcontractor.*" From this, the City simply concludes that "portion" means "percentage." However, the City never cites a single authority for this assertion. It cannot point to an express definition in the Contract Documents, or anywhere else for that matter. That is because there is none.

Moreover, although the City maintains that there is no ambiguity, a straight reading of the various references to the term "portion", cited by the City, do not square with "percentage" being synonymous with "portion." In fact the only consistent reading of all citations to the terms "portion of work", mandates that this phrase is interchangeable with "type of work":

- The first example cited by the City is on the "Designation of Subcontractor" form itself. There, the City points to language in paragraphs 1, 2, and 3 which, it maintains, instructs the bidder (by inference) to include information pertaining to "percentage" of work. That interpretation, however, is not supportable. For instance, in the 2nd paragraph it states:

"If the contractor fails to specify a subcontractor for any portion of the work to be performed under the contract, he shall be deemed to have agreed to perform such portion himself, and he shall not be permitted to subcontract that portion of the work except under the conditions hereinafter set forth."

This directive makes little sense if one were to substitute the word "percentage" for "portion." Clearly this language informs a bidder that if it fails to list a

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Page 5

particular trade or subcontractor to perform a type of work, the bidder is deemed to have agreed to perform that type of work itself.

- The City further references Paragraph 16 of the Instructions to Bidders ("Designation of Subcontractors") as proof that the word "portion" means "percentage." Again, this interpretation is faulty. The express language cited reads in relevant part 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.

Again, the City asserts, **without support or reference to any definition**, that "portion" means "percentage." Such a reading however, creates an illogical redundancy. The language above expressly states that the subcontractors listed must perform work "exceeding one-half of one percent (0.5%) of the Bidder's Total Price." That is the relevant language which addresses any concept pertaining to *percentages*. To insist that the phrase immediately following, requires further information on percentages, creates a redundancy. Instead, a fair reading of that following phrase would seem to require additional information regarding **the type of work to be performed**.

- Finally, the City cites Article 5.2.1 of the "General Conditions" in support of its interpretation that "portion" means "percentage." That language expressly states: "The Contractor shall also *list the portion of the Work that will be done by each subcontractor.*" Again, without reference to any other language, definition or support, the City simply declares that "portion" here means "percentage." That conclusion, however, does not necessarily follow. In fact, a more logical reading (or at least an equally plausible reading) of the phrase "portion of work that will be done", is that the instruction asks for information pertaining to the "type of work" which the subcontractor is to perform. In fact, the City omits the following language in Article 5.2.1, which immediately follows the verbiage quoted above: "The Contractor shall list only one Subcontractor **for each such portion** as

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defined by the contractor in his bid". Here, "portion" clearly pertains to "type" or "description" of work, rather than percentage.⁶

The lack of logic inherent in the City position is manifestly apparent, when it concludes that:

"Even accepting, for the purposes of argument, your contention that the "type/portion" language included in Paragraph 29 of the "Instructions to Bidders" was ambiguous (which the City does not concede), this requirement was specifically repeated no less than *three times* and in *three separate portions* of the Bid Documents."

The comment is not persuasive; mere repetition of an ambiguous statement (even three times) will not clarify the ambiguity – it simply reinforces it.

By engaging in this colloquy, the City seeks to divert attention from the simplistic reading of the Instructions to Bidders – namely, that bidders were entitled to identify either the "type" or "portion", regardless of how one defines portion. In that Western identified the type of work to be performed by each listed subcontractor, rejection of its bid was improper.

3. INACTIVE LICENSE

Independent of the above referenced issue pertaining to the type/portion of work, the City additionally deemed Western's bid non-responsive because the "Designation of Subcontractor" form included an inactive license number for the metal roofing subcontractor. However, as stated in Western's Bid Protest letter, the City Staff correctly noted that the license number which was included on the Bid Forms, was an "inactive" license number. However, that number was the inactive license number for an ***unrelated subcontractor***, "United Roofing," which was not listed to perform the work on the

⁶ The City also cites to Article 5.2.1 of the General Conditions for the proposition that the contractor shall self-perform/provide labor, materials, and equipment amounting to at least 50 percent of the Contract Price, and absent inclusion of subcontractor percentages, the City cannot determine the percentage of work to be performed by the prime contractor. The City however, ignores the fact that this is a condition for which the contractor is responsible **during construction**, and that it is **not** a specified condition in the Instructions to Bidders.

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Project. The actual subcontractor listed to perform the work, Western Roofing, is and always has been properly licensed.

The City's September 29th denial letter stated that the inclusion of the erroneous license information submitted by Western, regarding its metal roofing subcontractor, rendered the Western bid non-responsive. However, the justification given by the City for such a finding is flawed.

Specifically, the City states that: "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." This however, is **not** what the Instructions to Bidders states. Paragraph 17 of the Instructions to Bidders (quoted by the City) expressly states that:

- "[T]he possession of a valid license by each subcontractor is subject to strict compliance under state law." As specifically set forth in Western's September 12 Bid Protest letter, Western's subcontractor does possess and has always possessed a valid license.
- "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.**" Again, as set forth in the attached Bid Protest letter, Western Roofing, the subcontractor specifically identified and listed on the bid forms, does possess the appropriate license for the specialty work it was listed to perform.
- 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.*" As demonstrated by the attached Exhibits, the listed subcontractor is and always has been licensed in accordance with state law and pursuant to the requirements found in the bid documents.

Both the Instructions to Bidders and the California law upon which those Instructions are based, require that the listed subcontractor actually be licensed – they do not, as the City maintains, require that a bid which inadvertently contains irrelevant information about a subcontractor who is not listed, be deemed non-responsive. Such a

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holding would trumpet form over substance. Such a holding would not promote the policy considerations which mandate performance of public works by licensed subcontractors. Here, those policy concerns are protected since the subcontractor listed by Western was in fact validly licensed.

