

CITY OF SANTA BARBARA**INTEROFFICE MEMORANDUM**

TO: Mayor and City Council

FROM: Stephen P. Wiley, City Attorney
Karen Ramsdell, Airport Director
Christine Andersen, Public Works Director
Sarah Knecht, Assistant City Attorney
Owen Thomas, Project Engineer

DATE: Friday, March 20, 2009

SUBJECT: Staff Analysis of Swinerton Bid Protest -- Airport Terminal Contract

As you know, in recent correspondence and at the March 10th City Council meeting, Swinerton Buildings claimed that EMMA Corporation, the low bidder on the Airport Terminal contract, is not a responsible or responsive bidder. This memo is intended to summarize Swinerton's position in plain English within the context of the relevant City contract bid specifications which are in dispute and to provide the Council with City staff's analysis of Swinerton's assertions.

1. Swinerton's claim that Johnson Controls is a City recommended manufacture that was not listed by EMMA in its equipment list as required by the contract specifications and, as a result, EMMA was required to propose an alternate manufacturer. ("Assertion No. 1")

City Contract Bid Specification 13720 relevant to Assertion No. 1 provides as follows:

"Section 13720 2.3. RECOMMENDED MANUFACTURERS & COMPONENTS.

A. Integrated Access Control System Equipment:

1. Access Control System Software-Johnson Controls P2000 Security Management System, or approved Johnson Controls upgraded alternate.

2. Security Controllers-Johnson Controls, or approved, compatible alternate."

In addition, City Contract Bid Specification Addendum No. 1 provides, in part, as follows:

“Specifications:

3. SECTIONS A2, Page 10 and Section A3, page 11: Replace pages 10 and 11 with the attached pages 10 and 11. The list of Proposed Equipment and Materials Manufactures may be submitted up to 24 hours after bid opening.”

Further, the form provided by the City upon which bidders are instructed to list proposed Equipment and Material Manufactures (the “equipment and supplier sheet”) also indicates the following :

“The Bidder shall indicate the name of the manufacturer of the equipment, and supplier of the material, proposed to be furnished under the contract. Awarding of a contract based on this bid will not imply approval by the Owner of the manufacturer or suppliers, used by the Bidder. No substitution will be permitted after award of contract except upon written approval of the Owner (i.e., the City).”

The equipment and supplier sheet provided to the City by EMMA lists its Division 13720 response as a “Security Access Control and CCTV system” - i.e., simply a generic listing indicating that EMMA will provide the required Security System. EMMA also provided to the City its proposed Equipment and Material Manufactures list on December 17, 2008. EMMA’s Exhibit A of this list states that Div. 13720 Security Access Control and CCTV will be manufactured by “HID 1 class, GE Security, Securitron, Pelco, Action, Patlite.” The supplier listed by EMMA is “Excell Systems & Solutions.” Swinerton also asserts that its proposed electrical subcontractor, Taft Electric, had knowledge that, on bid day, EMMA did not have an electrical subcontractor who had secured a written bid from Johnson Controls. Thus, according to Swinerton, since EMMA showed no specific listing of a Johnson Controls P2000 Security Management System or a Johnson Controls Security Management System and since its electrical subcontractor had not received a bid from Johnson, EMMA must have been, by implication, proposing an alternate unidentified security system.

City Staff Analysis of Assertion No. 1.

As is typical and allowed, EMMA’s bid was a lump sum bid with Gilmartin Electrical Contracting listed as the electrical subcontractor as required since the electrical work exceeded the one half of one percent identification requirement. Critically, the Proposed Equipment and Materials Manufactures list is a proposed list that is not binding on either the bidder or the City and one for which substitutions may be approved by the City’s at the City’s discretion. The list specifically states that a mere listing on the list does not imply City approval of the manufactures or suppliers listed. The list form also expressly allows for substitutions prior to contract award. Typically, the list is used by the construction managers as construction progresses to assess the materials and suppliers being used by the prime contractor. City approval is always required for

any substitution or changes of a listed manufacture or supplier after contract award, but not before the award. Thus, EMMA was free (as was Swinerton or any other bidder for that matter) to substitute listed manufactures and suppliers listed on the Equipment list at any time and for any reason up to the point of contract award and afterwards at the discretion of the City.

Finally, nothing in the Security System information provided by EMMA or in the listing indicates that EMMA or its electrical subcontractor was planning on using an alternate to Johnson Control. In fact, EMMA has advised the City that it always intended to comply with this City recommended requirement.

2. Swinerton claims that, since EMMA was apparently proposing an alternate security system, it was required to show the “technical information and catalog cut sheets for the (alternate) product” being proposed and that EMMA failed to do so on bid day. Swinerton also argues that the City rejected an apparent low bid in January 2005 for this same reason. (“Assertion No. 2”)

The City Contract Bid Specification 13720 3.4 relevant to Assertion No. 2 states as follows:

“A. Bid Compliance Requirement:

1. The Security Contractor shall be responsible for complying with the contract performance specifications. If Security Contractors bids an alternative to any recommended system, the Security Contractors shall (with the bid) provide technical information and catalog cut sheets for the product being bid and a copy of the relevant section of this specification with each paragraph marked as comply or alternate.”

In making Assertion No. 2, Swinerton directs the City’s attention to a decision made by the City Council in January 2005 pertaining to the contract award for the Santa Barbara Airport Security System Upgrade. In that instance, the City Council rejected the apparent low bidder and awarded the contract to Taft Electric based on Taft’s bid protest. However, in that case, the apparent low bidder had, in fact, submitted a proposed alternative access control equipment and alternative CCTV systems. In addition, the low bidder in 2005 had also failed to provide to the City the technical information pertaining to the proposed alternate on bid day as clearly required by the bid specifications. The January 2005 bid was therefore deemed non-responsive by the City Council and appropriately rejected.

