

AMG
Ltr 1

June 24, 2014

VIA HAND DELIVERY

Paul Buckley, P.E.
Office of the City Engineer
Bureau of Engineering
9th Floor, City Hall
333 W. Ocean Boulevard
Long Beach, CA 90802

Mark Whitaker
Office of the City Engineer
Bureau of Engineering
9th Floor, City Hall
333 W. Ocean Boulevard
Long Beach, CA 90802

RE: **Bid Protest of AMG & Associates, Inc. to Woodcliff Corporation Bid for City of Long Beach North Branch Library Project**

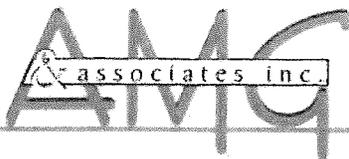
Dear Messrs. Buckley and Whitaker:

By way of introduction, I am the President of AMG & Associates, Inc. ("AMG"). On Wednesday, June 18, 2014, AMG bid the City of Long Beach ("City") public works project known as the North Branch Library R-6985 ("Project"). While the City's tabulation of bids (as revised on June 23, 2014) indicates that AMG is the apparent second-low bidder, a significant issue with the bid of the apparent-low bidder, Woodcliff Corporation ("Woodcliff"), which leads to the conclusion that AMG is the true lowest responsive and responsible bidder. This letter provides a detailed statement of the legal and factual grounds for AMG's protest of any potential award of the Project to Woodcliff.

California courts have made it clear that they intend for public entities to strictly uphold the standards they set for competitive bidding. As stated by California's Fourth District Court of Appeal:

"The importance of maintaining integrity in government and the ease with which policy goals underlying competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements." Konica Business Machines U.S.A. Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, 456-457 (Emphasis added.)

To be "responsive," a public works bid must be in strict accordance with the "material" terms of the bid documents. Menefee v. County of Fresno (1985) 163 Cal.App.3d 1175. Any "material" variance in a bid may not be waived by the awarding authority, and bids containing "material" variances must be rejected. Stimson v. Hanley (1907) 151 Cal. 379. This principle insures that all bidders will be treated alike, and guards against the possibility for fraud, corruption or favoritism in the bidding selection process. More fundamentally, it ensures that the public agency will be comparing "apples to apples" when reviewing the competing bid proposals. The "material" terms of a bid are: (1)



those terms which could affect price, quantity, quality, or delivery; and (2) those terms which are clearly identified by the bid documents as mandatory. See *Menefee v. County of Fresno*, supra.

A bid fails to comply materially with the bid package if it gives the bidder a substantial economic advantage or benefit not enjoyed by other bidders, or if the bidder could have withdrawn its bid without forfeiting its bid security. *Menefee v. County of Fresno*, supra. Where a deviation gives a bidder an unfair advantage relative to other bidders, or allows a bidder to withdraw its bid without forfeiting its bid security, a public agency may not waive the deviation as immaterial. Id. It need not be shown that a bidder possessed any intention of seeking a competitive advantage for a public agency to be required to reject such a bid as non-responsive. See *Konica Bus. Machs. U.S.A., Inc. v. Regents of Univ. of Cal.*, supra.

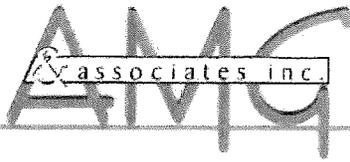
In addition, AMG notes that the District's Notice Inviting Bids, provides (at page B-3), in relevant part:

"The City will not consider any Bid that does not meet these [i.e. the Instructions to Bidders] requirements." and that "any errors shall, at the option of the City, constitute grounds for the City's rejection of the Bid."

In this case, Woodcliff failed to comply with the bid requirements, and gained an unfair advantage not enjoyed by AMG, due to the mathematical errors in Woodcliff's bid. Specifically, the sum of the "ITEM TOTAL (IN FIGURES)" \$11,537,750.00, in its bid does not add up to the "TOTAL BID AMOUNT" of \$12,345,750 listed in its bid. In fact, the difference between the two sets of numbers is \$808,000, a massive discrepancy. Clearly, the mistake made by Woodcliff was a "mistake in filling out the bid, and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans and specifications" as set forth in California Public Contract Code 5103. Therefore, under Public Contract Code § 5103, Woodcliff had the right to seek relief from its bid, without forfeiting its bid bond, by giving the City notice of the mistake within five days of the bid opening.