The City queries in its denial letter: "Why is your client's mistake the City's mistake?" The simple answer is that it is not, nor was such an accusation ever leveled by Western in its protest letter. Neither did Western ever charge the City with having to perform any "detective work" to ascertain the truth about Western Roofing's license status. However, Article 5.2.1 of the General Conditions (cited by the City in its denial letter) does state that:

"The Contractor shall list only one subcontractor for each such portion as is defined by the Contractor in his bid. The Construction Manager will promptly reply to the Contractor in writing, stating whether or not the Owner, the Architect, or the Construction Manager, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Construction Manager to reply promptly shall constitute notice of no reasonable objection."

Hence, City contentions that it was required to perform no investigation is neither credible, nor supported by the Contract Documents.

The City also maintains that had it conducted a further assessment of this license issue, it still would not have been able to verify that Western Roofing possessed a valid license, since there are numerous entities named "Western Roofing." This assertion is unpersuasive, since a simple phone call to Western would have cleared up the discrepancy in less than minutes. Not only was it in the City's power and authority to so check with Western, it is this very type of task in which a public entities routinely engages during a bidding process.⁷

⁷ 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."

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In fact, the City performed such a routine bidding discrepancy check during the bid opening period, for this very Project, with respect to the second highest bidder, CWS. 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. In the interest of equity, Western should have similarly 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.⁸

Additionally, the City's September 29th denial letter recites several different facts pertaining to (i) other dba's, under which Western Roofing is known; and (ii) the various addresses where Western Roofing is located. The City seems to be suggesting, through inference, that either Western Roofing is not a legitimate entity, or that it did not legitimately bid this project. Neither inference is valid. In addition to the supporting documents submitted by Western as attachments to its September 12, 2011 Bid Protest letter,⁹ Western also submits herein, as Exhibit C, a declaration from its subcontractor Western Roofing, stating that it is and has been properly licensed, that it did submit a bid proposal to Western to perform metal roofing work on this Project, and that the documents pertaining to its license and bid proposal (submitted in support of Western's September 12, 2011 Bid Protest letter) are true and correct.

Finally, as set forth in the September 12th Bid Protest letter, 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, the actual subcontractor identified to perform the work was listed and does possess a valid, active license.

⁸ This point was raised in Western's Bid Protest letter. The City however, failed to address these facts in its denial of the Bid Protest.

⁹ Western submitted the following as attachments to its Bid Protest: (i) a print out from the Contractors State License Board confirming that Western Roofing possesses a "current" and "active" license (Exhibit B to the Bid Protest); and (ii) a true and correct copy of the actual bid proposal of Western Roofing, submitted to Western Group immediately prior to bid opening (Exhibit C to the Bid Protest).

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Therefore, no grounds pertaining to licensing issues exist, which would justify deeming the Western bid non-responsive.

4. FIRE SPRINKLER SUBCONTRACT

The City's September 29th denial of Western's Bid Protest listed a new basis for rejection of the bid, previously unknown to Western and for which it has never received notice. The City further deemed the Western bid non-responsive because it

"... failed to submit a fire sprinkler contractor as a part of its bid in compliance with the Bid Documents.... [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 ... fire sprinkler systems may *only* be installed by a contractor or subcontractor possessing a "C-16" fire protection 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."

There is no merit to this position because Western's fire sprinkler subcontractor, Smart Fire & Electrical Technology, Inc., submitted a bid of \$40,000.00 for all work pertaining to fire sprinkler installation. In that this amount is less than ½ of 1%, Western was not required to list this subcontractor. Neither was Western ever intending to self perform this work.

Thus the City contention that this particular error "is clearly not 'harmless,' as it would affect both the contract price ... and the percentage of work to be done by subcontractors" is completely meritless. Western's bid cannot be deemed non-responsive on this ground.

5. HARMLESS ERROR

The types of defects identified in the September 6, 2011 City Council Agenda, and relied upon in the City's most recent September 29th denial letter, were

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

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.



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6. DEFECTIVE BID SUBMITTED BY CWS

The September 29, 2011 City denial of Western's Bid Protest was completely silent, with respect to the CWS bid defects identified in its September 12th Bid Protest letter. As set forth more fully in the Western Bid Protest, a review of the CWS bid evidences defects, which make CWS ineligible for contract award. Specifically, CWS failed to list subcontractors to perform the following specified work:

- Methane gas design and build;
- Glazing;
- Lithocrete; and
- Resilient Wood Flooring Assemblies.

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.

7. CONCLUDING REMARKS

As articulated in the September 12th Bid Protest (Exhibit 1), the types of issues encompassed by the "portion of work" and "licensing" discussions above, 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. *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 905 (47 Ops. Cal. Atty. Gen. 129, 130 (1966), quoted with approval in *National Identification Systems, Inc. v. State Bd. of Control*, 11 Cal. App. 4th at p. 1453, and *Konica*, 206 Cal. App. 3d at p. 454.)

The Bid submitted by Western substantially conformed to the City's call for bids, and may still be accepted since none of the variances could have affected the amount of the bid. This is obvious, given that the only bid "defect" which the City considered material to the contract price was one pertaining to the fire sprinkler issue. The City noted:

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"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."

However, as set forth above, the alleged fire sprinkler defect is a non-issue since the work comprised less than ½ of 1% of the value of the Contract. As such, these particular grounds should not prevent award of the Contract to Western.

Thus, the City is free to reconsider Western's bid. In that Western's bid beat that of the next lowest bidder by over \$350,000.00, Western is clearly the lowest bidder. Its bid submission adequately demonstrates its responsibility and responsiveness.

Should you require further information, or allow presentation of this information to the City Council, please do not hesitate to contact either Western Group principals, Sion Shabo and Meir Levi, or myself.

Thank you for your reconsideration.

Respectfully submitted,

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


DAVID POLINSKY

DP/alm
Enclosure

cc: S. Shabo
M. Levi

1004763.1

EXHIBIT A



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September 12, 2011

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City Engineer
City of Carson
701 E. Carson St.
Carson, Ca 90745

Mr. Gilbert Marquez
Senior Civil Engineer
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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*.

