

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

Discussion and possible action regarding award of Bid No. 08.15341.04-LED, Las Vegas Museum Phase 3 – Rehabilitation for the Las Vegas Museum of Organized Crime and Law Enforcement located at 300 Stewart Avenue and the construction conflicts and contingency reserve set by Finance and Business Services – Department of Public Works – Award recommended to: APCO CONSTRUCTION (\$11,512,000 – Parks and Leisure Activities Capital Projects Fund) – Ward 5 (Barlow)

Appearance List:

OSCAR B. GOODMAN, Mayor
GARY REESE, Mayor Pro Tem
KATHY RAINEY, Purchasing and Contracts Manager
STEVE WOLFSON, Councilman
LOIS TARKANIAN, Councilwoman
BRAD JERBIC, City Attorney
STEVEN ROSS, Councilman
JORGE CERVANTES, Director of the Public Works Department
JOHN RIDILLA, Deputy City Attorney
MARK FERRARIO, Law firm of Greenberg Traurig, appeared on behalf of Flagship Construction
JOHN MOWBRAY, Fennemore Craig, appeared on behalf of APCO construction
STAVROS S. ANTHONY, Councilman
BEVERLY K. BRIDGES, City Clerk

1 hour 8 minutes

Typed by: Angela Crolli, Lean Coleman, Gaby-Portillo Brenner

Proofed by: Lean Coleman, Angela Crolli

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

28 **MAYOR GOODMAN**

29 One, o, four is discussion and possible action regarding award of Bid Number 08.15341.04-LED,
30 Las Vegas Museum Phase 3, Rehabilitation for the Las Vegas Museum of Organized Crime and
31 Law Enforcement located at 300 Stewart Avenue and the construction conflicts and contingency
32 reserve set by Finance and Business Services, Department of Public Works. Award
33 recommended to APCO Construction. This is in Ward 5.

34 I'm going to have to abstain from this because I have a business relationship, owning an interest
35 in Apex with some of the principals of APCO and I'll turn this over to the Mayor Pro Tem. I
36 would say, though, that it's a very unusual situation where we're in an arbitration with the very
37 business to whom we are about to vote on awarding a construction contract. And I would hope
38 that if the relationship between the City and those contractors who will be doing business with us
39 is gonna be copasetic that everybody make the best effort to further that kind of relationship.
40 That's my comment. I'll turn it over to the Mayor Pro Tem.

41

42 **MAYOR PRO TEM REESE**

43 Thank you, Your Honor. Ms. Rainey, please.

44

45 **KATHY RAINEY**

46 Thank you, Mayor Pro Tem. Kathy Rainey, Manager of Purchasing and Contracts. On the item
47 before you this morning is the discussion and possible action regarding the award of the
48 Rehabilitation for the Las Vegas Museum of Organized Crime and Law Enforcement, also
49 known as the Mob Museum. Staff is recommending the award to APCO Construction, who has
50 been determined to be the lowest responsive and responsible bidder. Flagship Construction
51 Company filed a protest regarding this, the APCO bid, and they have three items in their protest.
52 I wanted to go over their three items with you briefly.

53 The – first claim is that APCO fails to demonstrate the requisite experience to qualify as a
54 responsible bidder. The bid requirement was that either the bidder or the superintendent has the
55 experience in restoration of historic buildings, having successfully completed one project in the
56 last 10 years according to the US Secretary of Interior Standards for the Treatment of Historic
57 Properties. APCO superintendent, who is Brian Benson, was verified to meet the qualifications

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

criteria in the restoration of the Los Angeles City Hall. Restoration, their project was done in 2001. The, that project was in the last 10 years and it did meet the Secretary of Interior's standards.

Their second claim was that APCO failed to disclose that it was removed from the Gemstone Project, also known as Manhattan West, and that it sued for breach of contract. The City Attorney's office investigated this matter. APCO claimed that the owner, Gemstone, failed to pay them for completed work, and that APCO exercised their contractual and statutory rights to terminate work on this project due to non-payment. Gemstone did retain another prime contractor and then later, shortly thereafter, abandoned the project due to lack of financing, and APCO is pursuing payment from Gemstone still for the – work that they completed. But beyond that, our bid documents don't focus on non-performance when there's on-going litigation, and therefore, we did not consider this matter.