City Staff Analysis of Assertion No. 2.

As explained in response to Assertion No. 1, EMMA did not list an alternate or equal security system in its bid nor was EMMA proposing to use an alternate. Therefore, the Security Contractor was not required to provide technical information and catalog cut sheets for an alternate with the EMMA bid. In staff’s opinion, this contract and EMMA bid is not at all similar to the 2005 situation discussed above because no alternate or equal was proposed by EMMA

and when no alternate or equal is proposed, there is no need to provide the City with the technical information required to review an alternate system.

3. Swinerton claims that, ECS, the Security Contractor to be used by EMMA's electrical subcontractor (GEC) lacks the required experience to meet the City's bid specification of specification 13720 1.3A. ("Assertion No. 3")

According to Swinerton, ECS, [the GEC Security Contractor identified as of March 10th] does not meet the City's bid specification 13720 1.3 A for two reasons: 1. because ECS is not authorized by Johnson Controls to work in the Santa Barbara area and 2. because ECS does not have the experience on Airport security projects which the City's specifications require.

The City's "experience" bid specification for the Terminal Contract [in this regard] read as follows:

"1.3 PERFORMANCE REQUIREMENTS

A. Security Contractor shall have provided and completed installation services for at least three (3) facility sites similar to that which will be provided to this project and provide at least three (3) references of work to the Owner, or designated representative prior to being awarded a bid contract."

Specifically, Swinerton asserts that ECS does not have the required three (3) "similar site" experience. Another apparent basis for Swinerton's claim that ECS is not authorized by Johnson Control may be the response time to service a problem in Santa Barbara. According to Swinerton, due to this lack of experience and the lack of authorization to do Johnson Control certified work in Santa Barbara, ECS does not meet the experience requirement contained in section 13720 of the City's bid specifications.

City Staff Analysis of Assertion No. 3:

The experience and performance requirements such as 1.3 quoted above are intended to provide information to the bidder concerning the City's expectation of performance of the particular bid specification, in this case, the over contract specification No. 13720. There is no requirement that a bidder's security contractor demonstrate compliance with this experience/performance requirement (or provide the necessary "experience" information) at the time bids are submitted so long as that experience and performance information is eventually demonstrated to the City's satisfaction prior to the actual award of the contract. The performance requirement simply puts the bidder on notice that the City will expect the security contractor to be able to meet the experience requirement when the contract is to be awarded. The bidder is expected to factor this criterion into its costing of its bid as it deems necessary.

Bidders on public works contracts such as this always have business decisions to make when preparing their bids. In this case, A bidder could have chosen to secure a fixed written bid from security contractors in order to meet the City's experience and performance requirement prior to submitting its bid to the City and, thereby, avoid a substantial risk of having a higher than expected subcontractor cost. But, in the alternative, a bidder can, as EMMA apparently did here, estimate the cost of this work for bid purposes and then secure the appropriately qualified company, manufacturer, or distributor at a later time – as permitted by the City contract specifications. In this instance, either approach meets the City's bid specification, particularly in this instance when EMMA was not proposing an alternate to a Johnson Controls security system and where EMMA will provide the required information to the City at the required time.

4. Swinerton asserts that EMMA's Failure to "comply" with the Contract Specifications is not fair and will result in cost differential to EMMA's advantage – an advantage which will ultimately work to the City's disadvantage. (Assertion No. 4)

According to Swinerton, since EMMA and its subcontractor, GEC, had no Johnson Control authorized bidder committed in writing on the actual bid day, it merely rough estimated EMMA's cost to provide the required security system. Swinerton argues that it, by contrast, had written bids on bid day from Johnson by way of its proposed electrical subcontractor, Taft Electrical. According to Swinerton, this fact could have affected the bid price and, possibly, it gave EMMA an advantage in submitting the lowest bid. So, Swinerton argues that this is unfair and that it should not be penalized for having used a sharper pencil.

City Staff Analysis of Assertion No. 4.

Bidders (and their subcontractors) on Public Works Project often and typically take many different approaches to submitting bid packages and on estimating their costs. The extent to which a particular prime bidder contracts with its many sub-subcontractors and suppliers and distributors prior to and at bid time is simply a business decision which, at time, can translate directly into why one bidder (or one subcontractor) is the lowest and another is not. Regardless, the City reviews the bid package to ensure that the low bidder/prime contractor will meet all requirements of the bid specifications and that the public facility will ultimately be delivered to the public in full accordance with the required specifications at the agreed upon price. The bidder/prime contractor which is ultimately selected by the City will be contractually bound to specifically perform under the contract at the bid price which has formed the basis of the contract with the City. Whether or not that contractor has made a detailed and correct assessment of its financial risks on bid day is not the City's concern so long as the bidder fully intends to and will be obligated perform as required.

In this instance, the City staff and the City Attorney's office will take every step necessary to assure that EMMA will perform and will complete this Terminal contract in full compliance with the contract specifications at the price they offered and which will form the basis of our contract. There is nothing "unfair" or inappropriate in this with respect to any of the unsuccessful bidders.

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Please feel free to contact any of us should have any additional questions regarding the Swinerton bid protest of the Airport Terminal Contract or if we can be of any further assistance in this matter.

cc: James L. Armstrong, City Administrator
Pat Kelly, City Engineer

Swiley/city council communications/Airport Terminal Bid Protest – Council Memo
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