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E. Clearly identify the specific Owner Staff/Board recommendation being protested.

F. Specify, in detail, the grounds of the protest and the facts supporting the protest.

G. Include all relevant, supporting documentation with the protest at time of filing."

Western herein complies as directed with the above items and includes as relevant supporting documents the following:

- Exhibit A – Designation of Subcontractor forms submitted by Western at bid opening
- Exhibit B – Printout from the CSLB demonstrating the active status of the Western Roofing license

Exhibit C – Copy of the August 1, 2011 bid proposal by Western Roofing System received by Western Group, Inc.

5. CONCLUDING REMARKS

In that Western's bid beat that of the next lowest bidder by over \$350,000.00, Western is clearly the lowest bidder. Its bid submission adequately demonstrates its responsibility and responsiveness.

The Bid submitted by Western substantially conformed to the City's call for bids, and may still be accepted since none of the variances could have affected the amount of the bid. *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 905 (47 Ops. Cal. Atty. Gen. 129, 130 (1966), quoted with approval in *National Identification Systems, Inc. v. State Bd. of Control*, 11 Cal. App. 4th at p. 1453, and *Konica*, 206 Cal. App. 3d at p. 454.) As such, these particular grounds should not prevent award of the Contract to Western.

Should you require further information, please do not hesitate to contact either Western Group principals, Sion Shabo and Meir Levi, or myself.

Law Offices

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

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Thank you for your consideration.

Respectfully submitted,

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


DAVID POLINSKY

DP/alm
Enclosure

cc: S. Shabo
M. Levi
1000904.1

EXHIBIT A

BID

PROJECT NO. 1223

CARSON PARK MASTER PLAN

DESIGNATION OF SUBCONTRACTORS

In compliance with the "Subletting and Subcontracting Fair Practices Act" being Sections 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 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 an amount 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. Only one subcontractor for each such portion shall be listed.

If the contractor fails to specify a subcontractor for any portion of the work to be performed under the contract, he shall be deemed to have agreed to perform such portion himself, and he shall not be permitted to subcontract that portion of the work except under the conditions hereinafter set forth.

Subletting or subcontracting of any portion of the work to which subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the legislative body of the Owner.

LIST OF PROPOSED SUBCONTRACTORS

["Duplicate Next Page if needed for listing additional subcontractor."]

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: ENKAY

Abatement

Address: COSTA MESA

License Number: 509785

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: SHAW: SON

Lithocasting

Address: COSTA MESA

License Number: 274144

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: ACE FENCE

Fencing

Address: LA PUENTE

License Number: 801674

Class ~~801674~~ ^{all} C-13

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: MCWILL

~~ALL~~
Hardwood Floor

Address: GARDENA

License Number: 676605

Class _____

Portion of Work (%) _____

LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: RAINBOW GLAZING

Glazing

Address: GARDENA

License Number: 863691

Class _____

Portion of Work (%) _____

~~Name and Address
of Subcontractor~~

~~Description of Work
to be Subcontracted~~

~~Name: TRIUMPH PAINTING~~

~~Painting~~

~~Address: RIVERSIDE~~

~~License Number: 440957~~

~~Class _____~~

~~Portion of Work (%) _____~~

*M.C.
8-1-11*

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: N M C

Masonry

Address: LANCASTER

License Number: 388218

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: SADDLES Plumbing

Plumbing

Address: Chatsworth

License Number: 268688

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: SILVESTER Roofing

Roofing / PVC

Address: ESCONDIDO

License Number: 516696

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: WESTERN Roofing

METAL Roof

Address: Los Angeles

License Number: 814839

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Sal Cal

Struct. Steel

Address: San Marcos

License Number: 897158

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: ~~THE~~ BARBER-WEBS

Methane Gas

Address: Los Angeles

License Number: _____

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Air Design Solution

HVAC

Address: Montebello

License Number: 953818

Class _____

Portion of Work (%) _____



LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: J. Vel Painting

Painting

Address: Carona

License Number: 754163

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Bennett Landscape

Landscape

Address: Los Angeles/Harbor City

License Number: 479003

Class _____

Portion of Work (%) _____

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: _____

Address: _____

License Number: _____

Class _____

Portion of Work (%) _____



EXHIBIT B

Department of Consumer Affairs Contractors State License Board

Contractor's License Detail - License # 675902

DISCLAIMER: A license status check provides information taken from the CSLB license database. Before relying on this information, you should be aware of the following limitations.

CSLB complaint disclosure is restricted by law (B&P 7124.6) If this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.

Per B&P 7071.17 , only construction related civil judgments reported to the CSLB are disclosed.

Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.

Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

License Number 675902 **Extract Date:** 9/10/2011

Business Information POPA ROOFING INC
dba WESTERN ROOFING SYSTEMS

13672 ONKAYHA CIRCLE
IRVINE, CA 92620

Business Phone Number:(949) 651-6130

Entity: Corporation

Issue Date 08/24/1993

Expire Date 08/31/2013

License Status This license is current and active. All information below should be reviewed.

Additional Status:

Classifications:

CLASS	DESCRIPTION
C39	ROOFING

CONTRACTOR'S BOND

This license filed Contractor's Bond number 122569 in the amount of \$12,500 with the bonding company
AMERICAN CONTRACTORS INDEMNITY COMPANY.

Effective Date: 01/01/2007

[Contractor's Bonding History](#)

Bonding:

BOND OF QUALIFYING INDIVIDUAL

- The Responsible Managing Officer (RMO) POPA JOHN AUGUST certified that he/she owns 10 percent or more of the voting stock/equity of the corporation. A bond of qualifying individual is not required.

Effective Date: 08/24/1993

[BQI's Bonding History](#)

Workers' Compensation: This license has workers compensation insurance with the
COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY

83

Policy Number:CPCA12495

Effective Date: 04/15/2011

Expire Date: 04/15/2012

Workers' Compensation History

Personnel listed on this license (current or disassociated) are listed on other licenses.