The third claim is that APCO submitted a bid from a subcon, subcontractor who's represented that they cannot obtain a performance bond from the project. We have a copy of the subcontractor bid, it's Cogent Electric. That subcontractor bid clearly states that performance and payment bond is included in the price. We also have a letter from Cogent's bonding company confirming that they're able to secure bonds for this project. I provided the Flagship and their attorneys copies of all the documents that we used to qualify APCO, including affidavits with regard to the qualifications of Brian Vincent, the superintendent, and the information on Cogent and their ability to secure bonds.

MAYOR PRO TEM REESE

I have – a question.

KATHY RAINEY

If there's any questions that –

MAYOR PRO TEM REESE

I – have a question.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

87 **KATHY RAINEY**

88 Absolutely.

89

90 **MAYOR PRO TEM REESE**

91 You jumped over to me one of the most important parts here, though. We bid this out earlier. Is
92 that correct?

93

94 **KATHY RAINEY**

95 Correct.

96

97 **MAYOR PRO TEM REESE**

98 And Flag, Flagship was the low bidder and APCO registered a complaint and tell us what
99 happened with that.

100

101 **KATHY RAINEY**

102 Let me go back a little bit in – history. Back in August of 2008 was the original timeframe in
103 which we bid this project. When those bids were received, it was determined that none of the
104 bidders met the qualification criteria. We determined at that point in time that are bid
105 specifications were too tight and that we needed to revise the bids or the bid specifications to
106 open up the – availability to have more bids or bidders qualify. We revised – the bids and put it
107 back out on the street in January. I can – have Jorge talk to you a little bit about what the bid
108 specification changes were at that time. I can give – you a summary there.

109 The – original bid had a requirement that both the bidder and its superintendent had to have
110 performed work to the Secretary of Interior Standards and the bidders that submitted at that time
111 did not qualify in both those categories. So, in the revision of the bid, we changed it to or, either
112 the bidder or its superintendent. We also had a requirement that, in the original bid that a
113 conservator had to perform specialty subcontractor work in the area of ornamental paint,
114 ornamental plaster and masonry work. And we removed in the second bid that requirement for
115 conservator to perform that work because, again, in the first bid none of the bidders had that
116 criteria met. And – so therefore, we felt that the bidding community in Las Vegas, because we

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

don't have a lot of historic buildings in this area, that we did not have a bidding community that could meet that criteria. Therefore, we felt it necessary to cancel those bids and to loosen the – criteria, so to speak, to open it up to more bidders.

What's also important to note is that in that timeframe, we had tried to sell bonds twice and had two failed attempts. We did not have the funds and would had to have cancelled the bids regardless of, because the, of the economy at that point in time. That's one of the reasons that took us until January to reissue the bids.

MAYOR PRO TEM REESE

Okay, just another question. The only experience I've had is dealing with those bids that we see at the City – offices and what goes through our City Council. In my opinion, if you have bids, everybody gets to look at each other's bids once it's opened, right? I mean, they – get to look at the –

KATHY RAINEY

Correct.

MAYOR PRO TEM REESE

– the other company's bid.

KATHY RAINEY

Correct.

MAYOR PRO TEM REESE

Does that give any one bidder an under advantage?

KATHY RAINEY

Well, certainly when the bids are publicly opened, every bidder has the opportunity to see the – bottom line price. They don't have the opportunity to see the details associated with those bids, in terms of, they can't see the subcontractor pricing because we, even the public body or the

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

147 local government is not permitted to see subcontractor pricing. So, you don't see the detail of all
148 those bids. You see the listing of who the subcontractors are, but you don't see the detail of the
149 pricing, just the bottom line price.

150

151 **MAYOR PRO TEM REESE**

152 And you did mention in your pre-statement that APCO is involved in another lawsuit with
153 another job that they had?

154

155 **KATHY RAINEY**

156 Apparently, that's correct. But there probably aren't too many contractors that aren't involved in
157 some level of lawsuits, one way or the other. That's not –

158

159 **MAYOR PRO TEM REESE**

160 Well, I know –

161

162 **KATHY RAINEY**

163 – necessarily a category that – would bar them from bidding on a project.

164

165 **MAYOR PRO TEM REESE**

166 Mr. Jerbic I'm really trying to be nice here, okay? Are there any other questions of the, Ms.
167 Rainey?

168

169 **COUNCILMAN WOLFSON**

170 Yes, if you don't mind –

171

172 **MAYOR PRO TEM REESE**

173 Yes.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

174 **COUNCILMAN WOLFSON**

175 – just a further clarification on exactly where you went, Mayor Pro Tem. Kathy, I wanna make
176 sure I understand completely. When the first bid opened up, how many bidders did we have?
177 How many participants?

