

Item 17-1

Supplemental Material

For

City of Sacramento

City Council
Financing Authority
Housing Authority
Redevelopment Agency

Agenda Packet

Submitted: October 26, 2009

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For the Meeting of: October 27, 2009

- Additional Material
- Revised Material

TITLE: CONTRACT: AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA) WATER METER RETROFIT PROJECT PHASE 6 (Z14010000)

Contact Information: David L. Brent, Engineering Manager, 808-1420; Dan Sherry, Supervising Engineer, 808-1419

Please include this supplemental material in your agenda packet. This material will also be published to the City's Internet. For additional information, contact the City Clerk Department at Historic City Hall, 915 I Street, First Floor, Sacramento, CA 95814-2604, (916) 808-7200.

SUPPLEMENTAL REPORT TO COUNCIL

Council Meeting: October 27, 2009

Council Item: Item 17 (Consent)

Contract: American Recovery And Reinvestment Act (ARRA) Water Meter Retrofit Project Phase 6 (Z14010000)

Bid Protest

On September 28, 2009, a bid protest was submitted by the second low bidder, Marques Pipeline, Inc., protesting the proposed award of the contract to the low bidder, WR Forde Associates. Marques' bid protest contended that Forde's bid should be rejected as non-responsive due to (1) Forde's submission of documentation of prior project experience after bid opening, rather than with its bid, and (2) irregularities in 3 American Recovery and Reinvestment Act of 2009 (ARRA) forms required to be submitted with Forde's bid.

Pursuant to Sacramento City Code § 3.60.510, City staff investigated the bid protest and determined that these bid omissions constituted minor bid irregularities that should be waived. In accordance with the City's bid protest requirements, a hearing on the bid protest was held before an independent hearing examiner employed by the Institute for Administrative Justice at the University of the Pacific's McGeorge School of Law.

Hearing Examiner's Decision

The Hearing Examiner's decision was issued on October 23, 2009, and a copy of the decision is attached hereto as Attachment 4. In summary, the Hearing Examiner's decision recommends that the bid protest be denied and that the City Council waive the irregularities in Forde's bid and find Forde's bid to be responsive. This recommendation is based on the Hearing Examiner's factual findings, including the following:

- Forde's failure to include documentation of its prior project experience with its bid was an inadvertent error that had no effect on, and could not have affected, Forde's bid price and conferred no competitive advantage to Forde.
- The documentation submitted by Forde after bid opening confirmed that Forde possessed the requisite prior work experience prior to the bid opening.
- The omissions in Forde's ARRA forms were inadvertent, had no effect on, and could not have affected, Forde's bid price, and conferred no competitive advantage to Forde.
- City staff properly applied its discretion in recommending that these irregularities be waived as an informality or minor irregularity.

SUPPLEMENTAL REPORT TO COUNCIL

Council Meeting: October 27, 2009

Council Item: Item 17 (Consent)

Contract: ARRA Water Meter Retrofit Project Phase 6 (Z14010000)

City Council Options

Under City Code Section 3.60.540, the City Council has the following options prior to taking action on a bid protest:

- Adopt the findings of fact issued by the Hearing Examiner, without hearing factual evidence from any party; or
- Review the recording of the hearing, or a transcript thereof, prior to adopting or rejecting, in whole or in part, the findings of fact issued by the Hearing Examiner, without hearing factual evidence from any party; or
- In addition to or in lieu of reviewing the recording of the hearing, or a transcript thereof, hear factual evidence from any party prior to adopting or rejecting, in whole or in part, the findings of fact issued by the Hearing Examiner.

City Code Section 3.60.540 also provides that the City Council may take any action on the bid protest that is authorized by law, including adoption of the Hearing Examiner's recommended determination of the bid protest, adoption of a determination different from that recommended by the Hearing Examiner or the rejection of all bids without deciding the bid protest.