Personnel List	Salesperson List	Other Licenses
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EXHIBIT C



Contractors Lic. No. 676902

Western Roofing Systems

2031 East Cerritos Avenue, Suite 7E, Anaheim, CA 92806
Office (714) 778-5183 Fax (714) 778-0248
Regional Office: (800) 766-8000

Gerald H. Calderone Jr. (818) 314-0377 geraldcalderone@sbcglobal.net

Date: 1 August 2011

From: GH Calderone

Subject: Standing Seam Roof Proposal and Specification for the Carson Park Master Plan: Rec Bldg. with Gymnasium 1223

To: Bidders

We are pleased to offer the following proposal for your standing seam roof system:

Subject to compliance with specified requirements, standing seam metal roofing products shall be R-MER, manufactured by the Garland Company or equivalent. Work to comply with Section(s) 07411, Specification pages 1-10 and Plan Pages: elevations and details.

Galvalume (Zincalume): Provide steel sheets coated with 55% aluminum and 45% zinc/mischmetal by weight, conforming to ASTM A 792, 0.55 ounces per square foot. 24ga.

- COLOR: STANDARD.
- UNDERLAYMENT: HPR Fire-Tite FR Base Sheet
- PRODUCT: SPAN SYSTEM, 22" o.c., 24 GA. Messes every 2" o.c.
- Panel Width: 18" with stiffening ribs.
- Seam Cap: Snap on.
- Bearing Plates.
- Raingutters and Downspouts, in accordance with plans and specifications. Includes leaderheads.
- ACCESSORIES: ALL ROOFING RELATED.
- CLEANING: Remove rubbish, debris and waste materials. Legally disposing of off the Project site.
- PROTECTION: Protect the Work of this section until Substantial Completion.
- WARRANTIES: 5 YEARS watertightness and installation. 20 year finish warranty.
- ESTIMATED NUMBER OF WORKING DAYS REQUIRED TO COMPLETE: 21

COST (FINAL PRICE TO BE ADJUSTED AFTER PHYSICAL MEASUREMENT OF ROOF DECK IS COMPLETED BY WESTERN ROOFING SYSTEMS. ANY CHANGES TO ROOFING STRUCTURE WILL BE CONSIDERED A CHANGE ORDER. PRICE WILL BE ADJUSTED ACCORDINGLY.):

Metal Roof and Raingutter System: \$195,660

Rigid Insulation System: \$53,975

Western Roofing Systems Inc., will not be subject to a higher retention than that retention being withheld by the owner. The retention will not exceed : 10% up to 50% ; 0% thereafter. Any retention reductions received by contractor will be passed along to Western Roofing Systems Inc. when they are received from the own.

Please contact me at 818-314-0377 with any questions. Thank you, for considering Western Roofing Systems .

Regards,

GH Calderone



EXHIBIT B



**ALESHIRE &
WYNDER, LLP**
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Sacramento, CA 95814
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September 29, 2011

David Polinsky, Esq.
Wasserman, Comden, Casselman & Esensten, LLP
5567 Reseda Blvd.
Suite # 330
Tarzana, CA 91356

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

Dear Mr. Polinsky:

We are the City Attorney for the City of Carson. In that capacity, your letter of September 12, 2011 has been referred to us for an independent review and response. For the reasons that will follow, we are satisfied that City staff acted legally and appropriately in deeming the bid submitted by your client, Western Group, Inc. ("Western"), non-responsive and hence your client's bid was not eligible for being awarded this public works project. Accordingly, your bid protest is, respectfully, overruled.

The specifications issued for Project No. 1223, Carson Park Master Plan (the "Bid Documents") clearly informed potential bidders that the City would evaluate all bids for responsiveness:

"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"

We are advised that 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 Project No. 1223, Carson Park Master Plan (the "Project"). In addition, upon receipt of your bid protest, the aforementioned City staff, the City's Construction Management Team and the City Attorney's office carefully re-reviewed the Project specifications and your client's response to the same.





David Polinsky, Esq.
September 29, 2011
Page 2

In the judgment of these bid evaluators, and in our legal opinion, your bid was properly deemed "non-responsive" for at least the following reasons:

A. **Failure To Identify Portion Of Work To Be Performed By Each Subcontractor.**

First, as you admit, on the "Designation of Subcontractor" form (a form which the Bid Documents say must be fully completed in order for a bid to be deemed "responsive"¹), "Western did not fill out the line item regarding the 'Portion of Work (%)' to be performed by each subcontractor." (Western Protest Letter, p.3, ¶ 1.) Contrary to the position asserted in your letter, the specifications issued for the Project *make abundantly clear, in several sections thereof, that both the name of each subcontractor and the portion of work to be performed by that subcontractor must be included in all responsive bids.*

Even accepting, for the purposes of argument, your contention that the "type/portion" language included in Paragraph 29 of the "Instructions to Bidders" was ambiguous (which the City does not concede), this requirement was specifically repeated no less than *three times* and in *three separate portions* of the Bid Documents. Citing to the one phrase of the Bid Documents which tenuously supports your argument is convenient, but presents an inaccurate picture of the requirements mandated by the City *and by State law.*

The following portions of the Bid Documents clearly mandated that the "portion of work" line item (left blank by your client) must be completed for each subcontractor listed in the bid:

(1) ***The very first paragraph of the "Designation of Subcontractors" form, which you yourself attach as an exhibit to your demand letter, clearly 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.*"

¹ See, "Instructions to Bidders," Paragraph 28, ("Bidders Responsiveness Checklist"), subsection (b) ("Completed Bid Data Forms").



David Polinsky, Esq.
September 29, 2011
Page 3

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, on which your client left the "portion of work" line item blank in direct contradiction to these explicit instructions.

(2) Paragraph 16 of the "Instructions to Bidders" ("Designation of Subcontractors") 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 Subcontractors²," 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."

Moreover, you argued that the "%" line item of the Designation of Contract Form is unclear 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, Western Protest Letter, p.4, ¶ 5). However, contrary to this assertion, it should be 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*:

- 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*."