178

179 **KATHY RAINEY**

180 We had nine.

181

182 **COUNCILMAN WOLFSON**

183 But none of them met the criteria, you said, I think – the term you used was that it was too tight.

184

185 **KATHY RAINEY**

186 In our – bid process, according to the Statute, the three apparent low bidders are required to
187 submit their one percent subcontre, subcontractor listing within two hours. We only required the
188 three low bidders to submit that. When all three low bidders submitted that, as well as their
189 informational, information, we don't require the balance of them to submit it. So, when we got it
190 for, and all three of the apparent low bidders failed to meet the – the qualification criteria, we
191 drew the conclusion that our bid specs were too tight.

192

193 **COUNCILMAN WOLFSON**

194 Okay. And I wanna stop you right there. Nine initially bid. You took the three lowest. You
195 asked for more information. They came back with this information and then a determination was
196 made that they didn't meet the criteria.

197

198 **KATHY RAINEY**

199 Correct.

200

201 **COUNCILMAN WOLFSON**

202 At this point in time, did the three bidders know each other's bottom line bid?

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

203 **KATHY RAINEY**

204 Yes.

205

206 **COUNCILMAN WOLFSON**

207 Okay. So, they know in that process. Then you open it up again, which resulted in a change
208 between the lowest bidder and the second lowest bidder.

209

210 **KATHY RAINEY**

211 Yes, there was a change in, what –

212

213 **COUNCILMAN WOLFSON**

214 And Councilman Ross, we've talked about this before. You're much more familiar with this
215 than me. It just seems odd, but maybe I'm wrong, that one contractor learns another contractor's
216 bid and because of the process where we had to open it up again because they didn't meet the
217 criteria, all of a sudden it kind of went like this. Now, maybe that's good economy. I don't
218 know.

219

220 **KATHY RAINEY**

221 Well –

222

223 **COUNCILMAN WOLFSON**

224 Maybe I'll be educated on that, but it just doesn't, there's something weird about that.

225

226 **COUNCILWOMAN TARKANIAN**

227 And – if I can just state that it wasn't that much lower either, you know. It just – a tiny bit.

228

229 **COUNCILMAN WOLFSON**

230 Thank you.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

231 **MAYOR PRO TEM REESE**

232 Any other questions?

233

234 **COUNCILWOMAN TARKANIAN**

235 I have a question of Brad Jerbic, if, is he here?

236

237 **BRAD JERBIC**

238 Yes, Councilwoman?

239

240 **COUNCILWOMAN TARKANIAN**

241 Now Brad, I do not feel that I can make an objective vote on this. Can I recuse myself, abstain?

242

243 **BRAD JERBIC**

244 You can. I think you'll need to state more detail on the record as to why you can't, but under the
245 Code of Ethics, there's an objective set of tasks under 281A and then there are subjective tasks
246 as well. Anytime you feel for subjective reasons that you cannot be objective, need to state the
247 reasons on the record and then abstain.

248

249 **COUNCILWOMAN TARKANIAN**

250 Okay, on the record, I do not feel I can be objective because of the information which has come
251 forward during all this time we've been working with APCO, from their initial work, through
252 what's been happening and the lawsuit and from comments they made, from actions they've
253 taken, I just don't feel I can be objective. I have to be honest on that and that's what I feel.

254

255 **BRAD JERBIC**

256 Again, if you can't be impartial and just base your decision on the facts, if there're other
257 considerations outside the facts that you would take into consideration, then I think you've
258 appropriately disclosed and should abstain.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

259 **COUNCILWOMAN TARKANIAN**

260 Well, I just feel it's only fair.

261

262 **MAYOR PRO TEM REESE**

263 Thank you.

264

265 **COUNCILMAN ROSS**

266 Your Honor?

267

268 **MAYOR PRO TEM REESE**

269 Yes, Sir.

270

271 **COUNCILMAN ROSS**

272 Your Honor, Pro Tem, just to respond to Councilman Wolfson's thought and comments about
273 the numbers and how they've seen 'em, I'm – looking at the bid sheet, Bid Abstract now, and,
274 you know, we're looking at an architect estimate of \$19 million on this project. And these
275 numbers coming in as close as they have, that's – a tight – market, and they're being competitive
276 enough. It's when we see projects of this magnitude and there's a real, real low number and then
277 everybody is in the ballpark. That's the scary moment because we don't have the tools
278 necessary to say, hey, that low number scares us. Now, it should be up here in this ballpark.
279 And looking at these numbers, they're all pretty competitive.

