

Metropolitan Wastewater Management Commission



partners in wastewater management

MWMC SPECIAL MEETING MINUTES

Friday, June 17, 2011 @ 7:30 a.m.
City of Springfield
Library Meeting Room

I. ROLL CALL

President Inge opened the meeting at 7:30 a.m. Roll call was taken by Kevin Kraaz.

COMMISSIONERS:

PRESENT

Jay Bozievich
George Brown
Bill Inge
Doug Keeler
Hilary Loud
Marilee Woodrow

RECUSE

Walt Meyer

STAFF IN ATTENDANCE:

Ron Bittler
Michelle Cahill
Judy Castleman
K.C. Huffman, Attorney

Tonja Kling
Kevin Kraaz
Geoffrey Long, Legal Aide
Barry Mays

Troy McAllister
Jayne McMahan
Josh Newman
Ed Pabor
Ken Vanderford

GUEST IN ATTENDANCE:

Tim Boedigheimer – R & G Excavating, Inc.
Joe Yazbeck – Attorney for R & G Excavating, Inc.
Kevin Knode – President of Kipco, Inc.
Robert Fraser – Attorney for Kipco, Inc.

III. PUBLIC COMMENT

There was no public comment.

IV. ORAL ARGUMENTS RELATED TO THE BID PROTEST FOR THE FACULTATIVE SLUDGE LAGOON RELINING PHASE 3 – FSL No. 2 PROJECT P80065

President Inge announced that the Commission would now hear oral arguments related to the bid protest for the Facultative Sludge Lagoon Relining Phase 3 – Project P80065 and that ten

minutes would be allowed for each party. K.C. Huffman, MWMC Legal Advisor, stated that the protesting party, Kipco, Inc. (Kipco) would go first to explain their protest and then R & G Excavating, Inc. (R&G) would respond.

Kipco, Inc:

Kevin Knode, president/owner of Kipco, Inc., stated that he has been a local Eugene contractor since 1981. He said that his protest is based on his understanding and interpretation of the Invitation to Bid, bid documents, the Request for Bids and specifications. He also said that he would like to say formally that he does not have anything against R&G and that they are a fine contractor. Mr. Knode stated that Kipco's protest of R&G's bid is two-fold; he believes it is not responsive and that it is unbalanced. His protest is based on the following:

- In Kipco's written response, they asked R&G how they defended their position of \$7/yard on bid items 1 and 2. He did not feel that their response was adequate because they did not provide any costs to show how they arrived at their number. R&G did not offer any documentation or verification in regards to their bid, such as loading cost, placing cost, crushing cost, and compaction.
- Mr. Yazbeck, R&G's attorney, states that "Kipco's protest is based on an incorrect assumption" that they had to purchase rock. Mr. Knode stated that was incorrect as his protest is based on the assumption that R&G must have some unusual source. Mr. Knode said he provided the MWMC's attorney with his estimate of what it would actually cost to buy the material, showing the plant price higher than what R&G quoted an in-place price.
- R&G offered they have some structural fill gravel from Lebanon and that they intend to transport the material with their own trucks and place the material with their own crews. Mr. Knode objects that R&G did not define how they are going to do that and show the unit cost. (Mr. Knode estimated the costs and gave an in-depth description to the Commission of what each part would cost. He said he was not able to figure it for only \$7/yard that R&G quoted.)
- Mr. Yazbeck states that "Kipco misconstrues some solicitation language" about including overhead and profit. Mr. Knode quotes Mr. Yazbeck's response letter as saying, "...including overhead and profit is not a prohibition against unbalancing." Mr. Knode remarked, "It sounds like Mr. Yazbeck is addressing that he did unbalance, but in reality all I am trying to show is that they did not include those costs in their unit price."
- Mr. Yazbeck contends that Kipco does not identify which unit prices are higher, and unbalancing only implies to unit prices. Mr. Yazbeck also responded, "Oregon has no published opinions regarding unbalanced bids," and he used the federal board's two-step process in defining unbalanced bids. The first part of that quote is, "It is mathematically unbalanced, that is, each item does not carry its share of the cost of the work in that nominal prices are offered for some of the work and enhanced prices offered for other work." Mr. Knode remarked that nowhere in that statement does it say anything about unit prices, it just talks about prices, and his price for items 1 and 2 are extremely low while R&G's price for the lump sum item is extremely high.
- Part two of this federal board process that Mr. Yazbeck offers states, "there exist a reasonable doubt as to whether award based on a mathematically unbalance offer will result in the lowest costs to the government." Mr. Knode said he thinks that this is really

