



CITY OF SACRAMENTO

9

TRAFFIC ENGINEERING DIVISION

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October 9, 1981

CITY MANAGER'S OFFICE  
**RECEIVED**  
OCT 9 1981

**APPROVED** CO 81022  
BY THE CITY COUNCIL

OCT 13 1981

OFFICE OF THE  
CITY CLERK

City Council  
Sacramento, California

Honorable Members in Session:

SUBJECT: Supplementary Report Regarding Award of Contract for Revenue Control Project

SUMMARY

A question has been raised regarding consideration of sales tax revenue in the calculation of low bid on the revenue control project. This report attempts to answer the question.

BACKGROUND INFORMATION

The three low bidders on the revenue control project were as follows:

ERI-Alton	\$669,000
Collins Electric	672,000
Schetter Electric	675,012

The second bidder is \$3,000 above and the third bidder is \$6,012 above the low bidder.

A question came up just before the last Council meeting as to whether the City's one percent share of State Sales Tax should and could be considered in determining the lowest responsible bidder. The City Attorney wrote an opinion on March 16, 1977, that concluded "The City may take into account the fact that the City will receive a one percent sales tax rebate from sales tax paid to supplier located within the City of Sacramento". A copy of the opinion is attached and it appears that it is intended for those cases where the City is making a direct purchase of materials, supplies or equipment. In this case, we are dealing with a construction contract, part of the cost of which is for materials, supplies and equipment. Section 57.102 of the City Code covers the use of sales tax in determining the low bid and it specifically says purchase of supplies. Section 58.102 covers contracts for public projects and makes no reference to sales tax. The calculation of sales tax distribution by the State Board of Equalization is not so direct in this case. In regard to contractors, the sales tax from all contractors in and out of the City goes into a County-wide pool and is distributed based on the distribution of total retail sales tax. Additionally,

in this case, the contractor will be paying his subcontractor for the equipment and a major portion of the sales tax may go to Los Angeles or wherever the major equipment supplier (subcontractor) is located.

In any event, we asked each of the three low bidders to provide the price of the equipment portion of their bid. The amounts range from about \$411,000 to \$447,000 (one bidder asked that the exact amount be kept confidential). If it is assumed that the City would realize one percent of the sales tax, we would consider \$4,110 to \$4,470 in the calculation. Therefore, if the second bidder is located in the City and the low bidder is not, and if the City were sure to realize the sales tax, then the second bidder is low by \$1,110 to \$1,470.

The low bidder's stationery lists a Rancho Cordova address, and the second bidder lists a Stockton address. It is known that the second bidder has an office in the City, however. If the award goes to the second bidder, and if they use their Sacramento office for transactions, and if the one percent sales tax is credited to the jurisdiction where the equipment is installed, and if the Council chooses to calculate low bid in this fashion, even if it were not mentioned in the bid documents, then Collins Electric is the low bidder.

One other item needs to be considered prior to deciding to apply sales tax credit to the low bid. Each of the three low bidders were asked to make certain submittals regarding the equipment they intended to install. At the same time, they were asked to give a quote for a second year of maintenance on the equipment (the first year of maintenance is included in the bid price). The quotes we received were as follows:

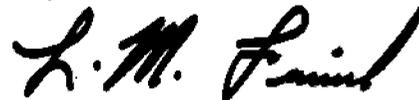
ERI-Alton	\$ 2,860
Collins Electric	19,900
Schetter Electric	24,517

The \$17,040 difference between ERI-Alton and Collins Electric cancels out the tax advantage several times over and reestablishes ERI-Alton as clearly the low bidder.

#### RECOMMENDATION

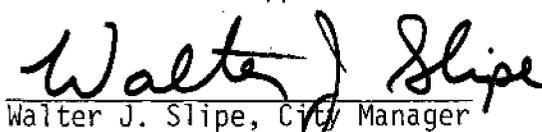
It is recommended that the contract be awarded to ERI-Alton and that the two Resolutions attached to the main report be adopted.

