

4.2



DEPARTMENT OF
UTILITIES

ENGINEERING SERVICES

CITY OF SACRAMENTO
CALIFORNIA

FROM CONTINUED
TO 10/29/97
FREEPORT BLVD.
SUITE 100
SACRAMENTO, CA
95829
PH 916-63-6338
FAX 916-63-6652

November 20, 1997

City Council
Sacramento, California

Honorable Members in Session:

SUBJECT: SUMP 35 PUMP STATION, (PN: WG56) TRANSFER FUNDS AND AWARD CONTRACT TO SIERRA NATIONAL CONSTRUCTION, INC., FOR AN AMOUNT NOT TO EXCEED \$528,205.

LOCATION AND COUNCIL DISTRICT:

Sump 35 Pump Station Project is in Council District 4. See location map.

RECOMMENDATION:

Staff recommends that the City Council transfer funds, accept the bid from Sierra National Construction, Inc., for an amount not to exceed \$528,205 and award the contract.

CONTACT PERSON: Andy Hunt, Senior Engineer, 433-6620
Gary A. Reents, Engineering Services Manager, 433-6633

FOR COUNCIL MEETING OF: December 2, 1997

SUMMARY

On September 10, 1997, the Sump 35 Pump Station Project was advertised for bids. Bids were received from eight contractors and opened by the City Clerk on October 22, 1997. The low bidder was EAI International with a bid of \$502,777. Because EAI International failed to meet the MBE/WBE goals, failed to submit a good faith effort, and failed to attend one of the required MBE/WBE program meetings, their bid was deemed non-responsive. Therefore, it is proposed to award the contract to Sierra National Construction, Inc., who is the second low bidder at \$528,205.



RECEIVED
CITY CLERKS OFFICE
CITY OF SACRAMENTO

NOV 26 10 16 AM '97

COUNCIL APPROVAL
MTG. DATE 12-2-97 ITEM NO. 4-2
FROM: CITY CLERK'S OFFICE

VIA FAX (916) 433-6652/(916) 264-7672
& U.S. CERTIFIED MAIL

Proposal/Bid No.: EAP278-01
November 21, 1997

City Clerk
City of Sacramento
915 I Street, Room #304
Sacramento, CA 95814

SUBJECT: Sump 35 Pump Station, City of Sacramento, Project No.: WG56.
BID PROTEST Per City Ordinance - 97-018 - Sacramento City Code: 58.10.

City Clerk:

This letter serves as a formal **BID PROTEST** in accordance with the Sacramento City Code 58.10. Please note the following:

Bid Protest: Section 58.10.1003.

Project: Sump 35 Pump Station, Project No.: WG56.
Bid Date: 10/22/97 (Amended Bid Date from 10/8/97)
City of Sacramento - Department of Utilities
Engineering Services Division
Project Manager: Mr. Bill Busath

Factual/Legal Grounds for Protest Sec. 58.10.1003.:

The bid process and award criteria for the above mentioned project is based on, and enlists MBE/WBE requirements, specifically 10.57% for MBE (Minority) and 9.5% for WBE (Women). The project requirements are based on **NO** federal funding and/or contract administration, furthermore, funding that is directed and administered by State and City agencies **must** comply with California law and statutes. The requirement for preferences and outreach on this specific project is defined as: "It is the intent of the City of Sacramento to increase the participation of Minority Business Enterprises (MBEs) and Women-Owned Business Enterprises (WBEs) in all aspects of contracting to the maximum extent feasible. This policy constitutes a commitment to substantially increase the utilization of Minority and Women-Owned Business Enterprises. Therefore, contractors, who are awarded City contracts agree to ensure MBE and WBE firms have the maximum opportunity to participate in the performance of contracts and subcontracts. The City of Sacramento has established the following goals for MBE and WBE participation on this contract: MBE: 10.57% WBE 9.5%."

The requirements continue with strict preferences listed on page 1 of 16 (City of Sacramento MBE/WBE Requirements), and the values for consideration published hold a maximum of combined preference dollars of \$25,000.00 for bid comparison. The 2% or 5% preference base is in direct violation of California Law, as confirmed by the Supreme Court 10 November 1997, upholding the 9th Circuit Courts ruling that Proposition 209 is California law, and that all public contracting is subject to the provisions and statutes therein.

In the event that the City of Sacramento is not in receipt of Proposition 209, and its legislative ruling for the State of California and all municipalities therein, please find the attached synopsis and the following information from the California Civil Rights Initiative on the November 1996 ballot as passed on November 5th of 1996 by 54% of California voters:

Proposition 209 States very clearly, “(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting

(f) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, and city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.”