Recommendation

City staff recommends that the City Council take the following action on the bid protest: (1) adopt the findings of fact issued by the Hearing Examiner, without hearing factual evidence from any party; and (2) adopt the Hearing Examiner's recommended determination of the bid protest. These recommendations are reflected in the revised Resolution attached hereto as Attachment 5.

Hearing Examiner Decision

Attachment 4

INSTITUTE FOR ADMINISTRATIVE JUSTICE
UNIVERSITY OF THE PACIFIC
McGEORGE SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
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CITY OF SACRAMENTO

**BID PROTEST HEARING
SACRAMENTO WATER METER SERVICE RETROFIT - PHASE 6**

In the matter of:)	Case No.: SACBP101509-2
)	
MARQUES PIPELINE, INC.,)	DECISION ON ADMINISTRATIVE
Protesting Bidder,)	APPEAL WITH FINDINGS OF
)	FACT AND RECOMMENDED
vs.)	DETERMINATION
)	
W.R. FORDE ASSOCIATES,)	
Protested Bidder,)	
and)	
)	
CITY OF SACRAMENTO,)	
Awarding Agency.)	

I. INTRODUCTION

The bid protest by Marques Pipeline, Inc. (Marques) concerning the City of Sacramento's proposed award of project PN:14419, Sacramento Water Meter Service Retrofit - Phase 6 (Phase 6), to W.R. Forde Associates (Forde) was heard before Vincent L. Pastorino, Hearing Examiner for the Institute for Administrative Justice, University of the Pacific's McGeorge School of Law, on October 15, 2009, in Sacramento, California.¹

II. APPEARANCES

Jeremy Jaeger, president, and Jason Anderson, operations manager, appeared on behalf of Marques. Eva Papineau-Anderson, executive assistant to the chief estimator, and Adam Saefong, bid coordinator, appeared on behalf of Forde. Michelle Carrey, associate civil engineer, Neal Joyce, associate engineer and project manager for Phase 6, and Joe Robinson, senior deputy city

¹ The impartial hearing examiner was appointed pursuant to Sacramento Municipal Code section 3.60.520.

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attorney, appeared on behalf of the City of Sacramento (City). Each party submitted documentary evidence and written argument. Testimony was received from all of the above-identified individuals except Mr. Robinson. Each party presented oral closing argument and the matter was then submitted for decision.

III. JURISDICTION AND SCOPE OF REVIEW

Section 3.60.520 of the Sacramento Municipal Code (SMC) sets forth the procedures for bid protest hearings before a hearing examiner appointed by the City Council. The protesting bidder has the burden of showing the existence of all facts necessary to support the bid protest. The hearing examiner shall issue a written decision that includes findings of fact and a recommended determination of the bid protest based on those findings of fact. Section 3.60.530 provides that after the hearing examiner issues a decision, the City Council shall consider the protest at a public meeting. The council may hear the bid protest as part of the council's consideration of the award of the contract to which the bid relates, or it may hear the bid protest as a separate item. Section 3.60.540 states that "the scope of the bid protest considered by the city council shall be limited to the issues and evidence set forth in the bid protest," and the section lists various procedures that the City may exercise, in its discretion, before taking final action.

IV. ISSUE PRESENTED FOR HEARING

Should the City conclude that Forde's bid is non-responsive because of Forde's failure to properly complete and timely submit certain documents in its sealed bid package?

V. BACKGROUND

The American Recovery and Reinvestment Act (ARRA) became federal law in February 2009. The ARRA designates approximately \$160 million for infrastructure development of California's drinking water systems. Those funds are administered through the California Department of Public Health (CDPH). In August 2009, the City Council authorized the city manager to negotiate and execute a funding agreement with CDPH for ARRA funding of the City's Water Meter Retrofit Project, Phases 1-9.

