

RESOLUTION NO. 1658

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF WILSONVILLE ACTING AS THE LOCAL CONTRACT REVIEW BOARD MAKING FINDINGS, DETERMINATIONS AND CONCLUSIONS DENYING THE PROTEST OF THE REJECTION OF W.A. JONES COMPANY BID FOR THE PUBLIC IMPROVEMENT CONTRACT FOR THE WILSONVILLE ROAD WATERLINE (PROJECT NO. 530-49130-5000-340); AND REPEALING RESOLUTION NO. 1657

WHEREAS, the City Council acting as the Contract Review Board, finds and recites:

1. Seven (7) sealed bids were received prior to 1 p.m., local time, at the Community Development Department, 8445 SW Elligsen Road, Wilsonville, Oregon, 97070. Bids were then opened individually and separately read aloud after 1 p.m., local time, June 13, 2000.

2. The City Council acting as the Local Contract Review Board, as recommended by the City Engineer, found and concluded that the bid of W. A. Jones Company was responsive and W. A. Jones Company was the lowest responsible bidder qualified for the work.

3. The City Council adopted Resolution No. 1657, adopted June 19, 2000 and signed two days later, provided that the award of the bid was: "Subject to the final review and approval of the City Engineer and in accordance with the provisions of the Oregon Revised Statutes, Chapter 279, Public Bids and Contracting and Wilsonville Code 2.314, Contracts with the City, and the Attorney General's Model rules which the City has adopted as its contracting rules".

4. Thus the City Engineer retains final approval authority over the award of bid after the award is authorized by the City Council.

5. In preparing to award the bid and mail the contract document on June 21, 2000, Staff discovered that W.A. Jones Company had deleted by hand the last line of contract provision 107.13.00A, Indemnification: Revise to: with an illegible initial in the margin (copy attached). The language struck through pertains to indemnification for the Owner by the Contractor and when deleted, eliminates the statement that indemnification pertains to anyone for whose acts any of them may be liable, "regardless of whether or not it is caused in part by a party indemnified hereunder."

6. The Project bid document "*Instructions to Bidders*"- stated the following: "Any person contemplating the submission of a proposal and being in doubt as to the meaning or intent of said Contract Documents, should request that the Project Engineer provide, in writing, an

interpretation thereof. Any interpretation or change in said Contract Documents will be made only in writing and a copy of such interpretation or change will be mailed or delivered to each person receiving a set of documents.”

7. The Project bid document “*Section 11, 102.5.00*”- stated the following: "If any Bidder, prior to submitting his bid, should find discrepancies in, or omissions from the drawings, specifications or other proposed contract documents, or if he should be in doubt as to the true meaning thereof, he shall at once make a written request to the Project Engineer for corrections, clarification, or interpretation of the point or points, in question. The persons submitting such request shall be responsible for its prompt delivery and this request shall be received five (5) days prior to the date fixed for opening proposals."

8. W.A. Jones did not notify the City that it had altered the Contract Document when it submitted its bid, nor did it request an interpretation of the Contract Document.

9. ORS Chapter 279, Public Contracts and Purchasing, is the statutory authority for purchasing, bids, and bids in general. The Attorney General's Model Public Contract Rules Division 30 (Public Procurement) and Division 40 (Public Improvement Contracts) have been adopted by the City, Ordinance 511, codified at WC 2.314(10)(b).

10. OAR 137-030-0050 provides for protest of contract terms and conditions unless otherwise specified in the contract, and subsection (3) provides for agency response: “The Agency shall not consider an Offer’s request for change or protest after the deadline established for submitting such request or protest. The Agency shall provide notice to the applicable Entity if it entirely rejects a protest. If the Agency agrees with the Entity's request or protest, in whole or in part, the Agency shall either issue an Addendum reflecting its determination under OAR 137-030-0055 or cancel the solicitation.”

11. OAR 137-030-0075 Mistakes allows the Agency to waive a minor informality before award of the contract. A reading of the rule indicates that minor informalities are such things as failure to return the correct number of offers, failure to sign an offer, and clerical errors. Subsection 3 allows the agency to reject any offer in which a mistake is evident on the face of the Offer.