² This language makes it *mandatory* that this information be included on the "List of Proposed Contractors" portion of the "Designation of Subcontractors" form – which your client left blank.



David Polinsky, Esq.
September 29, 2011
Page 4

- 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*)." Your client'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, this bid clearly fails one of the specified criteria for "responsiveness" and was properly rejected as "non-responsive."

Finally, it should be noted that this requirement is not waiveable, as it is not only imposed by the City of Carson's Bid Documents³, but is also required by the Greenbook – which sets forth the standards for all Public Works Construction in the state of California. 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*"

In sum, Western's failure to complete the "Portion of Work (%)" section of the Bid Documents makes 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, the Greenbook and California law). Accordingly, because Western's compliance with both the subcontractor bid specifications and California law regarding the same could not be verified, Western's bid was properly rejected as "non-responsive" by the City.

B. Listing Of Inactive License For Subcontractor.

Second, as you also admit, Western's bid 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. This error on the part of your client also renders its bid non-responsive for the following reasons:

³ Article 5.2.1 of the General Conditions section of the bid documents specifies the California law requirement that the "Contractor shall perform or provide, with its own organization, contract labor materials, and equipment amounting to at least 50 percent of the Contract Price."



David Polinsky, Esq.
September 29, 2011
Page 5

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 your client cited a subcontractor listed "Western Roofing, Los Angeles, License No. 814839" as the subcontractor to perform the "metal roof" component of the Project. As such, your client's bid was properly rejected for failure to comply with the above-detailed Bid Document specifications.

In your protest letter, you argue that it was "error for the City to disqualify the bid of Western on this basis" – *i.e.* that the City erred by noting the error of *your client*. Why is your client's mistake the City's mistake? Because the City should have done the extra detective work necessary to discover that the license listed was the inactive license of another subcontractor?

Even if, *arguendo*, the City 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 your protest letter), which you assert is the subcontractor that your client 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 your protest letter, identifies this subcontractor as "Western Roofing Systems" located in Anaheim at 2031 East Cerritos Avenue, Suite 7E, Anaheim, CA 92805.



David Polinsky, Esq.
September 29, 2011
Page 6

Given that the license number, business name and business location submitted by your client are *all* inconsistent with the registered information for this subcontractor, it is rather audacious for your client to assert that the *City* erred by failing to uncover and address this mistake before rejecting your client's bid. Moreover, even if the City had discovered this inaccuracy, or permitted your client to correct it after the fact, the "portion of work" error (detailed above) compounded by the fire sprinkler issue (detailed below) would have rendered this a futile exercise.

C. Failure To Submit A Fire Sprinkler Subcontractor.

Finally, Western's bid was also deemed non-responsive because your client failed to submit a fire sprinkler contractor as a part of its bid in compliance with the Bid Documents. 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.

Your client'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, this error is clearly not "harmless," 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



David Polinsky, Esq.
September 29, 2011
Page 7

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.

Accordingly, we are satisfied that the City acted within the bounds of the Bid Documents, the Carson Municipal Code, and applicable state law in rejecting your client's bid. Therefore, the City hereby overrules your protest. Pursuant to bid protest procedures specified at Paragraph 21 of the Instructions to Bidders contained in the Bid Documents, your client will have the right to appeal this decision to the City Council *within 10 business days of the receipt of this letter*, should it deem such an appeal appropriate.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lindsay M. Tabaian', written in a cursive style.

Lindsay M. Tabaian
of ALESHIRE & WYNDER, LLP

cc: Mr. M. Victor Rollinger,
City Engineer
Mr. Gilbert Marquez,
Senior Civil Engineer
Mr. David Biggs,
City Manager
Mr. William Wynder,
City Attorney

EXHIBIT C



Contractors Lic. No. 676902

Western Roofing Systems

2031 East Cerritos Avenue, Suite 7E. Anaheim, CA 92806
Office (714) 778-5163 Fax (714) 778-0248
Regional Office: (800) 766-8000

Gerald H. Calderone Jr. (818) 314-0377

From: GH Calderone

Subject: Roof Proposal

To: Western Group

I, G. H. Calderone, Jr., a project estimator and sales manager of Western Roofing Systems. I submit this declaration in support of the Bid Protest of Western Group, Inc., with respect to the Carson Park Master Plan, Project No. 1223. I have personal knowledge of the facts contained in this declaration.

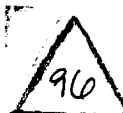
Western Roofing Systems is a fully licensed C39 roofing subcontractor. Our license is currently active, and was so at the time we submitted our bid on Project 1223. That is reflected on the print-out from the Contractors State License Board, which was attached as Exhibit B to Western Group's September 12, 2011 Bid Protest.

The subcontractor bid of Western Roofing Systems, for the Standing Seam Roofing for Project 1223, was sent to all bidding General Contractors on August 1, 2011. A copy of that bid was attached as Exhibit C to Western Group's September 12, 2011 Bid Protest.

I declare under penalty of perjury that the foregoing information is true and correct.

Sincerely,

GH Calderone Jr.



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

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ASTER C. CHANG
LEONARD J. COMDEN
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NOV 03 2011
City of Carson

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November 2, 2011

Mr. William Wynder
City Attorney
South Bay Centre, South Tower
1515 West 190th St., Suite 565
Gardena, CA 90248

Mr. M. Victor Rollinger
City Engineer
City of Carson
701 E. Carson St.
Carson, CA 90745

Mr. Gilbert Marquez
Senior Civil Engineer
City of Carson
701 E. Carson St.
Carson, CA 90745

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 further supplement the position and materials supplied by Western in support of its appeal to the City Council, regarding the above referenced Project.

As you are aware, the City cited the apparent failure of Western to designate a C-16 licensed subcontractor to perform fire sprinkler installation work, as one of the bases for deeming the Western bid non-responsive. In response, Western noted that it had received a \$40,000 bid from its fire sprinkler subcontractor, and that since that amount was less than 1/2 of 1% of the Contract value, California law did not require Western to list the subcontractor.