On August 19, the City commenced soliciting bids and issued its Contract Specifications booklet for Phase 6. The instructions in the booklet state that bids must be received at the city clerk's office by September 9 at 2:00 p.m. The City received eleven bids and opened them on September 9. Forde was the lowest bidder at \$1,113,400. Marques was the next lowest bidder at \$1,188,855. After the bid opening, Marques asked the City for copies of the complete bid packages from the first and third low bidders. The City provided those copies to Marques on September 11.

The City's bid instructions for Phase 6 state that the bidder's sealed proposal shall include written documentation of satisfactory experience installing water meter retrofits. During its review of Forde's bid package, the City discovered that Forde had failed to include that documentation. On September 11, Mr. Joyce from the Department of Utilities (DOU) sent an email to Mr. Saefong at Forde noting that Forde's bid packages for Phases 5 and 6 did not include written documentation of the relevant work experience. In his email, Mr. Joyce explained that,

under the bid instructions, a sealed proposal that did not include the written documentation of relevant work experience "may be rejected as non-responsive." He further stated that DOU was currently working with the city attorney to determine whether the bid package would be considered non-responsive. He concluded by stating, "in the meantime please provide the required documentation as soon as possible, as without it the City will be forced to reject the bid."

While the City was reviewing Forde's bid package, Marques was conducting its own review of that package. On September 15, 2009, Mr. Anderson at Marques sent an email to Mr. Joyce at DOU stating that Forde had apparently failed to include the required documentation of previous satisfactory work experience. In that same email, Mr. Anderson asked Mr. Joyce for verification as to whether the City had deemed Forde's proposal non-responsive.

On September 16, 2009, Mr. Joyce informed Mr. Anderson by email that although the documentation of previous satisfactory experience had not been included with Forde's Phase 5 and Phase 6 sealed bids, the documentation had been provided "shortly after" and the experience had been verified. Mr. Joyce also stated the opinion of legal counsel that because the language in the contract specifications states that under such circumstances the bid "may" be rejected as non-responsive, DOU had discretion to accept documentation after the bid opening on the rationale that the experience documentation did not affect Forde's bid price and would not give Forde any advantage over other bidders.

By letter dated September 17 and mailed on September 22, DOU notified all bidders that DOU would recommend to the City Council on September 29 that the council award the Phase 6 contract to Forde.

In its written report and recommendation to the City Council preceding the scheduled September 29 meeting, DOU did not mention the omitted work experience documentation. However, DOU did state in its report that Forde had submitted several incomplete attachments, specifically Attachments D, G, and M, required by ARRA as part of the bid package. DOU staff had recommended that those irregularities be waived because, in their opinion, the irregularities were minor and had no relationship to the bid price, and obtaining the missing information from Forde and its subcontractors after the bid opening would not provide Forde with any advantage over the other bidders. The report also stated that DOU staff had requested and received the incomplete or missing information from Forde and its subcontractors and the information had been reviewed and accepted by City and State staff.

On September 28, Marques submitted its bid protest. Marques asserts that the City should have deemed Forde's bid non-responsive due to (a) Forde's failure to provide written evidence of satisfactory work experience with the sealed bid package and (b) Forde's omissions on the ARRA attachments. The matter convened for hearing on October 15.

VI. LEGAL ANALYSIS AND FINDINGS OF FACT

A. **Work Experience Documentation.**

Marques asserts that Forde's bid should be deemed non-responsive because of Forde's failure to include written documentation of work experience in the sealed bid. City staff recommends, and Forde concurs, that the omission be waived because allowing Forde to submit the documentation after bid opening conferred no competitive advantage to Forde.

