

INTEROFFICE MEMORANDUM

DATE: 9/19/18

TO: Mayor and Council

FROM: Sonia Alvarez, City Clerk

SUBJECT: Late Distribution – Fire Station Award
Agenda 9/19/18, Item B-5

Attached are letters received from Weinberg, Roger & Rosenfeld, representing Carpenters Local #701. The letter dated 9/18/18 requests delay of award on the Fire Station Project, agenda item B-5. The letter dated 9/13/18 is referenced as an attachment to their request. Staff has no objection to the request to postpone action on the bid award and recommends that the item be rescheduled to the October 3, 2018 agenda.

Thank you.

C: City Administrator
City Attorney
Community Development Director
City Engineer

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September 18, 2018

VIA EMAIL ONLY – salvarez@cityofmadera.com

Ms. Sonia Alvarez
City Clerk
City of Madera
205 W. 4th Street
Madera, CA 93697

Madera City Clerk
RECEIVED
By: Salvarez
Date: 9/18/18

Re: REQUEST TO DELAY AWARD
Right to Access Bid Documents for Fire Station #58

Ms. Alvarez,

Thank you for your e-mail message of today in response to our request for the bid documents on the Fire Station #58 project.

We are requesting that the City delay awarding the Fire Station #58 project until we have had the opportunity to review the documents provided.

For the reasons explained in our September 13, 2018 letter, it was illegal for the City to withhold the bid packages once bids were opened. Therefore, your statement that the bid packages can now be released "since the item is scheduled for City Council consideration of award" does not have any legal basis. If the City were relying on some other exemption from the Public Records Act, it would have had to claim that exemption in its initial response to our client's request.

Furthermore, I imagine consideration of the award has been on the City Council's agenda for more than one day (the Brown Act requires 72 hours).

Accordingly, because the City has illegally withheld the bid packages since our client's original request on September 5, 2018, we are requesting that the City delay consideration of the award until our client and other concerned members of the public have an opportunity to review the bid packages. Doing otherwise would deprive the public of their right to a transparent bidding process and may prompt our client to consider legal action.

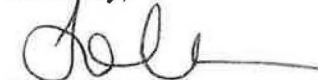
September 18, 2018

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Please share our request with the City Council immediately or at tomorrow's meeting, and advise us of the City's decision.

We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jolene', followed by a horizontal line extending to the right.

Jolene Kramer

JEK:

cc Via Email: Ms. Samantha Draper, sdraper@nccrc.org
Ms. Elizabeth Steelman, esteelman@nccrc.org
Mr. Brent Richardson, City Attorney, brichardson@cityofmadera.com
Ms. Shawndee Dix, Paralegal, sdix@cityofmadera.com

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September 13, 2018

VIA U.S. MAIL AND EMAIL - salvarez@cityofmadera.com

Ms. Sonia Alvarez
City Clerk
City of Madera
205 W. 4th Street
Madera, CA 93637

RECEIVED
OFFICE OF THE CITY CLERK

SEP 17 2018

BY 

Re: Right to Access Bid Documents for Fire Station #58

Ms. Alvarez:

This office represents Carpenters Local #701, which monitors bidding on public works projects to ensure compliance with competitive bidding laws and transparency in the bid process.

On September 5, 2018, our client requested the entire bid packages for the two low bidders on the Fire Station #58 project, which bids were publicly opened on August 30, 2018. She was directed to the City's Public Works Department, who directed her to your office. On September 12, 2018, you provided an e-mail response to our client as follows:

Since a contract has not yet been awarded, the requested documents are exempt from disclosure pursuant to [Government Code] §6254(a). Records will be available once an award has been made.

Respectfully, this position runs afoul of the California Public Records Act ("CPRA"), which ensures the public's right to access government records, and of state competitive bidding laws, which are "passed for the benefit and protection of the taxpaying public, not for the benefit and enrichment of bidders" (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-71) and act as a "guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best result for the public." (*Domar Electric* 9 Cal.4th at 170-71; see also *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 314 (citing, *inter alia*, *Domar Electric*)).

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I. Bids for Public Construction Contracts are discloseable once they are opened

Bids for public construction contracts submitted to government agencies are public records that are discloseable once they are opened. The CPRA defines a public record as "... any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency..." (Gov't Code § 6252(e).) Bids from outside construction contractors satisfy this definition.