ALHAMBRA

VENTURA

EXHIBIT NO. 7



Mssrs. Wynder, Rollinger and Marquez
November 2, 2011
Page 2

In the November 1, 2011 City of Carson Report to the Redevelopment Agency, the City answered, noting that the Western argument "is wholly inaccurate based on Western's own bid documents." The Report further stated:

"Rather, Item #13 (Fire Protection) of Western's bid breakdown states that 'fire protection' work will be performed for \$100,000... Therefore, any claim that this will be done for \$40,000 seems to be an impossibility."

The Report, however, is in error. Attached hereto is a copy of the August 1, 2011 bid proposal submitted to Western by its subcontractor, Smartfire, stating that it will perform the fire sprinkler installation work for \$40,000. Further, to the extent that the Western bid breakdown identified \$100,000 as the cost to perform the "fire protection" work, that bid figure was for the entire line item for fire protection, and included \$60,000 of site work to be self-performed by Western.

In that Western is properly licensed to self-perform the fire protection site work, and given that the fire sprinkler installation component of that work is less than 1/2 of 1% of the total Contract value, Western cannot be deemed non-responsive for failing to list Smartfire as one of its subcontractors.

Thank you for your reconsideration.

Very truly yours,

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


DAVID POLINSKY

DP/alm
Enclosure
1007339.1
cc: S. Shabo
M. Levi



Complete Fire Protection Solutions.

www.smartfire.us

August 1, 2011

C-16, C-10 Lic # 863196

Att: Meir Levi
Western Group Inc.
21777 Ventura Blvd. #224
Woodland Hills, CA. 91364

Re: Automatic Fire Sprinkler System Installation
Carson Master Plan
Project Number 1223

Smart Fire & Electrical Technology, Inc. is pleased to provide the following quotation for the design and installation of a fire sprinkler system. The scope of work and price reflects the information provided to Smart Fire & Electrical Technology, Inc.

Scope of Work:

1. We will install up to 20ft. of underground pipe
2. Fully sprinklered building designed for Light or Ordinary Hazard Occupancy as applicable with upright sprinkler heads on exposed pipe in areas with no ceilings.
3. Install chrome or white semi-recessed sprinkler heads located in covered ceilings.
4. Install all necessary sprinkler piping, hangers and sway bracing per NFPA 13.
5. Install an electric sprinkler bell with water flow and tamper switches.
6. Provide engineering, plans, permits and fire department inspections
7. Salary paid to fire sprinkler installers will be based on prevailing wages

Total cost for the above scope of work including all necessary labor, taxes, permits, and material for a complete installation is \$40,000.00

Payment Terms: Progress Payments on a Monthly Basis with 10% Retention Held Until Completion of the Project

Exclusions & clarifications:

1. Surety Bond
2. Fire extinguishers or cabinets.
3. Sub-cutting of any concrete or asphalt.
4. Patching or painting of any surface.
5. Painting, priming or cleaning of sprinkler piping.
6. Pressure reducing valve (PRV) or fire pump, if required by the City.
7. Electrical wiring, connections or sprinkler supervisory system.
8. Price is based upon work being done during normal business hours, if work is to be done after hours additional trip charges shall be incurred.
9. In areas with Gypsum board directly attached to the underside of the TJIs, or where the ceiling is within six inches or less below the bottom of the TJIs, the owner shall fill the joist channels with non combustible insulation.

INSTALLATION | SERVICE | MAINTENANCE | REPAIR | TESTING | MONITORING
Fire Life Safety Systems • Fire Detection & Alarm • Fire Sprinklers • Fire Extinguishing Systems • Fire Suppression Systems • Custom Solutions

11/01/2011 09:57 #211 P.002/003

From: Western Group Inc.



SAM K. ABDULAZIZ
A Law Corporation

KENNETH S. GROSSBART
A Law Corporation

BRUCE D. RUDMAN
A Law Corporation

MILENE C. APANIAN*

SHARICE B. MAROOTIAN

* ALSO ADMITTED IN NEVADA



————— LAW OFFICES OF —————
ABDULAZIZ, GROSSBART & RUDMAN
————— A Partnership Of Professional Corporations —————

Mailing Address: P.O. Box 15458 / North Hollywood, CA 91615 / (818) 760-2000 / Fax: (818) 760-3908

November 1, 2011

Via Email and Facsimile
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Gilbert Marquez
Senior Civil Engineer
City of Carson
701 E. Carson Street
Carson, CA 90745

M. Victor Rollinger
City Engineer
City of Carson
701 E. Carson Street
Carson, CA 90745

Re: Carson Park Master Plan, Project 1223
Western Group, Inc. Bid Protest
Our File No: 11738

Dear Gentlemen:

This office represents the interest of CWS Systems, Inc. ("CWS"). I am responding to the letter dated November 1, 2011 from counsel to Western Group, Inc. ("Western"). I previously provided comments regarding the correct position of the City of Carson with respect to the determination that the Western bid was non-responsive. In this letter, I respond to the assertion that the bid of CWS is non-responsive because of the listing of Catalina Structures, which was listed with its correct name, address, license classification, description of work to be subcontracted, and percentage portion of the work, but which license number was apparently incorrectly stated and instead the license number from the preceding listed subcontractor was listed.

As shown herein, CWS bid is responsive and no comparison can be made between the CWS issue and the non-responsive listing by Western.

6454 Coldwater Canyon Avenue / North Hollywood, California 91606-1187

EXHIBIT NO. 8





ABDULAZIZ, GROSSBART & RUDMAN

*William Wynder,
City Attorney*

*Gilbert Marquez
Senior Civil Engineer
City of Carson*

*M. Victor Rollinger
City Engineer
City of Carson*

*November 21, 2011
Page 2*

Looking at the bid form, and specifically page 32 of its bid, CWS inadvertently wrote the same license number for Catalina Structures as it did for AQ Backhoe, which was listed in the immediately proceeding line. However, unlike the bid of Western Group, the bid is responsive to the requirements of the contract and bidding instructions, and Public Contract Code section 4104. Public Contract Code section 4104 requires that the name and location of the place of business of each subcontractor who will perform work be listed, and the portion of work that will be done by each subcontractor be listed. CWS did that in its listing.