Respectfully submitted,



L. M. Frink  
Traffic Engineer

Recommendation Approved:



Walter J. Slipe, City Manager

Attachment

October 13, 1981  
All Districts



CITY OF SACRAMENTO

JAMES P. JACKSON  
CITY ATTORNEY

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ASSISTANT CITY ATTORNEY

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March 16, 1977

MEMORANDUM

TO: JACK CRIST, Director of Finance

FROM: LELIAND J. SAVAGE, Deputy City Attorney

RE: CONSIDERATION OF CITY SALES TAX REBATE IN DETERMINING THE  
LOWEST RESPONSIBLE BIDDER FOR CITY CONTRACTS

QUESTION PRESENTED

In determining who is the "lowest responsible bidder" for purposes of awarding city contracts, is it permissible to take into account the one percent sales tax rebate the city receives from sales tax paid to suppliers located within the City of Sacramento?

ANSWER

Yes. Consideration of the sales tax rebate is a permissible method of determining the lowest bidder as required by City Charter Section 252. It does not constitute an illegal local preference bidding system.

ANALYSIS

I. Consideration of sales tax rebate in determining the "lowest bid" does not constitute an illegal local preference.

Under Section 252 of the City Charter, any city contract for supplies, equipment or the undertaking of a public project amounting to more than \$5,000, is subject to competitive bidding requirements which mandate that the contract be awarded to the "lowest responsible bidder."

Under a typical local preference bidding system, local suppliers are given a percentage preference or advantage over non-local bidders. A "bidding preference" has been defined as "some advantage, preference or privilege accorded to a locality, class of bids, or a competitor." There appears to be no local privilege, preference or advantage in using the sales tax rebate to calculate the lowest bid submitted, since all suppliers,

local and non-local, would be treated the same from an economic point of view. The supplier submitting the lowest responsible bid will be awarded the contract. For example, if the preference were five percent, any local bidder bidding less than five percent higher than a competing non-local bid would be awarded the contract, assuming other relevant factors are equal.

When the City purchases supplies from a supplier located outside the City, it pays six percent sales tax on the purchase price. When the City purchases the same supplies for the same price from a supplier located within the City, it pays the same rate of sales tax; however, state law provides for a one percent tax rebate.

If the sales tax rebate is taken into account, the ultimate economic cost to the City would be less if the City purchased the supplies from a local supplier. For example, if the City buys \$10,000 worth of supplies from a supplier located outside the city, the total price including tax is \$10,600. The same purchase from a Sacramento firm would also cost \$10,600. However, the City would receive \$100 back in its local sales tax rebate, reducing the total economic cost to the City to \$10,500. In this situation, the local supplier would be the low bidder and, assuming it qualifies as a "responsible bidder," it should be awarded the contract.

Neither the City Charter nor the City Code set forth specific guidelines or criteria for determining the "lowest" bid. Consideration of sales tax rebates does not impair or modify competitive bidding. Bidder responsibility and economic cost remain the only permissible criteria for letting contracts.

1. As the following figures show, any local bid lower than \$10,095.20, would cost the City less than a non-local bid of \$10,000:

<u>Sacramento Bidder</u>		<u>Non-Local Bidder</u>	
\$10,095.20	Bid	\$10,000.00	Bid
<u>+ 605.70</u>	6% Sales Tax	<u>+ 600.00</u>	6% Sales Tax
10,700.90	Gross Price	\$10,600.00	Total Cost to City
<u>- 100.90</u>	1% Local Rebate		
\$10,600.00	Total Cost to City		

March 16, 1977

Page 3

There does not appear to be any California authority on this point. Other jurisdictions have decided cases which are closely analogous in favor of taking into account the lowest economic cost. In Austin vs. Housing Authority of the City of Hartford (1956) 122 A.2d 399, the Supreme Court of Errors of Connecticut upheld a municipality's consideration of projected insurance dividends in calculating the lowest bid for city insurance coverage. Company X submitted a bid for a fixed five-year gross premium of \$86,997.45. Company Y submitted a gross premium bid of \$114,567. However, Y stated it would pay an estimated dividend of \$57,283.50 over the five-year period; X offered no dividends. The court concluded that while X's bid of \$89,997.45 was the lowest of all the bids which made no deduction from gross premiums for dividends, Y's bid of \$114,567 minus the \$57,283.50 in projected dividends was the lowest net premium bid.