280

281 **COUNCILMAN WOLFSON**

282 Mayor Pro Tem?

283

284 **MAYOR PRO TEM REESE**

285 Yes.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

286 **COUNCILMAN WOLFSON**

287 I failed to state one fact that I think it's relevant to my observation, and that is that by law, if the
288 lowest bidder is responsive and responsible, by law we have to give it to them. And I'm not
289 making any character comment on either of these construction companies. But we have, let's –
290 talk theoretically. Theoretically we have two equally good bidders but because they learned of
291 each other's bids, knowing that if they're both responsive and responsible and they come just
292 under the other one, by law we have to award the bid. It just sounds a little hokey.

293

294 **COUNCILMAN ROSS**

295 Well, Mayor Pro Tem, if I may again.

296

297 **MAYOR PRO TEM REESE**

298 Yes.

299

300 **COUNCILMAN ROSS**

301 Councilman Wolfson is right on the money. I mean, we are bound by law to – accept those bids,
302 and that's why I said that and I think that brought it to your attention, that low, low number. If
303 that low, low number comes in and it's, we know it's not right, we're gonna have problems at the
304 end of the day. I think that opens a bigger discussion for new legislation, as I know this topic
305 has been brought up in other municipalities throughout the State of Nevada. I'm not gonna say
306 Southern Nevada, the entire State of Nevada. It's a big challenge for local governments to deal
307 with.

308

309 **MAYOR PRO TEM REESE**

310 Well, and again, we all know also that the way the economy is and – as tight work is, that people
311 are going, companies are really going out there and sharpening the pencils trying to get bids, of
312 any kind. So, when projects like this are advertised, we should be having tons and tons of people
313 bid on 'em.

314 Jorge, would you, Mr. Cervantes, anything you'd like to add or?

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

315 **JORGE CERVANTES**

316 No, Councilman. Certainly, I'm here to answer any questions you have or after you hear from
317 the –protester, to answer any questions you may have.

318

319 **MAYOR PRO TEM REESE**

320 Okay. Gentleman behind, who do you represent?

321

322 **JOHN RIDILLA**

323 John Ridilla, Deputy City Attorney. I just want to emphasize that the Council should only
324 consider the three items that are in the bid protest. And then, there might be other items brought
325 up today but we should only consider the three items that were, that Kathy had discussed earlier
326 in regards to the protest of the bid.

327

328 **MAYOR PRO TEM REESE**

329 If you can do that.

330

331 **COUNCILMAN WOLFSON**

332 Mayor Pro Tem, my question would be, who's gonna monitor that? And I understand there's
333 three formal protests but if somebody goes outside the box, outside the four corners of the three
334 protests, who's gonna stand up and say –

335

336 **BRAD JERBIC**

337 Council –

338

339 **COUNCILMAN WOLFSON**

340 – that's not appropriate.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

341 **BRAD JERBIC**

342 – if I could answer that. I would suggest, that's a good question, I think the better way to handle
343 this is to go through the three that were addressed by Kathy Rainey, one by one, and then, if
344 there's a fourth, you'll know it and that's the time to stop it.

345

346 **MAYOR PRO TEM REESE**

347 Thank you. Is there anyone here from the public wish to speak on these items, on this item?
348 One guy's got a huge box.

349

350 **MARK FERRARIO**

351 Mark Ferrario from the law firm of Greenberg Traurig on behalf of the protestor, Flagship
352 Construction. If you wouldn't mind, I'd like to have Mr. Ray, who works for me, hand out some
353 material to you that might assist you as I address certain points that had been raised.

354

355 **MAYOR PRO TEM REESE**

356 And if I – could, I need to ask our City Attorney a question. It's going to take four votes in the
357 affirmative to pass this, right?

358

359 **BRAD JERBIC**

360 You're absolutely right because we have a Councilmember absent and two Councilmembers
361 have abstained. Under State law, this will require a unanimous vote of the remaining eligible
362 Councilmembers.

363

364 **MAYOR PRO TEM REESE**

365 Thank you. We have to be out of here by, at least, seven o'clock tonight, and I don't know how
366 we're all going to go through this, real quickly.

367

368 **MARK FERRARIO**

369 I'm – gonna be brief. I'm not gonna go through all that material. There's a lot of background
370 but I'm gonna focus in on the comments that you made, you all made during your questioning of

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

371 Ms. Rainey. I'm gonna express disagreement with the City Attorney in their efforts to limit us to
372 the three things that we were avai, we were able to address in a short time we had to gin up our
373 protest. This is an important matter and I would agree with your comment, Councilman
374 Wolfson, that – when you look at this objectively, it does seem a little hokey.

