

OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: BRAD JERBIC

FROM: JOHN REDLEIN SUBJECT: GOLF COURSE RFP @ STEPHANIE & VEGAS
VALLEY

COPIES TO: LYNN MACY

This afternoon I spoke to the engineers at Kleinfelder who accepted the job of preparing the engineering report for Dick Goecke at this proposed golf course site. As you know, the report later appears to have been delivered to the Walters Group at the direction of, or with the permission of, our Director of Public Works. This was done without the knowledge of the competing bidder for this public works project, Dick Kohlman. He was later given proof of these events by an anonymous person.

I learned that Dick initially met with the Kleinfelder engineers at the site and ordered more than what was reported to us to be a "soils" report. This report is styled as a "Geotechnical Feasibility Study" which encompasses all the following: seismic considerations; grading; foundation excavation and compaction; paving; foundation construction; as well as soil drainage and the corrosive quality of the soils relevant to planting at the site. The City paid \$2,000 for the report and it was delivered to Walters simultaneously with its delivery to the City --- before the time bids were to be submitted for this project. This sort of information would indisputably affect the quality and accuracy of a submitted bid if possessed by the bidder. I received a specific report from a member of the City's bid screening committee that Walters' presentation demonstrated an impressive command of the soils and drainage considerations at the site.

Within an hour of my conversation with the Kleinfelder engineers, I received a telephone call from a shaken Councilman McDonald who informed me that he had just been roasted by the Mayor for permitting this inquiry to occur. She informed *him* that I was working on this project and made it plain that it should go no further. McDonald was the contact because, as he told me, the Mayor was expecting him to get this project on the next agenda to award the contract. He asked me to stop my inquiries until I spoke to him or the Mayor tomorrow. I had a meeting soon after with Lynn Macy and Steve Houchens. The Mayor had just been after Lynn on the same subject. The Mayor was evidently so angry that Lynn had some concern that she might be punished for asking me to work on this.

I promised Lynn that I would make plain that she did not initiate the investigation --- it was reported to our office by Lynette Boggs as she left the employment of the City. We turned it over to the City Manager's office and eventually received a request to give advice on whether the contract could *legally*

be awarded under these circumstances. Further, that we advised Lynn that an investigation was inevitable because of the fact that the competing bidder, while not supplied with the report, was aware that the City had ordered it and had supplied it to his competitor. I felt that we needed to act and guessed that the only reason Mr. Kohlman had not made this public was that he was probably just waiting for the award to go against him to create a better lawsuit against the City.

I have researched the law and learned that an unfairly treated bidder does have grounds for obtaining a writ to prevent the contract from going forward because of an irregularity. Suits for damages are not generally entertained --- the thinking of the courts seems to be that permitting legal actions for money damages would only punish taxpayers twice (the first being for a bad decision on award of the contract). There is some legal authority for the proposition that an unfairly treated bidder can recover his costs in preparation of his bid. Finally, awarding the bid in these circumstances is a waste of time. Secret information supplied to only one bidder makes the awarded contract void. *see: Attached extract from McQuillin on Municipal Corporations.* It is not "competitive bidding" when the competition is not fair. I think it is safe to assume that the last thing in the world the Mayor wants is a legal process which would inevitably have this mess on the front page of the paper when it is so easily cured. A common sense of fairness, entirely aside from legal issues, would suggest that, when she learns all the facts, the Mayor will agree that the only sensible thing to do would be to share the report and circulate a new RFP.

There is no way I could, as counsel for the City, do anything other than advise each member of the City Council of the legal repercussions of going forward with the current bid situation. I find it difficult to believe that there would be much support for awarding the contract based on this marred RFP. If all members of the Council were made aware of this, sooner or later it would become public, no matter how well we protected the confidentiality of our client's business. I will attempt to persuade the Mayor that the only safe, fair and legal solution is to readvertise the project with the geotechnical report attached --- no explanations have to be given. If every bidder has the benefit of the same information, the best man will get the job. It may be that Billy Walters will eventually deserve to get this project, but action by City staff which appears to have been calculated to help him ruined his chances this time around.

assumed that an advertisement for bids was correct, in due form, and duly made.⁸

The specifications should be clear, definite,⁹ reasonable,¹⁰ and identical to all bidders.¹¹ Those relating to public improvements must be made sufficiently definite and certain that all may know what each is bidding upon, and that any bidder who secures the contract may be compelled to perform it in a way to produce the kind, character and grade of improvement desired, and so that liability upon his or her bond may result from the bidder's failure to do so.¹²

Specifically, bidders should be informed, by the advertisement or the specifications on file, of: (1) the quantity or amount of the work or supplies, whenever it can be specified; (2) the time within which the work is to be finished or the supplies furnished; (3) the manner in which the work is to be done; (4) the quality of the materials, if any, to be furnished; and (5) any other matter necessary to enable bidders to bid intelligently.¹³ Where neither the statute nor the charter contains any provisions in regard to the specifications, such information is to be put within reach of bidders as will enable them to bid intelligently, and will enable the city to know whose bid is lowest.¹⁴

In order to attain competitive bidding in its true sense, bids must be invited under circumstances which afford a fair and reasonable opportunity for competition.¹⁵ Consequently it is essential that the bidders, so far as possible, be put on terms of perfect equality, so that they may bid on substantially the same proposition, and on the same terms.¹⁶ Hence, a contract awarded to a bidder who has been furnished secret information is void.¹⁷ So, too, to render the contract valid the bid accepted must be made upon the information furnished by the specifications. Thus, the awarding of a contract for second-hand material, when new material was specified, is void where no notice was given to the other bidders nor an opportunity given them to bid on that basis.¹⁸ Plans and specifications must be furnished to all alike, and they must contain all information necessary to enable the bidders to prepare their bids.¹⁹ Furthermore, the advertisement must contain the terms, conditions and requirements contained in the ordinance authorizing the contract and in the event of an omission the bidding process is rendered void.²⁰

Advertisements for bids and specifications must be of sufficient definiteness to require competition on every material item,