Accordingly, Woodcliff's mistake impermissibly provided it with an opportunity for a "last look", after bid opening, before deciding whether to seek to withdraw its bid due to its mistake. Even if Woodcliff did not intend to do so, the unfair advantage is present. Therefore, under applicable California law, the City cannot waive the irregularity as an immaterial deviation. See *Konica Bus. Machs. U.S.A., Inc. v. Regents of Univ. of Cal.*, supra and *Valley Crest Landscape, Inc. v. City Council of Davis* (1996) 41 Cal. App. 4th 1432. As a result, Woodcliff's bid must be rejected.

In closing, California law mandates that all bidders must properly complete their bid documents as required by the City's bid forms, especially where the failure to do so provides the non-complying bidders with a material advantage not enjoyed by the complying bidders. All bidders must be afforded a "level playing field" when submitting



bids to a public entity. As demonstrated herein, the Woodcliff bid is non-responsive because it is not in compliance with the material requirements of the City's bid documents, which non-compliance provided Woodcliff with a material advantage over complying bidders. Under these circumstances, the City does not have the "option" to reject Woodcliff's bid; rather, it must do so under California law. AMG therefore respectfully requests that the City find Woodcliff's bid non-responsive, and that it award the Project to AMG, the actual lowest responsive and responsible Bidder.

This letter will also serve as a request under Government Code Section 54954.1 for mailed notice of the City's meetings at which any issue pertaining to the award of this Project is on the agenda. If there is any fee for this service, please provide this information to the undersigned, so we can promptly pay any such fee. We also respectfully request to be informed by email, telephone or facsimile as soon as any staff recommendation or reports concerning any issue pertaining to the Project award are available to the public so we can immediately inspect these reports and recommendations. My email address is: albert@amgassociatesinc.com. Further, we request the right to address the City before or during consideration of any issue pertaining to the contract award as guaranteed by Government Code Section 54954.3.

Sincerely,

A handwritten signature in black ink, appearing to read 'Albert M. Giacomazzi', written over a horizontal line.

Albert M. Giacomazzi
President

Cc: Anthony Traverso, Vice President
Steven R. Cuneo, Jr., General Counsel

File: Bid File No. 2197 – North Branch Library



CoLB
Ltr

CITY OF LONG BEACH

DEPARTMENT OF PUBLIC WORKS

333 WEST OCEAN BOULEVARD • LONG BEACH, CA 90802 • (562) 570-6383 • FAX (562) 570-6012

July 1, 2014

Albert M. Giacomazzi
President
AMG & Associates, Inc.
28296 Constellation Road
Santa Clarita, CA 91355

Subject: Your Bid Protest dated June 24, 2014, for R-6985, North Branch Library in the City of Long Beach

Dear Mr. Giacomazzi:

The City has received and reviewed your protest of Woodcliff Corporation's (Woodcliff) bid on the subject project. Your protest is denied for the following reasons:

Your claim that Woodcliff had an unfair advantage over other bidders due to its error in totaling the bid is unsubstantiated. Every bidder had the opportunity to look at its bid after the bid tabulation by the City was posted, and could have claimed mistake in filling out the bid per Public contract Code Section 5103; two bidders did exactly that.

The City has waived the minor irregularity presented by Woodcliff's bid and will be moving forward with award.

Thank you for your interest in doing business with the City of Long Beach. You are encouraged to bid on future projects meeting your interests and abilities.

Sincerely,

Ara Maloyan, P.E.
Director of Public Works/
City Engineer

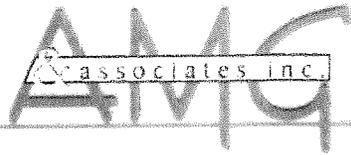
**DIRECTOR'S OFFICE
BUDGET & PERSONNEL**
333 W. Ocean Blvd., 9th Floor
Long Beach, CA 90802
Ph. (562) 570-6383
Fax (562) 570-6012

ENGINEERING
333 W. Ocean Blvd.
9th & 10th Floor
Long Beach, CA 90802
Ph. (562) 570-6634
Fax (562) 570-6012

**ENVIRONMENTAL
SERVICES**
2929 E. Willow Street
Long Beach, CA 90806
Ph. (562) 570-2850
Fax (562) 570-2861

ASSET MANAGEMENT
333 W. Ocean Blvd., 3rd Floor
Long Beach, CA 90802
Ph. (562) 570-6099
Fax (562) 570-6380

PUBLIC SERVICE
1651 San Francisco Avenue
Long Beach, CA 90813
Ph. (562) 570-2782
Fax (562) 570-2729