Consideration of the sales tax rebate in calculating the lowest bid appears to be closely analogous to consideration of dividend refunds in the bidding process in Austin. In both cases net economic cost, rather than monetary face value determines the lowest bid. The court allowed inclusion of dividends in calculating the lowest net premium bid in spite of the fact that the amount of the dividend refunds were speculative. Insurance dividends are based on the return of the unused or unabsorbed premium, and in this particular case, dividends were estimated on the basis of the returns to policyholders over a period of the ten preceding years. 122 A2d 399, 401. The sales tax rebate, on the other hand, is not a projected figure, but rather a certain cash return. This appears to provide even stronger justification for including the tax rebate in calculating the lowest bid.

In Market Maintenance Co. Inc. vs. City of Newark (1960) 164 A2d 367, the New Jersey Superior Court, Appellate Division, upheld the City's inclusion of a 1 percent "prompt payment discount" in computing the lowest bid. The plaintiff submitted a lump sum bid of \$87,600 on the window washing contract. The combined bids of four other bidders amounted to \$88,219, but two of them offered discounts with the bid for a net price bid of \$87,089.47 - some \$511 less than plaintiff's bid.<sup>2</sup>

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2. It should be noted that in this particular case, there was little uncertainty as to the inclusion of the discount in the ultimate bid price. In awarding the bids, the City accompanied its acceptance with a contract binding itself to pay the net sums of the bids after discount within 20 days of invoice.

The court concluded that consideration of the discount was a lawful exercise of the authority of the Business Administrator in determining "which bid in given circumstances is most advantageous to the city, and so the lowest bid..." "[T]he mere fact that alternative [payment] proposals are sought does not of itself invalidate the bidding. (citations omitted)" 164 A2d. 367, 369.

II. Consideration of the sales tax rebate in the bidding process is within the proper discretion of the City Council, and is presumed to be valid.

The determination of who is the lowest responsible bidder lies within the judgment of the governing body and will not be disturbed by the courts unless the decision was induced by fraud or shown to be an arbitrary, unreasonable misuse of discretion. Diablo Beacon Painting & Publishing vs. Concord, (1964) 229 Cal.App.2d 505, Cyr vs. White, (1947) 83 Cal.App. 2d 22.

The court stated in Diablo Beacon Painting & Publishing vs. Concord:

"In determining whether to accept a bid for a public contract, public officers as a rule perform not merely ministerial functions, but duties of a judicial or discretionary nature, and the courts in absence of fraud or an abuse of discretion, will not ordinarily interfere, so long as the officers comply with the controlling constitutional or legislative provisions." (229 Cal.App.2d 505, 508)

Thus a presumption of validity attaches to the determination of the lowest responsible bidder which can only be overcome by proof that the governing body acted without justification or fraudulently. When measured against this standard, consideration of the sales tax rebate in the bidding process would not seem to be sufficient grounds for judicial intervention. It is not contrary to constitutional, statutory, or charter provisions.

Secondly, the sales tax rebate is a reasonable factor to include in determining the low bid. It is easily calculated, and non-discriminatory.

Finally, consideration of the sales tax rebate leads to a more precise measure of the ultimate economic cost of a bid. Arguably, Section 252 of the City Charter which requires selection of the lowest responsible bidder requires that the sales tax

MEMO TO JACK CRIST  
March 16, 1977  
Page 5

rebate be included in the factors considered when determining the lowest responsible bidder.

CONCLUSION

The City may take into account the fact that the City will receive a 1 percent sales tax rebate from sales tax paid to supplier located within the City of Sacramento.

JAMES P. JACKSON  
City Attorney

By:

*Reliand J. Savage*

RELIAND J. SAVAGE  
Deputy City Attorney

LJS:plf