In contrast, although the bid form required the address next to each listed subcontractor, Western Group merely wrote the City in which the contractor was located. As referenced in the rejection of the bid protest, a look at the Contractors' State License Board's records for "Western Roofing," shows more than 21 companies that are known as Western Roofing or Western Roofing Company, with two of those stated to be in Los Angeles, and others in suburbs of Los Angeles. In addition, there are another dozen or so companies with other variations of the term Western Roofing in their name.

Without an address and with an incorrect license number, there was no way for the City of Carson to actually determine who was listed by Western Group, and the license number that was specifically listed was for an entity known as United Roofing, not Western Roofing, and of course that license was not active.

A review of the Contractors' State License Board records for Catalina Structures show exactly one entity known as Catalina Structures, and the entity that was shown has the exact same address and license classification listed on the bid form. I attach that listing. Of course, that entity is currently licensed. It can easily be said that in the error on the bid form by CWS is inconsequential. It listed an entity known as Catalina Structures with its correct address, license classification and portion of the work. That entity is currently licensed. The only inconsistency is the license number was a typographical error carried over from the immediately proceeding subcontractor. The City can easily determine Catalina Structure's license number of 842680. This inconsequential issue could be waived, where by contrast listing Western Roofing with a license number was inactive and with an improper listing that also showed no portion of the work, and no license classification, there was no way for the City to confirm who was the entity was that entity was listed, or that it was properly licensed.



ABDULAZIZ, GROSSBART & RUDMAN

*William Wynder,
City Attorney*

*Gilbert Marquez
Senior Civil Engineer
City of Carson*

*M. Victor Rollinger
City Engineer
City of Carson*

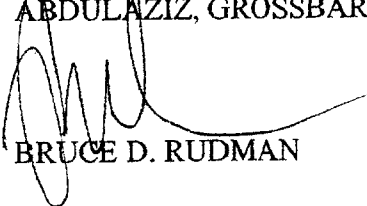
*November 21, 2011
Page 3*

Another important distinction exists in that if the City had looked up the license number for Western Roofing, which in turn related to United Roofing, it pointed to an owner on that license named Oscar Torres. There is no Oscar Torres affiliated with an active license known as Western Roofing. Western Group contends that it intended to list another Western Roofing, which is not qualified by Oscar Torres, the owner of United Roofing or Western Roofing that was listed, but instead, is qualified by John Popa. There is absolutely no cross-reference between the two entities. Further, the Popa Roofing, Inc. that is alleged to have done the work is not located in Los Angeles. This in and of itself renders the Western bid non-responsive because the bid also does not properly identify the location of Popa Roofing.

For these reasons, it is clear that CWS Systems, Inc.'s bid is responsive, and it is equally clear that Western Group's bid is not.

I will be happy to address any further issues dealing with this at the hearing tonight.

Very truly yours,
ABDULAZIZ, GROSSBART & RUDMAN



BRUCE D. RUDMAN

BDR:rkk
Cc: client
David Polinsky

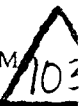
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Department of Consumer Affairs Contractors State License Board

Contractor Name Search Results

Select the license number you would like to check for status, or return and enter another name search.

Name Type	Contractor Name	License	City	Status
DBA	CATALINA STRUCTURES	<u>842680</u>	FONTANA	Active
DBA	CATALINA SWIMMING POOL SUPPLY & MAINTENANCE	<u>294823</u>	LONG BEACH	Expired
Previous	CATALINA VIEW CONSTRUCTION	<u>621245</u>	OCEANSIDE	Expired
DBA	CATALINA VIEW CONSTRUCTION INC	<u>621245</u>	OCEANSIDE	Expired
DBA	CATALINA VIEW LANDSCAPE	<u>892753</u>	VISTA	Inactive
DBA	CATALINE BUILT HOMES INC	<u>104857</u>	PITTSBURG	Cancelled
DBA	CATALINE CONSTRUCTION	<u>514164</u>	LAFAYETTE	Active
Previous	CATALINE CRAIG E	<u>514164</u>	LAFAYETTE	Active
DBA	CATALLO A CONSTRUCTION COMPANY	<u>201751</u>	SANTA MARIA	Expired
DBA	CATALLO JOSEPH	<u>197554</u>	HAWTHORNE	Inactive
DBA	CATALLO TOMMASO	<u>566725</u>	SOLVANG	Expired
DBA	CATALONI ELECTRIC	<u>490607</u>	LAGUNA NIGUEL	Active
Previous	CATALONI JOHN	<u>490607</u>	LAGUNA NIGUEL	Active
Previous	CATALYST	<u>766878</u>	STEVENSON RANCH	Expired
DBA	CATALYST	<u>800834</u>	LOS ANGELES	Expired
DBA	CATALYST CONST	<u>391798</u>	SAUSALITO	Expired
DBA	CATALYST CONSTRUCTION	<u>827701</u>	ROSEVILLE	Revoked
DBA	CATALYST CONSTRUCTION	<u>828871</u>	ATASCADERO	Inactive
DBA	CATALYST CONSTRUCTION	<u>919440</u>	ATASCADERO	Active
DBA	CATALYST CONSTRUCTORS INC	<u>445845</u>	IRVINE	Expired
DBA	CATALYST DESIGN BUILD INC	<u>958455</u>	PALO ALTO	Active
DBA	CATALYST DEVELOPMENT PARTNERS INC	<u>954776</u>	IRVINE	Active
DBA	CATALYST ENVIRONMENTAL	<u>820368</u>	SAN CARLOS	Active
DBA	CATALYST INC	<u>567926</u>	BELLEVILLE	Expired
DBA	CATALYST NETWORK SYSTEMS	<u>766878</u>	STEVENSON RANCH	Expired
DBA	CATALYST SERVICES INC	<u>798967</u>	DEER PARK	Expired
DBA	CATALYST TECHNOLOGY INC	<u>570003</u>	PASADENA	Expired
DBA	CATALYZING CONSTRUCTION	<u>880427</u>	NOVATO	Active
DBA	CATAMOUNT CONSTRUCTION	<u>566984</u>	LOOMIS	Expired
Previous	CATAMOUNT CONSTRUCTION	<u>566984</u>	LOOMIS	Expired
DBA	CATAMOUNT CONSTRUCTORS INC	<u>760295</u>	EVERGREEN	Active



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

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November 1, 2011

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701 E. Carson St.
Carson, CA 90745

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 supplement the position and materials supplied by Western in support of its October 6, 2011 appeal to the City Council, regarding the above referenced Project. Western recently discovered additional information relevant to these issues and seeks to have the City Council consider this information prior to or at the upcoming session before the City Council, currently scheduled for Tuesday, November 1, 2011.