The bid instructions contain a boilerplate form entitled Sealed Proposal that must be completed and signed by the bidder. Page 2 of the form states:

...Additionally, the undersigned shall include written documentation with the Sealed Proposal of previous satisfactory experience in installation of water meter retrofits, in accordance with the following:

- The undersigned shall provide documentation for a minimum of one project of a minimum of 750 meter retrofits constructed or multiple projects combined that would equal a similar size and scope or similar construction work as approved by the Engineer. The work shall have been performed by the undersigned for a municipality or other public agency in the last five years. The documentation for each project shall describe the work performed; including the size and number of meters installed, the contract amount and duration, and the time period of performance, and shall include the name, address and telephone number of the owner agency or municipality. The documentation also shall include the name of a contact person for each owner who is familiar with the work performed. The above documentation shall be included with the Sealed Proposal.
- A Sealed Proposal that does not include the above required documentation may be rejected as non-responsive.

In addition to the above, page 2 of the Contract Specifications booklet states that "the right to reject any and all bids or to waive any informality in any bid received is reserved by the City Council." This provision is consistent with section 3.60.140 of the Sacramento Municipal Code, which gives the City Council the authority to reject the bid or "waive any informalities or minor irregularities" in the bid.

California courts have cited favorably a portion of an opinion of the Attorney General, which states:

"a basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted....However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted *if the variance cannot have affected the amount of the bid or given*

*a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential....*² [Konica Business Machines U.S.A., Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, 454, quoting from 47 Ops.Cal.Atty.Gen. 129, 130-131 (1966), in turn quoting from Dougherty v. Folk (1941) 46N.E.2d 307, 311. See also, National Identification Systems, Inc. v. State Board of Control, et.al. (1992) 11 Cal.App.4th 1446, 1453; Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4th 897.]

Thus, case law confirms that the bid instructions properly give the City discretion to reject Forde's bid as non-responsive for failure to submit the work experience documentation with the sealed bid. Case law also confirms that the City has discretion to waive that variance and accept Forde's bid as responsive if the variance in the bid cannot have affected the bid amount or conferred a competitive advantage to Forde.

With regard to the bid amount, the parties agree and the evidence shows that Forde's failure to include the work experience documentation in its sealed bid had no effect on Forde's bid amount. With regard to competitive advantage, after DOU discovered the variance in the bid it asked Forde on September 11 to submit the work experience documentation and Forde promptly complied. The evidence is also undisputed that Forde had gained the requisite work experience prior the September 9 bid deadline. Thus, City staff has held Forde to the same standard as other bidders with respect to having the requisite experience prior to bid opening.

In addition, the evidence confirms no attempt at deception or other subterfuge by Forde. As described elsewhere in this Decision, Ms. Papinoeau-Anderson testified in detail concerning how the bid package was assembled. Her testimony showed that Forde's failure to include work experience documentation was an inadvertent error. There was no evidence to plausibly suggest the contrary.

Marques asserts that Forde's omission did confer an advantage to Forde by not holding Forde to the same bid deadline applicable to the other bidders. The evidence does not support that assertion. As established above, the City has discretion to waive any informality in any bid if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. Here, the lowest bidder failed to include work experience documentation. City staff discovered that variance when it reviewed the bid, and City staff handled the matter by consulting with legal counsel and giving the bidder, Forde, additional time to submit the documentation. There was no evidence to indicate that City staff would have handled the matter differently if some bidder other than Forde had been the lowest bidder and had similarly failed to provide work experience documentation in the sealed bid. The Hearing Examiner concludes that all bidders were subject to the same rules and exceptions with respect to bid content and deadlines.

In summary, the Hearing Examiner concludes that City staff has properly applied its

² Italics from Konica, supra.

discretion in recommending that Forde's failure to submit work experience documentation with the sealed bid package be waived as an informality or minor irregularity.

B. ARRA Attachments D, G, and M.

The bid instructions contain a list of eleven ARRA attachments required to be completed and submitted with the sealed bid package. Attachments D, G, and M are at issue in this bid protest. Forde submitted those attachments with its sealed bid, but some portions of those attachments were not completed. Marques asserts that the City should have deemed Forde's bid non-responsive due to those omissions. DOU requested and obtained the missing information from Forde and its DBE subcontractors after bid opening. City staff recommends and Forde concurs that the omissions be waived because, according to City staff and Forde, the omissions were minor and had no relationship to the bid price, and obtaining the required information from Forde and its DBE subcontractors after bid opening did not provide Forde with any advantage over the other bidders.