Under the CPRA, a government agency, upon receipt of a request for a public record, *must* make the record promptly available to the requestor once the appropriate fees are paid:

Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, *shall make* the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

(Gov't Code § 6253(b) (emphasis added).) It further provides, "Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records." (Gov't Code § 6253(d).)

The bid submissions requested are public records and therefore must be made available promptly. In response to our client's request, you invoked Government Code section 6254(a), which provides an exemption for the following types of documents:

Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(Gov't Code, § 6254(a).) For a number of reasons, this exemption does not apply. First, bid submissions from outside contractors are plainly not "preliminary drafts, notes, or interagency or intra-agency memoranda." Second, to the extent you may be claiming that the bid submissions relate to such internal correspondence, that would be insufficient to invoke the exemption. Our client's request is limited only to the bid documents submitted by outside contractors; it is specifically *not* seeking any internal City correspondence or documents relating to the City's evaluation of the bids. Where the request is so limited, the City cannot rely on the Section 6254(a) exemption. Third, you have made no showing or even explained how the public interest in withholding the bid submissions (assuming there is one) might outweigh the public interest in disclosure, which is particularly strong here given the need for fair and transparent bidding processes.

Indeed, none of the CPRA exemptions would apply here.¹ Other public entities make bid submissions publicly and widely available as soon as they are opened and before the bid is awarded.

¹ Under the CPRA, it is incumbent on the public agency to identify which exceptions allow it to withhold disclosure of public documents. (Gov't Code § 6253.)

Many public entities publicly post that information online. For example, the website for Caltrans on the California Department of Transportation website lists bid results and includes links to downloadable bid documents. A review of the Caltrans website shows that bid documents for bids opened two days ago, September 11, 2018, have already been posted to its website. (View Bid Results, CALTRANS, <http://www.dot.ca.gov/dpac/bid-results/viewbidresults.html>.)

Furthermore, Section 10305 of the California Public Contract Code specifically requires public inspection of submitted bid documents, which makes it clear that such documents are not considered exempt from public disclosure. (Pub. Contract Code § 10305.)

For these reasons, your reliance on Section 6254(a) is misplaced, and the bid submissions should be produced to our client as soon as possible.

II. The Subletting and Subcontracting Fair Practices Act also requires prompt disclosure of the bid documents

Prompt production of the bid documents is also required to ensure compliance with the Subletting and Subcontracting Fair Practices Act (“SSFPA”). (Pub. Contract Code §§ 4100 *et seq.*) The SSFPA was enacted to address bid shopping and bid peddling on public works projects, and to mitigate problems with “subcontractor financial solvency and quality of subcontractor work on public projects by ensuring that the awarding authority [has] the opportunity to investigate and approve initial subcontractors and any proposed substitutions.” (See Pub. Con. Code § 4101; *E.F. Brady Co. v. M. H. Holden Co.* (1997) 58 Cal.App.4th 182.)

This goal is accomplished in part by the SSFPA’s requirement that bids include the name, location, and license number of each subcontractor, (Pub. Con. Code § 4101), and by its regulation of the circumstances under which a listed subcontractor can be replaced after award of the contract. (*Id.*, § 4107.)

It is therefore in the public interest that any issues related to possible problems in the contracting process come to light as early as possible. Transparency in the bidding process demands prompt dissemination of bids and subcontractor lists. This permits other bidders and interested entities to evaluate the information submitted and, if warranted, submit bid protests or other correspondence regarding potential Public Contract Code violations *before* the contract is awarded. With this type of information, the City can ensure the project will be awarded to the lowest responsive and responsible bidder who will comply with the law and provide quality workmanship on time and on budget.

III. Conclusion

The CPRA and state competitive bidding laws require the City of Madera to provide the requested documents promptly and without delay. This action will put the City in compliance with the California Public Records Act and state competitive bidding laws. It will also promote transparency in the expenditure of public funds, ensure public trust, and enable the bidders and other concerned entities to provide valuable information to the City as part of the public contracting process.

Ms. Sonia Alvarez
September 13, 2018
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On behalf of Carpenters Local #701, we ask that the City immediately provide all bid submission packages for bidders on the Fire Station #58 project, including subcontractor lists. Please provide this information to our client directly at the contact information provided. Electronic transmission would be preferable, if possible.

Should you have any questions or concerns, feel free to contact the undersigned.

Sincerely,



Jolene Kramer

JEK:mda
opeiu 29 afl-cio(1)

cc **Via Email:** Ms. Samantha Draper, sdraper@nccrc.org
Carpenters 46 Northern California Counties Conference Board

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