One of the grounds for which the Western bid was deemed non responsive, is related to Western's inclusion of an erroneous license number for one of the subcontractors listed to perform work on the Project. However, it has recently come to the attention of Western that CWS, the contractor to which Carson currently intends to

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EXHIBIT NO. 9



Mssrs. Wynder, Rollinger and Marquez
November 1, 2011
Page 2

award the contract, similarly included the erroneous license number of a listed subcontractor.

Specifically, CWS listed Catalina Structures to perform the subcontract work related to "catch basin and precast structures," estimating that work at 1% of the total Contract work to be performed. However, CWS erroneously identified Catalina's license number as "895215."¹ That number is incorrect. In fact, the correct number for Catalina Structures is "842680."²

The City's September 29th denial letter to Western stated that the inclusion of the erroneous license information submitted by Western, regarding its metal roofing subcontractor, rendered the Western bid "non-responsive." Specifically, the City stated that: "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." Although Western disputes the City's interpretation of the requirements cited in the Bid Instructions, any interpretation by the City must be applied uniformly and consistently to all bidders. Hence, if the Western bid is to be deemed non-responsive, the CWS bid must as well.

In truth, Western raises this point, not for the purpose of depriving CWS of the contract, but for the purposes of demonstrating that the reason for deeming the Western bid non-responsive is unjustified. Obviously, the City deemed the defect in the CWS bid to be non-material, since the listed subcontractor was in fact properly licensed (even though the correct license number had not been included on the bid listing sheet). Similarly, the roofing subcontractor listed by Western was properly licensed, even though the erroneous license number had been inadvertently included on Western's subcontractor listing sheet.

As urged by Western in its October 6, 2011 letter appeal, both the Instructions to Bidders and the California law upon which those Instructions are based, require that the listed subcontractor actually be licensed – they do not, as the City maintains, require that

¹ Please see Bid Listing Sheet submitted by CWS, attached hereto as Exhibit A.

² Please see the print out from the Contractors State License Board, confirming the true and correct license number for Catalina Structures, attached hereto as Exhibit B.

Mssrs. Wynder, Rollinger and Marquez

November 1, 2011

Page 3

a bid which inadvertently contains irrelevant information about a subcontractor who is not listed, be deemed non-responsive.

The City apparently recognized this truth, when it deemed the CWS bid defect to be either non-material or inconsequential. Accordingly, equity demands that Western be given the same benefit of the doubt. Therefore, no grounds pertaining to licensing issues exist, which would justify deeming the Western bid non-responsive.

Thank you for your reconsideration.

Very truly yours,

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

DAVID POLINSKY

DP/alm
Enclosure

cc: S. Shabo
M. Levi

1006964.1

LIST OF PROPOSED SUBCONTRACTORS (continued)

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Champion Plumbing
4195 Chino Hills Pkwy 189
Address: Chino Hills CA 91709
License Number: 730334

plumbing

Class C36

Portion of Work (%) 3

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: AQ Backhoe
13532 Mulberry Dr
Address: Whittier CA 90605
License Number: 895214

undergrounds

Class A

Portion of Work (%) 1/2

Name and Address
of Subcontractor

Description of Work
to be Subcontracted

Name: Catalina Structures
8543 Mulberry St
Address: Fountain CA 92335
License Number: 895214

catch basins
precast structures

Class C-8

Portion of Work (%) 1

Department of Consumer Affairs
Contractors State License Board

Contractor's License Detail - License # 842680

 **DISCLAIMER:** A license status check provides information taken from the CSLB license database. Before relying on this information, you should be aware of the following limitations.

CSLB complaint disclosure is restricted by law (B&P 7124.6) if this entity is subject to public complaint disclosure, a link for complaint disclosure will appear below. Click on the link or button to obtain complaint and/or legal action information.

Per B&P 7071.17, only construction related civil judgments reported to the CSLB are disclosed.

Arbitrations are not listed unless the contractor fails to comply with the terms of the arbitration.

Due to workload, there may be relevant information that has not yet been entered onto the Board's license database.

License Number	842680		Extract Date: 10/27/2011
Business Information	CATALINA STRUCTURES 8543 MULBERRY AVE FONTANA, CA 92335		
	Business Phone Number:(809) 350-2054		
Entity:	Sole Ownership		
Issue Date	07/14/2004		
Expire Date	07/31/2012		
License Status	This license is current and active. All information below should be reviewed.		
Additional Status:			
Classifications:	CLASS	DESCRIPTION	
	C-8	CONCRETE	
Bonding:	CONTRACTOR'S BOND This license filed Contractor's Bond number 71135994 in the amount of \$12,500 with the bonding company <u>WESTERN SURETY COMPANY.</u> Effective Date: 07/09/2011 Contractor's Bonding History		
Workers' Compensation:	This license has workers compensation insurance with the <u>STATE COMPENSATION INSURANCE FUND</u> Policy Number:713-0014926 Effective Date: 11/09/2005 Expire Date: 11/09/2012 Workers' Compensation History		

Personnel List

<https://www2.cslb.ca.gov/OnlineServices/CheckLicenseII/LicenseDetail.aspx?LicNum=8...> 10/27/2011