Chronological Events of Bid Evaluation:

EAI was informed within two days of the bid opening that the City’s tentative position was to award the project to Sierra National Construction, Inc. due to their bid achieving the maximum allowable percentage points of 5% for a MBE and WBE subcontracting participation. This position allowed for a maximum of \$25,000.00 for bid comparison evaluation. This evaluation criteria allowed for the second bidder to be considered for the award. This position, however, is in direct violation of California Law as denoted above. EAI was to receive a letter the week of 11/3/97, via certified mail regarding the engineering & labor compliance’s office (staff) recommendation. Upon closer examination one week later, the City changed its ruling, stating that no letter would be sent, and a closed door meeting was to take place on Thursday 11/13/97 regarding this issue and that a formal decision would be made.

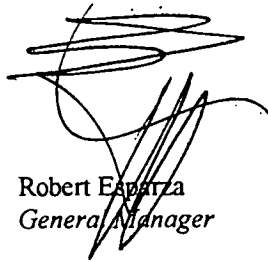
19 November 1997, EAI International received a project letter stating “The Department of Utilities staff is recommending on December 2, 1997 that the City Council award the contract to Sierra National Construction, Inc.” The basis and/or ruling for denial of award consideration to EAI International was not published.

The consideration of any other bidder on this project based on the MBE and WBE participation or bidding evaluation/outreach is a direct violation of California Law. EAI International will protect its rights in this issue and continue with legal recourse for the award of this contract to our firm. Please note that EAI, in addition to corporate counsel, has enlisted the Pacific Legal Foundation for constitutional and state evaluation of the City of Sacramento's requirements and award decision.

Please find the attached information for incorporation into the project record, and as factual/legal evaluation of this bid protest. If you have any questions or require additional information, I can be contacted directly at (707) 427-5100.

Respectfully Submitted,

EAI International

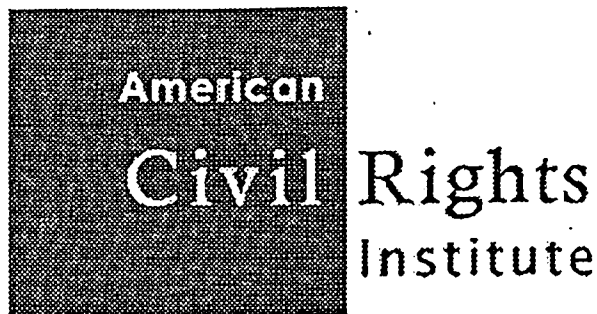


Robert Esparza
General Manager

Attachments

CC: Mr. Bill Busath, City of Sacramento Project Manager - Engineering
Mr. Anthony Miranda, EAI Counsel

EAI International



California's Proposition 209

COPY

Following is the text of the California Civil Rights Initiative, Proposition 209 on the November 1996 ballot, which was passed on November 5th by 54 percent of California voters.

- (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (b) This section shall apply only to action taken after the section's effective date.
- (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
- (f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.
- (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United State Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable.

MBE/WBE REQUIREMENTS
(City Contracts no Federal Funds Used)

It is the policy of the City of Sacramento to increase the participation of Minority Business Enterprises (MBEs) and Women-Owned Business Enterprises (WBEs) in all aspects of contracting to the maximum extent feasible. This policy constitutes a commitment to substantially increase the utilization of Minority and Women-Owned Business Enterprises. Therefore, contractors who are awarded City contracts agree to ensure MBE and WBE firms have the maximum opportunity to participate in the performance of contracts and subcontracts.

The City of Sacramento has established the following goals for MBE and WBE participation on this contract.

MBE: 10.57% WBE: 9.5%

Under Title 58.08.802 of the Sacramento City Code, a bidder must meet or exceed the participation goals or document Good Faith Efforts to have done so in order to be a responsible bidder. Those bidders who submit bids which meet or exceed the participation goals may be eligible for a bid preference.

THESE PREFERENCES ARE INDIVIDUALLY EARNED AND ARE CUMULATIVE

- Bid submitted which meets or exceeds MBE goal: 2% price preference*
- Bid submitted which meets or exceeds WBE goal: 2% price preference*
- Bid submitted which meets or exceeds both goals: 1% price preference*
- Bid submitted by certified preference eligible MBE: 2% price preference* ✓
- Bid submitted by certified preference eligible WBE: 2% price preference*

* up to a combined maximum of \$25,000

The bid preference given, if any, will be used to lower a bid for comparison evaluation only. The bid preference given, if any, will be used to calculate the lowest bid among those bids receiving such preference deemed to be responsible. If, as a result of a bid preference application a bid is determined to be the lowest responsible bid received, the contract award, if any, will be made at the submitted price.

Bidders are to submit completed subcontractor and/or trucking and material supplier form(s) with the sealed proposal. Bidders are also urged to include copies of their own City of Sacramento MBE/WBE Letter of Certification, if applicable, and the City of Sacramento MBE/WBE Letter of Certification for each subcontractor, trucker, materials supplier, or other business entity listed on these forms with the sealed proposal, or within four (4) working days after the opening of sealed proposals.