375 And I think to – put in perspective what happened here, my client was the lowest, responsive,
376 responsible bidder the first time around. APCO lodged a protest. Rather than address the merits
377 of that protest, and I disagree with Ms. Rainey, what happened is, the City went back and said,
378 oh, we have a problem with the bid documents and it wasn't a fair process and we're now gonna
379 have to rebid this. The problem I had with that position was, there was no problem with the
380 process. When you looked at the process as a whole and you took into account comments that
381 were made by Mr. Lloyd Davis at the pre-bid meeting, that all bidders are required to attend
382 when the questions were raised regarding the experience required of the general contractor.
383 During that meeting, Mr. Davis made it very clear that the experience of the general contractor
384 was but one factor the owner may consider, and of course, that the owner could also consider the
385 experience of the various superintendents. So, with that clarification, the bids went out. I
386 believe that every bidder, with the exception of APCO understood that, and participated in the
387 bid process based upon the representations from Mr. Davis.

388 Now, I don't wanna get in to debating that because the – process, they pulled the – bid, they said
389 there were gonna rebid it. We elected to participate in the rebid. But after that, numbers are
390 known and not only numbers, but subcontractors' matrixes are known. And what happens? We
391 get beat out by a small amount. As you can imagine, in this economy, my client, who is looking
392 at the same statutes that you quoted, was very upset. Now, we lodged a protest and Ms. Rainey
393 is correct. We challenged, based upon what we knew at that time, the experience of APCO and
394 that's in our documents, and I'll commit them to your review, that they didn't do any projects
395 that were commensurate in size or scope to this project, and we challenged the qualifications of
396 their superintendent.

397 Initially, when the superintendent listed his qualifications, he mentioned that he had participated
398 in the restoration of a historic exterior elevator as part of the remodel of the Los Angeles City
399 Hall. That was about \$110 million dollar project, I don't know the numbers are in the books.
400 His part was about a \$12.5 million part of that. When we looked at that, we were – hard pressed

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

401 to determine how participating on a restoration of an exterior elevator would equate to the type
402 of experience required on this project. When we lodged the protest, we then got multiple
403 affidavits from this gentleman saying that he not only did that but he did other things and the –
404 whole, his whole ex, body of experience evolved dramatically to, as I read it now, he almost
405 handled the whole job. That to me is a bit curious.

406 Another thing that we raised initially was the, excuse, feel free to interrupt. You know, I'm used
407 to that. Another thing we raised was Cogent Electric's participation in this process. Now, as –
408 any of you know that have been through this, there's – a pool of subcontractors out there, and
409 typically, they affiliate with general contractors and they wanna give their best price 'cause they
410 want to work. Cogent, when was approached by my client, said we can't participate in this
411 project because we are not going to bond. Not only did they tell my client that, they told other
412 general contractors in town that. And I have here someone who's not affiliated with my client,
413 works for Martin Harris Construction, Donald Drusky, sitting in the audience. When Cogent
414 was approached by Martin Harris, Cogent told Martin Harris that they wouldn't bond this
415 project. Cogent, I believe, also said the same thing to Jane's Construction, and we have
416 information in the material we gave you, where Cogent was telling everybody they simply
417 wouldn't bond this job. Without a commitment to bond the job, it's my contention that you
418 could not participate in the bid process because that perverts the process and it would turn it into
419 a bid shopping exercise. And why do I say that? Well, it goes back to the pre-bid meeting on
420 the second time around, where Mt. Lloyd Davis made it very clear that any sub participating this
421 had to be willing to post payment and performance bonds. So, my client, hearing Mr. David
422 again and taking direction from him, refused to use Cogent's price. Now, Cogent happens to
423 beat most of the electrical contractors on this job.

424 Now, I will acknowledge that in the material that you will get from the City Attorney, you will
425 see a letter that came from an insurance person who works for Wells Fargo. I believe it was
426 dated April 29th or May 29th. You'll have to excuse me, I don't remember the exact date, saying
427 that they could procure bonds. You will also see a letter from Cogent, back at the beginning of
428 this process that says that they included bonds in their price. You will also see emails that we've
429 attached where it's clear that Cogent was struggling with the bonding issue back in the early part
430 of the year, and there's conflicting information in those emails that come from Cogent go to

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

other people. But what's more disturbing to me, and perhaps what was going on at the beginning of the year, is Cogent's bonding issues really haven't disappeared, because if you'll check the website for the Contractor's Board today, you will find that their contractor's license has been suspended because they have not posted their contractor's bond. So, that is something that we just learned as this process has evolved.