critical because Kipco's lump sum bid item is \$146,000 lower than R&G's lump bid. He explained that the lump sum part gets paid no matter what the actual costs are. He asked the Commission to assume that according to the Engineers reason for allowing the award is that R&G has some additional knowledge of this site – greater than the Engineer's knowledge. R&G unbalances these items 1 and 2 because they don't think they are going to use that material and they are going to get paid substantially more if those two items are not used. Assuming the other three bid items - 3, 4, and 5 - Kipco is still \$93,000 lower than R&G.

- Mr. Knode stated he thinks there is clearly reasonable doubt in his mind that R&G's unbalanced offer provides the lowest cost to the government.
- Mr. Yazbeck's response regarding certification as to the qualification to bidders is that the City already has that information and that there is no time limit specified for when the information is provided. Mr. Knode stated that in the specification book on page 4 of the Invitation to Bid it states in bold print, "For the bid to be awarded to any given bidder, such bidder must be qualified in accordance with the applicable parts of Public Contracting Code within five (5) days following the opening of the bid." Mr. Knode stated that after the bid opening, Kipco requested a copy of R&G's bid; on June 8th they requested a copy of their qualifications; later that afternoon a copy was received and it was dated June 8th. That is not within five days.

R & G Excavation, Inc.:

Mr. Joe Yazbeck, R&G's lawyer, stated that R&G has done the previous two projects on the Facultative Sludge Lagoon Relining and they prosecuted both those projects successfully. He continued his response to the bid protest by stating:

- R&G submitted the low bid on this project; however, Kipco takes the position that their bid is really lower because their lump sum portion is lower. Mr. Yazbeck stated that the way the Invitation to Bid is structured, the lowest bid is taken in accordance with the addition of the lump sum price plus the unit prices and you can't change that evaluation process in mid stream.
- Mr. Yazbeck quoted Mr. Knode as saying R&G did not justify their bid price. Mr. Yazbeck responded that the reason these projects are put out to bid is because bidders have different bidding strategies and they use those strategies to submit the lowest price so that they will get the job. R&G has the Lebanon source and other sources as well. If they want to bid a source of their own where they don't have any other market for the rock and they want to not charge for the rock or charge a bare cost for placing the rock, that is their business. They do not have to, at this point, come in and justify their \$7 bid just because there is a protest. Mr. Yazbeck said this is clearly not an unbalanced bid.
- Kipco had an unbalance bid; they figured out what overran on the last two contracts and they put \$20/yard on sludge removal when R&G submitted \$9/yard on sludge removal. R&G put their actual cost down and Kipco put in \$20/yard thinking that they were going to "cut a fat hog" if the sludge removal overran again. If it overruns, as it did on the last contract, they will have a terrific windfall. That is an unbalanced bid.
- With regard to the certification of compliance of ORS 279C, the MWMC had that information twice from R&G from other bids. This is not something that is submitted with the bid, it is submitted after the bid opening. It is a matter of responsibility and not

responsiveness. There is nothing in the bid that says that the bid becomes nonresponsive if it is not submitted on time. Mr. Yazbeck pointed out that language from the ODOT general provision (00130.00) cited on page 3 of his letter. It says, "An example of a good cause for rejection in the public interest is the Agency's determination that any of the unit bid prices are significantly unbalanced to the Agency's potential detriment." He commented that certainly a low price, such as this, is not to the agency's potential detriment.

