MEMORANDUM OF LAW

DATE: June 15, 1987

TO: Roger Graff, Water Utilities Department
FROM: City Attorney
SUBJECT: Bids for Temporary Repairs to the Soledad Reservoir

Your memorandum of May 27, 1987 requested our opinion regarding application of the "low responsible bidder" rule for purposes of evaluating the bids for the temporary repairs to the Soledad Reservoir. You indicate that the lowest bidder, Riha Construction (Riha), does not have the requisite experience for this job. You inquire whether the job may be lawfully let to the second lowest bidder, Roca Construction (Roca), and if so, under what circumstances? A corollary to this question would be how to proceed once such a determination is made. You further advised that all three bids were in excess of the engineering estimate.

You included a copy of a letter from the City's consultant, John Powell & Associates, dated May 20, 1987. The consultant had evaluated the bid proposals and advised that Riha did not have the requisite experience, while Roca, the second low bidder, did. This was based on the fact that Riha did not list a prestressing subcontractor but would do the work itself, whereas Roca listed a prestressing subcontractor who had specific experience with prestressing circular structures. The consultant further observed that while Riha has experience with prestressing slab type work, that is of a different nature than the Soledad Reservoir project.

In an attempt to understand the differences, I requested the consultant to elaborate further about the engineering practices inherent in pursuing such a project. I was advised that in dealing with circular structures it is imperative that the stress be applied uniformly to the steel bands during the stressing process, particularly with a water reservoir that is presently structurally distressed. Otherwise, "bulging" of the walls will result with the high probability of a rupture and discharge of water. The effects of this will be to flood houses downhill from the tank and disrupt the water and fire main supply. The tank is only half-full now, but soon must be brought to full capacity during the high fire season. There is a fuel load from brush in the Soledad Mountain area that increases the fire hazard. The tank is the main source of water supply to these houses and no

alternative method of water supply is reasonably available. These factors are further outlined in the attached letter from the consultant dated June 7, 1987.

It is clear that there is no room for error and that experience is a critical factor in the accomplishment of this job. The consultant notes that although Riha is a highly competent contractor, the subcontractor who would be used by Roca, DYK Prestressing Tank, is highly specialized and an experienced expert in this field. Riha does not have such a highly skilled and specialized work force. This is relevant to the extent that the work done by Riha could be done by personnel without adequate experience in the technique of stressing circular structures.

Section 303-3.1.4 of the specifications provided that the bidders were to submit information relating to contractor's experience with prestressing equipment and the technique to be used. It further provided that the bid would not be considered "responsive" unless data was provided governing experience with stressing of structures of similar size and capacity. The section further provided that the bidder was to list five (5) structures on which the proposed qualifying equipment and bar system had been used by the prestressing contractor for repair of tanks similar to that specified. Riha did not list a prestressing subcontractor, but telephonically advised you that it intended to rent the prestressing equipment and perform the work using its own staff. None of the projects listed by Riha involved circular structures but slab type work. The consultant did not further elaborate on whether the projects submitted by Riha were sufficiently dissimilar, but we assume for purposes of discussion that there were differences that were considered by the consultant to be significant.

You indicated that you felt Riha's bid was thus not "responsive," although we do not believe that issue to be germane in light of the fact that Riha did provide information relative to their experience. As we see it, it is the experience that is to be evaluated to determine whether Riha is a "responsible" bidder, rather than whether it is "responsive."

As you know, City Charter section 94 requires public works contracts to be let to the "lowest responsible and reliable bidder." The leading case on this subject is City of Inglewood - Los Angeles County Civic Center Authority v. Superior Court, 7 Cal.3d 861, 103 Cal.Rptr. 689 (1972). Inglewood involved the award of a contract to the second low bidder who had more experience than the lowest bidder. The City there had concluded

that experience was critical insofar as the low bidder had not built a high-rise building whereas the second low bidder had. It was also clear from the decision that the low bidder was not "irresponsible," but rather that the second bidder was considered superior to the first. The California Supreme Court held that the award was improper.

From Inglewood we may draw certain conclusions. The first is that relative superiority alone is not the basis for award, but rather, whether it can be determined that the low bidder is not qualified to do the project. Id. at 870. The second is that if the award is to go to other than the low bidder, an opportunity must be allowed to the low bidder to "present evidence that he is qualified to perform the contract." Id. at 870.

In the Inglewood case, neither of these two principles were followed, with the result that the Court ruled in favor of the low bidder. In the case you present, it is clear that the criticality of the job mandates that an experienced prestressing contractor be chosen. Yet, there is nothing in the record to demonstrate that Riha Construction cannot do this job. Rather the evidence suggests that Riha Construction might not have sufficient similar experience, but is otherwise "responsible" and it is not irresponsible. Your consultant also noted that Riha is considered highly competent.

The Inglewood case points out the dilemma presented to public officials who must determine whether a low bidder can perform the contract. Yet, what was lacking in Inglewood was that no determination was made "whether in fact . . . the lowest bidder, was also qualified to perform the contract." ╒Emphasis added.σ Id. at 870. Therefore, we must advise you that your department should make an express finding that Riha Construction is or is not qualified to do the job; if you conclude Riha Construction is not qualified, you should allow them an opportunity to present evidence to show that they can do the job.

It may be observed that the burden is on Riha Construction, and the final discretion is that of the City Council, West v. Oakland, 30 Cal.App. 556 (1916), petition for hearing denied by the Supreme Court on July 24, 1916. Once the evidence on

qualifications is evaluated, then your decision can be made in compliance with the dictates of Inglewood. We may also observe that Inglewood does not require a determination that Riha Construction is "irresponsible" or "not-responsible;" merely, that Roca Construction would be the low responsible bidder, although if there is adverse evidence which particularly bears on Riha's competence, that too should be presented.

Procedurally, we advise you that if you choose Roca Construction because of the criticality of the experience level that you do so in the following manner:

1. Advise Riha Construction of your decision and the reasons relative to the experience factor and any other factor that is pertinent relative to their ability to do the job;
2. Allow Riha Construction an opportunity to demonstrate to you and your consultant that it can do the job;
3. Unless you are then satisfied that Riha Construction can do the job, you may proceed to recommend the award to the next low responsible bidder;
4. Notify Riha Construction that it may appear before the Council to protest the award to Roca Construction and present evidence relative to its competence to do the job;
5. At the time of Council action, fully articulate to the City Council all the factors relative to: the criticality of the technique; the public safety problems associated with a tank rupture; the lack of qualifying experience on the part of Riha Construction; the qualifications of Roca Construction and the subcontractor who will actually perform the work; the expression of sound engineering practice that dictates the why's and how's governing the job performance and why, in the judgment of engineering professionals, the qualification factor is so critical. You should also include any other factors that are pertinent to establish that Roca is, in fact, the low responsible bidder and that Riha is not.

It would be our further recommendation then that the Resolution of Award to be adopted by the Council memorialize these factors in order to confirm any decision that will be judicially supportable, if the award by Council is to Roca.

The other alternative, should you elect not to pursue this process, is to recommend to Council to reject all bids and readvertise. Whether the time involved would be disadvantageous is a factor for you to also consider, along with whether the bids would be economically better.

Please contact the undersigned if you have any further questions on this matter.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:mrh:150(x043.2)
Attachment
cc Jack Thorpe
Ralph Shackelford
ML-87-61