Now, I wanna turn to the, where – Coun, where Mayor Pro Tem Reese started, and that has to do with this idea of awarding a contract to someone who's involved in litigation and it or is a two-pronged analysis. It's a contractor who's involved in litigation and then it's a contract who's involved in litigation with the City. I think Councilman Reese, some time ago, believe it was in December of '07, when dealing with this issue and the APCO situation came up, Councilman Reese asked this question. Why allow them to bid if they're suing us? And I have the greatest respect for Mr. Jerbic, having just worked with him on a case. But I think Mr. Jerbic, perhaps, gave the wrong advice if the same specs were in those bid documents as – there're in these, and Mr. Jerbic said, well, we have an obligation to award to the lowest, responsible bidder. In effect to mean that you couldn't consider the facts of litigation. I disagree with that. And why? Because if you look at the invitation to bid, Spec 13.02, in this bid sec, this, these bid documents, it says, in the event that arbitration or litigation is pending, the bidder should provide evidence to the owner that the disputes involved therein do not reflect negative, negatively upon the bidder's ability to perform the project or for the most part, are in favor of the bidder. So, what has to happen where a bidder is involved in litigation? You can't simply dismiss it and say that every contractor's involved in litigation. This places an affirmative duty on your staff to qualitatively evaluate the merits of that claim. So, what conundrum does that put you in? Because, as I understand it, it's a private arbitration still going on between APCO and the City. As I understand it, APCO has sued the City and the City is suing APCO. So, now you have to, you're – in a tough position. Either, a, you are filing frivolous claims against APCO and they have no merit, in which case, you should drop them or b, your claims have merit and you should be considering those as you evaluate APCO.

COUNCILMAN WOLFSON

Mr. Ferrario.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

461 **MARK FERRARIO**

462 Yes.

463

464 **COUNCILMAN WOLFSON**

465 Mayor Pro Tem –

466

467 **MAYOR PRO TEM REESE**

468 Yes.

469

470 **COUNCILMAN WOLFSON**

471 – please. Mr. Jerbic, has our Nevada Supreme Court entered any kind of opinion on this issue?

472

473 **BRAD JERBIC**

474 I’m gonna ask Mr. Ridilla to step to the mike. I’m not aware of any. I’m not aware of any at
475 this point. Maybe Mr. Ferrario is aware of it.

476

477 **MARK FERRARIO**

478 I am not.

479

480 **BRAD JERBIC**

481 (Inaudible).

482

483 **COUNCILMAN WOLFSON**

484 Your Honor, Mayor –

485

486 **MARK FERRARIO**

487 I’m not either.

488

489 **COUNCILMAN WOLFSON**

490 (Inaudible).

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

491 **MARK FERRARIO**

492 I don't think the Supreme Court's weighed in on this, Councilman Wolfson. But it goes, it, it's a
493 broader issue. It puts you in a very difficult position, because I've, from what we can glean,
494 okay, the City believes it has a meritorious position in this lawsuit and has allocated substantial
495 City funds, public funds to defending and prosecuting those claims. So, you can't simply ignore
496 those in evaluating APCO'S ability to perform.

497 On the Gemstone case, which we raised, okay, when I met with City staff what I was told was,
498 it's in litigation, we won't consider it. Again, if they're following Section 13.02, they can't just
499 pass that off. They have to go evaluate that and to my knowledge that wasn't done. And – I
500 think Ms. Rainey indicated that when she said they didn't do a qualitative analysis.

501 On this issue as well, I wanna speak to one other thing that we were able to find, and this all goes
502 to APCO'S disclosures in their bid documents. A very important part of the Public Works'
503 bidding process has to do with the credibility of the bidder. And what – the bodies want is they
504 want you to come clean and tell them about your past, so you can make an informed choice as to
505 whether you should move forward with a certain contractor or not.

506 In the bid documents, there were questions raised regarding whether or not APCO had involved,
507 had been involved in any suits and what have you or access liquidated damages. In the material
508 that we forwarded to you, under Tab 21, we forwarded some minutes of the Board of Trustees
509 meetings for the North Las Vegas Library District back in 2006. And in 2006, APCO was
510 working on the library project and according to these minutes, were assessed liquidated damages
511 of \$2,000 per day. The minutes will speak for themselves. They talk about APCO failing to
512 meet deadlines and to, and such and being given multiple opportunities and extensions. Now,
513 there is no reference in the APCO bid documents to that project. I will confess to you that I
514 don't know if they ultimately paid those LDs. I don't know the outcome of that. It may have
515 very well been a negotiated item, but again, this is what we could find given the – time that we
516 had.