- Referring back to the certification, Mr. Yazbeck stated that the reason you did not have to submit this with the bid was because it was not considered one of the important things that had to be evaluated to determine whether the bid was responsive or not. It was submitted, there is nothing that says that it was to be submitted before the award or before the notice of intent to award. He said this is a minor informality that the MWMC has the authority to wave under the bid terms.
- Mr. Yazbeck stated that R&G has successfully prosecuted all these projects for the MWMC and they do not have to reveal their entire bidding strategy to a competitor simply because the competitor files a protest saying that their price is too low. The competitor's protest was based on the fact that all the rock prices were higher. Mr. Yazbeck remarked that of course the rock prices are higher for the people who sell it out there commercially retail. R&G is fortunate enough to have this bar run gravel that they think will meet the specifications without further processing. Kipco did not show any test results that said that it wouldn't work; R&G has other material that can be blended with it, if necessary.
- R&G's done a good job on the last two projects and they will do a good job on this project. The bid was responsive.

ADJOURN SPECIAL MEETING AND CONVENE EXECUTIVE SESSION

The Metropolitan Wastewater Management Commission will now meet in Executive Session pursuant to ORS 192.660(2)(h) for the purpose of consulting with legal counsel regarding MWMC's legal rights and duties in regard to current litigation or litigation that is likely to be filed, and to consider information that is exempt from public inspection pursuant to ORS 192.660(2)(f).

Representatives of the news media and designated staff may attend the Executive Session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the Executive Session, except to state the general subject of the session as previously announced. No final decision will be made in Executive Session.

At the end of the Executive Session, we will return to open session and welcome the audience back into the room.

ADJOURN EXECUTIVE SESSION AND RECONVENE SPECIAL MEETING

IV. THE FACULTATIVE SLUDGE LAGOON RELINING PHASE 3 – FSL NO. 2 PROJECT P80065

President Inge reconvened the special meeting of the MWMC. He stated that the item up for discussion was the Facultative Sludge Lagoon Relining Phase 3 – FSL No. 2 Project P80065 and asked if there was any further discussion or comments.

MOTION: PRESIDENT KEELER MOVED TO ADOPT RESOLUTION 11-07, FINDING THAT R&G'S BID WAS RESPONSIVE WITH RESPECT TO ITS STATED BID AMOUNTS; KIPCO'S PROTEST IS REJECTED AS UNFOUNDED; THAT THE COMMISSION ALSO DIRECTS MWMC'S COUNSEL TO PROVIDE A WRITTEN STATEMENT OF THE COMMISSION'S FINDINGS. COMMISSIONER LOUD SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY 6/0.

President Inge asked Mr. Huffman to give a brief explanation of the Commission's decision.

Mr. Huffman stated that the decision came down to a mix of authority on what constitutes an unbalanced bid. There is no Oregon controlling authority; there are different federal standards that are used. In this case the keys that were looked at are: mathematical discrepancy and risk to the public agency. He said you have to look at all the factors under basis of award and not just a portion of those. That was really a key for the Commission in that you can't just pick and choose certain portions.

With respect to the certification issue, which goes to responsibility not responsiveness, it is up to the MWMC's discretion to wave a minor irregularity such as that. Also the fact that they have provided information on prior jobs and the Commission had that information.

Mr. Huffman concluded this is a brief summation of the factors that went in to the decision. He stated that he would provide a written document to both parties by the end of the day.

Mr. Bittler thanked the Commission for all their patience with three meetings in one month. It was beyond the call of duty and staff appreciates that they made themselves available for the special meetings this month. He stated that he was hoping that we would be able to take July or August off and give the Commissioners a break. He also thanked staff and those who came in on vacation days.

Mr. Bittler announced that the Environmental Quality Commission accepted the revised Water Quality Standards on a four to one vote. He said staff will continue educating themselves on the new standards.

Commissioner Inge added his thanks to everyone for their time and attention. He noted that it is time consuming and it takes a lot of reading but we do appreciate your commitment to the Commission.

V. ADJOURNMENT

President Inge adjourned the meeting at 8:35 a.m.

Minutes were recorded by Kevin Kraaz.