12. OAR 137-030-0012(3) Contingent Offers provides, "Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to OAR 137-030-0010 and 137-030-0090, a Proposer shall not make its Offer contingent upon the Agency's acceptance

of any terms or conditions (including specifications) other than those contained in the Solicitation Document." Subsection (4) provides that by signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document.

13. The customary procedure is to examine the bidder's proposal before awarding the contract. The Bid Contract Documents included with the proposal (and prepared by the City) are not usually reviewed since any changes by the bidder must be in writing and approved by the City Engineer in accordance with the bid instructions, statute, and rule.

14. In accordance with Wilsonville Code 2.314(10), the City Engineer is the designated Contracting Officer for public improvements, and thus retains final authority over the Waterline Contract as delegated by the City Council. In his final review, the City Engineer determined that a change in the contract document had been made, without request for interpretation and without notice to the City. This change would not be considered minor within the meaning of OAR 137-030-0075 as it pertained to indemnification for acts or omissions by the Contractor and agents, with the result that any change would require an interpretation of the indemnification provision. By returning the Contract Document with changes the bidder W. A. Jones, made its offer contingent, contrary to OAR 137-030-0012(3).

15. Based on the change in contract document without request, the City Engineer may reject the bid based on the authority to reject a bid for Mistake, OAR 137-030-0075. Additional authority is provided in WC 2.314(5): "The Council or an official designated by the Council may reject any bid not in compliance with all prescribed public bidding procedures and requirements and may reject all bids if it is in the public interest to do so."

16. Under ORS 279.029(6)(a)(B)(iii), "lowest responsible bidder" is defined in part as one who has met the standards of responsibility. The contracting agency shall consider among other standards, "a satisfactory record of integrity. The public contracting agency shall document the record of integrity of a prospective bidder if the public contracting agency finds the prospective bidder not to be responsible under this sub-paragraph."

17. ORS 279.029(6)(a)(B)(v) provides that the lowest responsible bidder has "supplied all necessary information in connection with the inquiry concerning responsibility. If a prospective bidder fails to promptly supply information requested by the public contracting

agency concerning responsibility, the public contracting agency shall base the determination of responsibility upon any available information, or may find the prospective bidder no to be responsible..."

18. W.A. Jones Company did not notify the City or request the change, and thus did not allow opportunity for the City to notify other bidders. The City determines that W. A. Jones Company has not substantially complied with ORS 279.029 and is not responsible.

19. When the City investigated the change in contract document, W. A. Jones Company told the City first that no change had been made, and second, that the change must have been made after the bid was delivered to the City. The actions of the bidder reflect on the integrity of the bidder and the issue of responsibility.

20. The City Engineer recommends that the City Council convene as the Local Contract Review Board and schedule a hearing for July 6, 2000 at the City of Wilsonville Community Development Annex at 7 p.m. for the purpose of allowing W.A. Jones to respond to the City Engineer's recommendation.

21. From its experience in carrying out public contracts, the City has determined that the working relationship between the contractor and the City is of primary importance because of decisions that are made within the scope of the contract, whether or not such decisions are referenced in the contract document. The working relationship must be based on mutual trust and integrity.

22. The City Engineer has determined that the change in the contract bid documents represents an unfair bidding advantage toward W.A. Jones and said advantage has not been afforded to those other firms wishing to submit a bid proposal for the referenced project.

23. The City Engineer has determined that it would be in the best interest of the City to recommend that the bid of W.A. Jones be rejected because it is not responsive and has so notified said firm both verbally and in writing of this decision.

24. W.A. Jones has the opportunity to respond to the City Engineer's decision and has been requested to do so in written form and in a prompt manner.

25. By letter of June 28, 2000, by and through its attorney, W. A. Jones has protested the rescission of the award of contract and the award to any other bidder.

26. WC 2.314(5) provides that "in addition to the powers and duties established by this Code, the Board shall have such additional powers as authorized by state law and ORS

279.035 provides "...may, for good cause, reject any and all bids upon a finding of the agency it is in the public interest to do so."

27. In order to meet the construction schedule for the new Boones Ferry Elementary School, it is imperative that the award of the construction of the water system improvements not be delayed and declaring all the bids received rejected and re-bidding the Project would cause a material delay.