1. Attachments D and G.

The bid instructions contain Disadvantaged Business Enterprise (DBE) provisions. Section 12 of the ARRA materials in the Contract Specifications booklet states that "the DBE rule requires that responsive bid[s] shall conform with 'Good Faith Efforts' to increase DBE awareness and procurement opportunities through race/gender neutral efforts." Section 12 also states:

...Compliance with the requirements of this section and the referenced Attachments satisfies the Disadvantaged Business Enterprise (DBE) requirements for this construction contract. Failure to take the six (6) affirmative steps listed under Good Faith Effort Requirements below prior to bid opening and to submit the following forms with the bid package shall cause the bid to be rejected as a non-responsive bid.

- Attachment C: Disadvantaged Business Enterprise Information Form
- Attachment G: EPA Form 6100-03 (DBE Subcontractor Performance Form)
- Attachment F: EPA Form 6100-04 (DBE Subcontractor Utilization Form)

Section 12 further states:

- (3) Using the MBE/WBE Verification of Qualification Form (Attachment D), the apparent successful low bidder must provide evidence of certification by a federal, State, or local government entity for each Disadvantaged Business Enterprise firm to be utilized. Such certification documentation shall be submitted within five (5) working days following bid opening. [Emphasis in the original.]

Forde submitted Attachments D and G on September 11 with its sealed bid package.

When reviewing Forde's bid package, DOU determined that Attachment D did not include the name of the agency certifying the MBE/WBE qualification for the subcontractor known as Water Components & Building Supply (Water Components). During that review, DOU also determined that on Attachment G "the DBE subcontractors did not include a description of the work or services bid and submitted an incomplete form." DOU has determined that the omissions were minor, were subsequently corrected, and should be waived.³

Marques' assertions concerning Attachments D and G are more specific. Marques asserts that with regard to Attachment D, for the subcontractor Water Components, the space for entering the name of the agency certifying Water Components as an MBE/WBE was left blank. Marques also asserts that with regard to the Attachment G submitted for the subcontractor known as Vickers Concrete Sawing (Vickers) and for the Attachment G submitted for Water Components, the yes/no spaces for indicating whether the subcontractor was currently certified are left unchecked. Marques further asserts that Attachment G for Vickers does not list the name of the prime contractor in the space provided. Instead, it bears the name Flowline Contractors in a fax imprint at the top of the page, while the name Forde does not appear on the page. Mr. Anderson testified that Attachment G is usually completed by the subcontractor and then submitted to the prime contractor, and thus he believes that it is particularly important to have the name of the prime contractor entered in the proper space on the attachment.

On behalf of Forde, Ms. Papineau-Anderson acknowledged at the hearing that the above-noted omissions had in fact occurred. She testified that Forde had no excuse for the omissions, but she did offer her explanation as to how those omissions occurred. Her explanation, in essence, was that she completed portions of Attachments D and G and then faxed those partially completed attachments to the applicable subcontractors for them to complete and return to Forde. During that process, Water Components' Attachments D and G had been altered in the areas reserved for certification information and signatures by the subcontractor. The alterations rendered those areas substantially illegible. In addition, on Vickers' Attachment G, Vickers had apparently covered the prime contractor's name, Forde, with white-out and left the space blank. By doing so, Vickers could presumably duplicate the attachment sent by Forde and more conveniently send it to other prime bidders, such as Flowline.⁴

Visual examination of the above-referenced Attachments D and G corroborates Ms. Papineau-Anderson's explanation. Alteration of the certification and signature area on Water Components' Attachments D and G is obvious, whether caused by malfunction of the fax process, a flaw in the photocopy process, some intentional alteration by Water Components, or other means. In addition, the use of white-out or some similar substance by Vickers on Attachment G is evident by broken lines and partially obscured text in the area reserved for the prime contractor's

³ Since Forde submitted an Attachment G, albeit incomplete, with its sealed bid, the ARRA instruction concerning mandatory rejection for failure to submit Attachment G does not apply.