July 7, 2014

VIA HAND DELIVERY

Ara Maloyan, P.E.
Office of the City Engineer
Bureau of Engineering
9th Floor, City Hall
333 W. Ocean Boulevard
Long Beach, CA 90802

AMG
Ltr 2

RE: **Response of AMG & Associates, Inc. to the City's Rejection of AMG's Bid
Protest re North Branch Library Project (R-6985)**

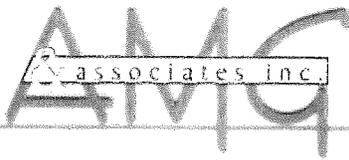
Dear Mr. Maloyan:

We are in receipt of, and responding to, your July 1, 2014 letter constituting the City of Long Beach's ("City") rejection of AMG & Associates, Inc.'s ("AMG") June 24, 2014 bid protest on the City's North Branch Library ("Project"). Needless to say, we are disappointed by, and take exception to, the City's conclusions as set forth in your letter.

As we understand it, City's position appears to be that, since all bidders could have built errors into their bids - thereby allowing them a "last look at its bid after the bid tabulation by the City was posted, and could have claimed mistake in filing out the bid," - Woodcliff Corporation ("Woodcliff") did not have an unfair advantage over the other bidders. There are at least two fundamental flaws with this position.

First, the City's position implies that AMG should have availed itself of the admitted flaw in the City's bid form, which allows an unscrupulous bidder to intentionally build in a mistake into its bid. As the City's position acknowledges, building such a mistake into its bid would have allowed AMG to submit an aggressive "ITEM TOTAL (IN FIGURES)" in its bid, while submitting a more conservative "TOTAL BID AMOUNT", which was not the sum of the "ITEM TOTAL (IN FIGURES)". If AMG's "ITEM TOTAL (IN FIGURES)" turned out to be too aggressive compared with other bidders' prices, or AMG could not reduce its anticipated costs through bid shopping during the five (5) day "mistake withdrawal" window of Public Contract Code Section 5103, then it could simply withdraw its bid.

California courts have made it clear that they intend for public entities to strictly uphold the standards they set for competitive bidding. As stated by California's Fourth District Court of Appeal:



"The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. [Citations.] Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and **contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money.** [Citations.]" Konica Business Machines U.S.A. Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, 456-457 (Emphasis added.)

The City's stated position not only improperly encourages bidders to build errors into their bids, but also permits bid shopping during the five (5) day "mistake withdrawal" period; both of these activities are contrary to the spirit and letter of the Public Contract Code. By rejecting AMG's bid protest, the City is not only punishing those bidders like AMG that "play by the rules", but is in fact tacitly condoning violations of California's public works bidding laws.

The second fundamental flaw in the City's position is its assertion that a bidder has to obtain an "unfair advantage" in order for a bid to be deemed non-responsive due to a "material variance" in such bid. That is not the correct legal standard under California law. The Konica case, cited above, further provides that:

"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. [Citations.] 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." Id. At 454. (Emphasis added.)

As the City will note, this is a "two prong" test, under which the City must reject Woodcliff's bid if it is found to have violated either prong of the test.

It is undeniable that the "variance" at issue, the difference in Woodcliff's bid as calculated by sum of the "ITEM TOTAL (IN FIGURES)" compared to Woodcliff's "TOTAL BID AMOUNT", "affected the amount of the bid". In fact, the "amount of the bid" is significantly different, depending on which number in Woodcliff's bid the City accepts.



Further, as the City's July 1, 2014 letter admits, Woodcliff had the opportunity to for a "last look" after bid opening, and could have withdrawn its bid for mistake without forfeiting its bid security. In fact, the City's letter notes that two other bidders did just that. The fact that Woodcliff did not actually withdraw its bid for mistake is legally irrelevant. It need not be shown that a bidder possessed any intention of seeking a competitive advantage for a public agency to be required to reject such a bid as non-responsive. See Konica, supra. What is legally relevant is the fact that the City admits that Woodcliff could have withdrawn its bid for mistake without forfeiting its bid security under Public Contract Code Section 5103. This fact prohibits the City from waiving Woodcliff's admitted "irregularity" as minor or immaterial.

Based on the foregoing, AMG respectfully requests that the City: (1) find Woodcliff's bid non-responsive, and (2) that the City award the Project to AMG, the actual lowest responsive and responsible Bidder. At a minimum, in order to maintain the integrity of the public works bidding process, the City should reject all bids, revise its bid form to eliminate the opportunity for bidders to build in errors allowing for post-bid bid shopping and withdrawal under Public Contract Code 5103.