28. The bid documents received at the bid opening have remained in the custody of the City and MacKay & Sposito Inc.

29. If the Project were re-bid, the firms submitting bids, especially the firm who submitted the current lowest responsible bid, would be at a distinct disadvantage as their proposal amounts are now known; and

30. Re-bidding the Project would result in a substantial reduction in the number of bid proposals resulting in a decrease in competition leading to additional construction costs to the City; and

31. There is not good cause to reject all bids in the public interest.

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

The City Council, acting as the Local Contract Review Board, makes the following findings, determinations and conclusions:

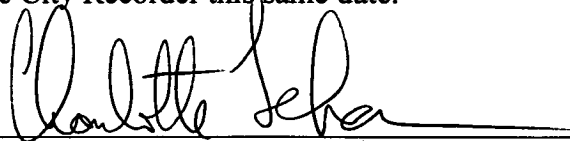
- (1) The findings recited above are incorporated herein as if fully set forth.
- (2) W.A. Jones Company was given notice and opportunity to appeal the disqualification by letter dated June 23, 2000. W.A. Jones Company has filed a timely protest of the bid rejection process and had an opportunity to be heard de novo in this matter.
- (3) The City Council, acting as the Contract Review Board, finds, determines and concludes that good cause has been presented and that it is in the public interest to reject the bid of W. A. Jones Company as nonresponsive under the standards of WC 2.314(5); ORS 279.035; ORS 279.029, OAR 137-030-0012(3); OAR 137-030-0050; OAR 137-030-0075.
- (4) There is not only good cause to reject W.A. Jones' bid in the public interest, but when the effect on the City and the other bidders of re-bidding is also balanced against the public interest good cause is not established to reject all bids.

(5) The City Council, acting as the City Contract Review Board, finds, determines and concludes in the public interest, the Project shall not be re-bid.

(6) W.A. Jones' protest is denied.

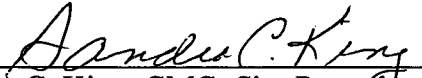
(7) Resolution No. 1657 is hereby repealed.

ADOPTED by the Wilsonville City Council at a special Council meeting thereof this 7th day of July, 2000, and filed with the Wilsonville City Recorder this same date.



CHARLOTTE LEHAN, MAYOR

ATTEST:



Sandra C. King, CMC, City Recorder

SUMMARY OF VOTES:

Mayor Lehan	Yes
Councilor Helser	Yes
Councilor Barton	Yes
Councilor Kirk	No
Councilor Holt	Yes

Resolution No. 1658

107.13.00 Indemnification: Revise to:

- A. Contractor shall indemnify and hold harmless Owner and Project Engineer and their agents and employees from all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the work, provided that any such claim damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including the loss of use resulting there from and (b) is caused in whole or in part by any negligent act or omission of Contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, ~~regardless of whether or not it is caused in part by a party indemnified hereunder.~~
- B. In any and all claims against Owner or Project Engineer or any of their agents or employees by any employee of Contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts of them may be liable, the indemnification obligation under paragraph A shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor under workmen's compensation acts, disability benefits acts.
- C. The obligations of Contractor under paragraph A shall not extend to the liability of the Project Engineer, his agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications.

107.14.00 Public Safety and Convenience: Add:

Access to abutting properties shall be maintained. Interruption of access shall be in accordance with the project plans or as approved by the Project Engineer upon Contractor's prior written request. Contractor shall maintain pedestrian access to bus stops.

In accordance with generally accepted construction practices, the Contractor will be solely and completely responsible for conditions of the job site, including safety of all persons and property during performance of the work. This requirement will apply continuously and not be limited to normal working hours.

The duties of the Owner do not include review of the adequacy of the Contractor's safety measures, on or near the construction site.

108 PROSECUTION AND PROGRESS OF WORK**108.1.00 Contractor's Construction Schedule: Add:**

At the preconstruction conference, the Contractor shall submit a list of subcontractors and a detailed work progress schedule indicating the block time periods for completing the various stages of construction. Schedule to be updated weekly as necessary. The weekly schedule will be reviewed at construction progress meetings to be scheduled by the Owner. A representative of the Contractor, Owner and Project Engineer shall attend each meeting.

WILSONVILLE ROAD
18" WATER MAIN AND 8" SANITARY SEWER MAIN

II - 11