⁴ The evidence confirmed that Flowline was one of the prime bidders on Phase 6.

name. Forde offered no explanation for the absence of a visible yes/no check on Vickers' Attachment G.

Having considered all of the above, the Hearing Examiner is persuaded that the omissions on Attachments D and G were inadvertent, had no effect on Forde's bid amount, and conferred no competitive advantage to Forde. As with the work experience documentation issue discussed above, the Hearing Examiner is persuaded that City staff would have proceeded to address those omissions the same way if some bidder other than Forde had been the lowest bidder and made the same omissions on the Attachments D and G. Accordingly, the Hearing Examiner concludes that City staff has properly applied its discretion in recommending that the omissions on Attachments D and G be waived as an informality or minor irregularity.

2. Attachment M.

Marques asserts that Attachment M for the subcontractor Vickers does not indicate Forde as the prime contractor, either on the bidder line or anywhere else on the attachment, but instead bears only the name Flowline Contractors on the fax imprint at the top of the form. Marques also asserts that Forde provided no Attachment M for the subcontractor Water Components.

Ms. Papineau-Anderson's explanation for the omissions on Vickers' Attachment G is equally applicable to Vickers' Attachment M. Visual examination of Vickers' Attachment M shows that the entry over the line reserved for naming the bidder has been largely erased or covered with white-out. The name Flowline again appears in the fax imprint at the top of the page.

With regard to an Attachment M for Water Components, the City confirmed at the hearing that the City had received an Attachment M for Water Components. Upon reviewing that attachment, Marques asserted that it was incomplete because it did not list the project name or number and it did not list the Data Universal Numbering System (DUNS) Number for Water Components. Examination of the attachment shows otherwise. The project name and number appear at the top of the attachment, and the DUNS Number appears in the proper space. Marques also asserted at the hearing that Water Components' Attachment M incorrectly lists Water Components, rather than Forde, as "the bidder." Examination of the attachment shows that Marques is correct on that point.

The City staff recommends that the Attachment M omissions be waived for the same reasons as stated for Attachments D and G. The Hearing Examiner is persuaded that the Attachment M omissions were inadvertent, had no effect on Forde's bid amount, and conferred no competitive advantage to Forde. The Hearing Examiner concludes that City staff has properly applied its discretion in recommending that the omissions on Attachments M be waived as an informality or minor irregularity.

VII. RECOMMENDED DETERMINATION

The Hearing Examiner has made the following findings:

A. Work Experience Documentation

- Forde's failure to include the work experience documentation in its sealed bid had no effect on and could not have affected Forde's bid amount, and conferred no competitive advantage to Forde.
- Forde possessed the requisite work experience prior to the September 9 bid deadline.
- Forde's failure to include work experience documentation was an inadvertent error.
- City staff has held Forde to the same standard as other bidders with respect to having the requisite work experience prior to bid opening, and all bidders were subject to the same rules and exceptions with respect to bid content and bid deadlines.
- City staff has properly applied its discretion in recommending that Forde's failure to submit work experience documentation with the sealed bid package be waived as an informality or minor irregularity.

B.(1) ARRA Attachments D and G

- The omissions on Attachments D and G were inadvertent, had no effect on and could not have affected Forde's bid amount, and conferred no competitive advantage to Forde.
- City staff has held Forde to the same standard as other bidders with respect to completion of Attachments D and G, and all bidders were subject to the same rules and exceptions with respect to bid content and bid deadlines.
- City staff has properly applied its discretion in recommending that the omissions on Attachments D and G be waived as an informality or minor irregularity.