517 So, when I step back from this, I do think that this process has been, in effect, perverted. I –
518 think that the decision by staff to rebid this was erroneous. I am dismayed by the fact that staff
519 did not put the time and effort in evaluating my client's first bid on these qualification issues as
520 they did with APCO. This is something that – really kind of, and – I don't know, I'm not casting

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

dispersions but I'm concerned. For example, in APCO'S bid they listed a couple of subcontractors. And when – the qualifications of those subcontractors were questioned through the vetting process, the City spent a ton of time calling, I think, a priest in New Orleans who was a parishioner 20 years ago, and, hey do you remember this guy being on the job. And they went to Chicago and they allowed APCO to list other pro, these subs to list other projects. They didn't do any of that with first our bid. Had they done that type of analysis with our first bid, we wouldn't be here now. We wouldn't have had to go through the rebid process and my client would be doing this project.

So, to step back, I think the pro, the process is hokey. I don't think that you can look at the material that is in front of you, both in staff's files and in the material that I gave you, and conclude that APCO is a responsive and responsible bidder based on the record that you have in front of you because, to my knowledge, staff has not undertaken the obligation imposed by them by Section 13.02 and the Nevada Revised Statutes dealing with the qualification of bidders.

So, with that, I will conclude because I, you, I won't keep you here 'til seven. I – would be happy to answer any questions. And again, what I've given is what we can accumulate in the short period of time that we had to respond to this. And – in fairness to staff, they – met with me. We had a full and fair vetting of ideas, and then this thing rapidly approached and we – put together as much material as we can. But this – is problematic and I don't think that this body should move forward and award this contract to APCO today.

MAYOR PRO TEM REESE

Thank you.

MARK FERRARIO

Thank you.

MAYOR PRO TEM REESE

I do have a question of staff, I mean of – Mr. Jerbic and fellow Councilmembers here. Could you go to 13.02 one more time 'cause what he said to me makes sense. I – just need to understand more about it because Councilman Ross mentioned that we have a State law that we

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

551 have to take the lowest bidder.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

552 **BRAD JERBIC**

553 I'm – gonna have to step to the podium and read Item 13.02 in front of me but if Mr. Ridilla
554 from my office and Mr. Cervantes and Ms. Rainey will –

555

556 **MAYOR PRO TEM REESE**

557 Mr. (inaudible), you – wanna approach that question, please.

558

559 **JOHN RIDILLA**

560 In regards to the question about the research on litigation, we pulled all of the litigation files
561 from the Clark County website, including the complaints filed by AP or the complaint filed by
562 Gemstone, the – response filed by APCO, and we did an evaluation of those complaints. They
563 weren't just an arbitrary, oh, it's in litigation –

564

565 **MAYOR PRO TEM REESE**

566 No, no. My question –

567

568 **JOHN RIDILLA**

569 – and we're gonna dismiss them.

570

571 **MAYOR PRO TEM REESE**

572 – my question is, Mr. Ferrario brought up a point where Councilman Wolfson and Councilman
573 Ross both stated that we have, as the State law requires us to take the lowest qualified bidder.
574 And he – read out 13.0, 13.02 where he's saying that if this happened and this happens we don't
575 have to do that.

576

577 **COUNCILMAN WOLFSON**

578 I think, excuse –

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

579 **JOHN RIDILLA**

580 Mr. Ferrario, refresh my memory here, where you were quoting 13.02. There's about 10
581 sections.

582

583 **MARK FERRARIO**

584 Invitation to Bid section, 13.02 here.

585

586 **JOHN RIDILLA**

587 Yeah, there's (sic) like 15 sections to 13.02.

588

589 **BRAD JERBIC**

590 I think we need to separate a couple of issues here while they're at the podium debating that.
591 NRS 338 requires that you must award the bid to the lowest responsive, which means they
592 answered the bid specs responsibly and responsible; they have a good track record; they're not
593 incompetent; they can do it. If the response to the bid specs has given us materials we request,
594 and they're responsible based on past performance, then it must be awarded. If I understand Mr.
595 Ferrario correctly, he's talking about a specific section in the bid documents that, I think his
596 argument is, they were not responsive to and therefore, they don't meet that prong of NRS 338
597 because they didn't answer it. Is that correct?