This letter will also serve as AMG's renewed request under Government Code Section 54954.1 for mailed notice of the City's meetings at which any issue pertaining to the award of this Project is on the agenda. If there is any fee for this service, please provide this information to the undersigned, so we can promptly pay any such fee. My email address is: albert@amgassociatesinc.com.

Finally, we request the right to address the City Council before or during consideration of any issue pertaining to the contract award as guaranteed by Government Code Section 54954.3. We feel strongly that, once the factual and legal background of this matter is explained to the City Council, it will decline to condone the violation of California's public works bidding laws inherent in any award of the Project to Woodcliff.

Sincerely,

A handwritten signature in black ink, appearing to read "A. M. Giacomazzi", is written over a horizontal line.

Albert M. Giacomazzi
President

Cc:

Paul Buckley, P.E., Office of the City Engineer
Mark Whitaker, Office of the City Engineer
Anthony Traverso, Vice President
Steven R. Cuneo, Jr., General Counsel

BIDDER'S NAME: _____

**BID TO THE CITY OF LONG BEACH
NORTH BRANCH LIBRARY**

In accordance with the Notice Inviting Bids for this Work in the City of Long Beach, California, to be opened on June 18, 2014, at 10:00 a.m., we offer to furnish all necessary labor, tools, materials, appliances and equipment for and perform all Work mentioned in the Notice Inviting Bids, in full compliance with Plans & Specifications No. R-6985 at the prices listed below.

We certify that we have examined the site and that the Bid is complete. By signing the Bid, we certify that the Contractor will not submit a claim based on failure to examine the site thoroughly. We also certify that we have completed and submitted the List of Subcontractors (including the type of subcontracted work and its dollar value).

ITEM NO.	ITEM DESCRIPTION	UNIT	ITEM TOTAL (IN FIGURES)
1.	Division 1 General Conditions & Requirements	LS	
2.	Division 2 Existing Conditions	LS	
3.	Division 3 Concrete	LS	
4.	Division 4 Masonry	LS	
5.	Division 5 Metals	LS	
6.	Division 6 Wood, Plastics and Composites	LS	
7.	Division 7 Thermal and Moisture Protection	LS	
8.	Division 8 Openings	LS	
9.	Division 9 Finishes	LS	
10.	Division 10 Specialties	LS	
11.	Division 11 Equipment	LS	
12.	Division 12 Furnishings	LS	
13.	Division 21 Fire Protection	LS	
14.	Division 22 Plumbing	LS	
15.	Division 23 Heating, Ventilation & Air Conditioning	LS	
16.	Division 26 Electrical	LS	

ITEM NO.	ITEM DESCRIPTION	UNIT	ITEM TOTAL (IN FIGURES)
17.	Division 27 Telecommunications	LS	
18.	Division 28 Electronic Safety & Security	LS	
19.	Division 31 Earthwork	LS	
20.	Division 32 Exterior Improvements	LS	
21.	Division 33 Utilities	LS	

TOTAL AMOUNT BID

We understand that these quantities are for the purpose of facilitating the comparison of Bids, and that the Contractor's compensation will be computed on the basis of the completed Work.

The following information will be used for statistical analysis only.

Is the Bidder a Minority-Owned Business? _____ Which racial minority? _____

Is the Bidder a Women-Owned Business? _____

Where did your company first hear about this City of Long Beach Public Works project?

(Continued on Next Page)

ADDENDA ACKNOWLEDGEMENT / SIGNATURE

This Bid is submitted with respect to the changes to the Plans & Specifications included in the following addenda numbers:

_____ 1 _____ 2 _____ 3 _____ 4 _____ 5 _____ 6 _____ 7

(Initial above all appropriate numbers)

Respectfully submitted,

Signature**

Legal Name of Company

Print Name / Title

Names of Other General Partners

Names of Other Partners

State of Incorporation

State Where Registered as LLC

City of Long Beach Business License Number

Business Address (Actual Address - Not A Post Office Box)

City of Long Beach Business License Expiration Date

Telephone Number / Fax Number

Address on City Business License

Email Address

Contractor's License Number

- _____ If Bidder is an individual, set forth his/her signature.
- _____ If Bidder is a joint venture, set forth the name of the joint venture with the signature of an authorized representative of each venture..
- _____ If Bidder is a general partnership, set forth the signature of the general partner.
- _____ If Bidder is a limited partnership, provide names of other partners.
- _____ If Bidder is a limited liability company, set forth legal name of company with signature of a member or manager authorized to bind the company
- _____ If the Bidder is a corporation, set forth the legal name of the corporation with the signature of an officer of the corporation.