B.(2) ARRA Attachments M

- Forde's Attachment M omissions were inadvertent, had no effect on and could not have affected Forde's bid amount, and conferred no competitive advantage to Forde.
- City staff has held Forde to the same standard as other bidders with respect to

completion of Attachments M, and all bidders were subject to the same rules and exceptions with respect to bid content and bid deadlines.

City staff has properly applied its discretion in recommending that the omissions on Attachments M be waived as an informality or minor irregularity.

The City staff has acted within its proper discretion to recommend that all of the omissions in Forde's bid be waived and the bid deemed responsive. However, it would be equally within the City Council's proper exercise of discretion, as delineated in the bid instructions and the Sacramento Municipal Code, to uphold the bid protest and deem Forde's bid non-responsive, especially since the omissions in Forde's bid were multiple. In making a recommended determination for the present case, the Hearing Examiner has considered the following:

First and foremost, as emphasized above and in recognition of the principle in Konica, Forde's omissions did not and could not have affected the amount of Forde's bid, and City staff's handling of those variances gave Forde no benefit or advantage not allowed other bidders. All bidders were subject to the same rules concerning the City's discretion to waive any irregularities or minor informalities in the bid. The prompt, objective, and thorough manner in which DOU identified and proceeded to address Forde's omissions shows that DOU would most likely have followed the same procedures if some Phase 6 bidder other than Forde had been the lowest bidder and made the same omissions. Next, the omissions were inadvertent. There was no evidence to suggest that Forde's omissions arose from intentional or careless disregard for the bid instructions; indeed, Forde's immediate cooperation when DOU brought those omissions to Forde's attention shows the contrary. In addition, the most significant omission—the omission regarding work experience documentation—was remedied within one or two business days after being brought to Forde's attention, and the other omissions regarding ARRA attachments were also promptly remedied after being brought to Forde's attention. Finally, none of Forde's omissions was subject to language in the bid specifications that stated such an omission *would* cause the bid to be deemed non-responsive.

All of the above factors weigh in favor of the City Council's determining that Forde's bid is responsive. Accordingly, the Hearing Examiner recommends that the City Council deny Marques' bid protest by waiving the irregularities in Forde's bid and finding Forde's bid to be responsive.

Dated: October 23, 2009



Vincent L. Pastorino, Hearing Examiner
Institute for Administrative Justice

PROOF OF SERVICE VIA U.S. CERTIFIED MAIL AND FACSIMILE

I, Stacy Conley, declare as follows:

I am employed in the County of Sacramento, California; I am over the age of 18 years and not a party to the within action. My business address is 3455 Fifth Avenue, Sacramento, California 95817. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On October 23, 2009, I served a copy of the following document:

DECISION ON ADMINISTRATIVE APPEAL
In the matter of Marques Pipelines, Inc. vs. W.R. Forde Associates
and City of Sacramento
Case Number: SACBP101509-2

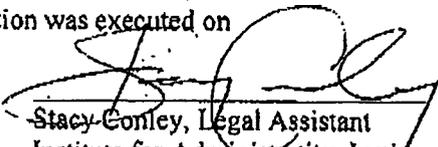
on the party or parties named below by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

Michelle Carrey, P.E.
City of Sacramento
Department of Utilities
1395 35th Avenue
Sacramento, CA. 95822-2911
Fax: 916-808-1497

David Voorhis
Eva Papineau-Anderson
W.R. Forde Associates
984 Hensley Street
Richmond, CA. 94801-2217
Fax: 510-215-9867

Jeremy Jaeger
Marques Pipeline, Inc.
1300 National Drive, Suite 120
Sacramento, CA. 95834
Fax: 916-929-5532

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 23, 2009, in Sacramento, California.


Stacy Conley, Legal Assistant
Institute for Administrative Justice
McGeorge School of Law

Attachment 5**RESOLUTION NO.**

Adopted by the Sacramento City Council

**AWARD CONTRACT FOR THE SAFE DRINKING WATER STATE REVOLVING FUND
AMERICAN RECOVERY AND REINVESTMENT ACT WATER METER RETROFIT
PROJECT PHASE 6 (Z14010000)**

BACKGROUND

- A. On August 6, 2009, the City Council approved Resolution 2009-516 authorizing the execution of a \$ 20 Million grant/loan funding agreement for the Water Meter Retrofit (WMR) Project (Phases 1-9), utilizing American Recovery and Reinvestment Act (ARRA) funding provided through the Safe Drinking Water State Revolving Fund (SDWSRF) Program administered by the California Department of Public Health. The City Council approved the addition of additional Phases to the Project on September 15 (Phase 10) and September 22 (Phase 11).
- B. The WMR Project will retrofit water services with meters at a total of 15,000 - 17,000 residential and commercial properties, and Phase 6 of the Project will install 1,045 meters on unmetered services.
- C. The plans and specifications for Phase 6 of the Project were approved by the City Council on June 23, 2009.
- D. Bids for Phase 6 of the Project were opened on September 9, 2009, and WR Forde Associates was the lowest bidder.
- E. On September 28, 2009, a bid protest was submitted by the second low bidder, Marques Pipeline, Inc., protesting the proposed award of the contract to WR Forde Associates. Marques' bid protest contended that Forde's bid should be rejected as non-responsive due to (1) Forde's submission of documentation of prior project experience after bid opening, rather than with its bid, and (2) irregularities in 3 ARRA forms required to be submitted with Forde's bid.
- F. Pursuant to Sacramento City Code § 3.60.510, City staff investigated the bid protest and determined that these bid omissions constituted minor bid irregularities that should be waived. In accordance with the City's bid protest requirements, a hearing on the bid protest was held before an independent hearing examiner employed by the Institute for Administrative Justice at the University of the Pacific's McGeorge School of Law.
- G. The Hearing Examiner's decision was issued on October 23, 2009, and a copy of the decision, entitled "Decision on Administrative Appeal with Findings of Fact and

Recommended Determination," referred to hereafter as the Hearing Examiner's Decision, is included in the record as Attachment 4 to the Supplemental Report to Council submitted by City staff for this matter.

- H. The Hearing Examiner's Decision makes factual findings and recommends that the bid protest be denied and that the City Council waive the irregularities in Forde's bid and find Forde's bid to be responsive.
- I. Under City Code Section 3.60.540, the City Council has the following options prior to taking action on a bid protest:
- Adopt the findings of fact issued by the Hearing Examiner, without hearing factual evidence from any party; or
 - Review the recording of the hearing, or a transcript thereof, prior to adopting or rejecting, in whole or in part, the findings of fact issued by the Hearing Examiner, without hearing factual evidence from any party; or
 - In addition to or in lieu of reviewing the recording of the hearing, or a transcript thereof, hear factual evidence from any party prior to adopting or rejecting, in whole or in part, the findings of fact issued by the Hearing Examiner.

City Code Section 3.60.540 provides that the City Council may take any action on the bid protest that is authorized by law, including adoption of the Hearing Examiner's recommended determination of the bid protest, adoption of a determination different from that recommended by the Hearing Examiner or the rejection of all bids without deciding the bid protest.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

- Section 1. The findings of fact issued by the Hearing Examiner and included in the Hearing Examiner's Decision are adopted.
- Section 2. The Hearing Examiner's recommended determination of the bid protest, set forth in the Hearing Examiner's Decision, is adopted. The bid protest submitted by Marques Pipeline, Inc. is denied, the irregularities in the bid submitted by WR Forde Associates are waived as minor informalities or irregularities, and the bid submitted by WR Forde Associates is determined to be responsive.
- Section 3. The contract for the SDWSRF ARRA Water Meter Retrofit Project Phase 6 is awarded to WR Forde Associates, for an amount not to exceed \$1,113,400.