598

599 **MARK FERRARIO**

600 You said it better than I did. That's correct. There's a problem with their documentation in that
601 they didn't disclose the North Las Vegas Library situation, and they didn't disclose the situation
602 with the City, is not even on their bid docs. I mean, at a minimum, they should have disclosed
603 that, so they're not responsive.

604

605 **BRAD JERBIC**

606 (Inaudible).

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

607 **MARK FERRARIO**

608 They mentioned Gemstone, but you're correct, Mr. Jerbic, that is exactly the point I made.

609

610 **BRAD JERBIC**

611 I think that does require an answer from staff as to whether or not the staff's opinion they are
612 responsive to the bid documents.

613

614 **MAYOR PRO TEM REESE**

615 Thank you.

616

617 **BRAD JERBIC**

618 And again, when we talk about responsiveness, there's also another level of analysis, from time
619 to time you will find immaterial omissions. It seems to me that this, and – correct me if I'm
620 wrong, things were not – included that we required, this would be a material omission. If staff
621 disagrees, I'd like to hear it right now.

622

623 **COUNCILMAN WOLFSON**

624 Mayor Pro Tem?

625

626 **MAYOR PRO TEM REESE**

627 Yes, please.

628

629 **COUNCILMAN WOLFSON**

630 And I think we're going in the right direction. Mr. Ferrario or staff, please read that section
631 again.

632

633 **MAYOR PRO TEM REESE**

634 And while – they're getting ready to read that, I – want to announce to those folks that are
635 coming for our afternoon session, we still have some other items we have to go – through this
636 morning. So, we're looking at probably at least having our morning session run another hour,

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

637 with lunch, we have a closed door. So, we're looking at least two – two o'clock or two thirty
638 before we reconvene. So, you're welcome to sit here if you'd like. Just for your information,
639 it's gonna be an hour or so before we – get to the afternoon items. Thank you. Mr. Ferrario,
640 you're ready to answer that question that –

641

642 **MARK FERRARIO**

643 I am. I just wanted to apologize. I was in Los Angeles and I was thinking of Hotel 11 and I'm
644 relying on my – folks and they paraphrase, but it's in Section 13.02 and – the language is "in the
645 event that arbitration or litigation is pending, the bidder should provide evidence to the owner
646 that the disputes involved therein do not reflect negatively upon the bidder's ability to perform
647 the project or for the most part, are in favor of the bidder." And I think that given the posture of
648 your case with APCO, you can't move forward with them as a bidder.

649

650 **COUNCILMAN WOLFSON**

651 Mayor Pro Tem.

652

653 **MAYOR PRO TEM REESE**

654 Yes.

655

656 **COUNCILMAN WOLFSON**

657 The language you just read –

658

659 **MARK FERRARIO**

660 Yes.

661

662 **COUNCILMAN WOLFSON**

663 – is in the bidding documents.

664

665 **MARK FERRARIO**

666 Yes.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

667 **COUNCILMAN WOLFSON**

668 So, it is incumbent on the bidder to subjectively determine whether they should respond or not,
669 and then, likewise, I think, if I follow your reasoning, it would be the responsibility of staff to
670 determine whether they've responded in appropriate way or not.

671

672 **MARK FERRARIO**

673 I –

674

675 **COUNCILMAN WOLFSON**

676 Is – that your point? I mean, staff knows that APCO'S in serious litigation with the City. It's no
677 secret, so I guess it's objective whether or not APCO decides to respond to that section of the
678 bidding documentation. And it's, likewise, arguably a responsibility of the City staff to make a
679 determination whether they should have or not. Is – that right?

680

681 **MARK FERRARIO**

682 In part. I actually think it's an affirmative obligation to disclose that to the City. Okay.

683

684 **COUNCILMAN WOLFSON**

685 They did not, correct?

686

687 **MARK FERRARIO**

688 They did not. And they didn't disclose the North Las Vegas situation. I believe they, I – think
689 they did disclose Gemstone, but what's important here, you have to look at these things as a
690 whole. The only way that makes sense, which is it's, again, part of the bid package and so
691 everybody's reading it. The only way it makes sense is that if you do disclose those items, and
692 then what happens is there needs to be a give and take. And the owner, in this case the City, has
693 to determine whether or not there is merit to the claims that are being made by that con, or
694 against that contractor. That's what's required here. It's not simply, and I – disagree with – the
695 City Attorney on this. It's not simply looking at cold pleadings in the courthouse. It requires
696 you to make a determination, or for the most part, are (sic) in favor of the bidder. You have to

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

697 evaluate that. So, to go full circle, APCO, what – concerns me because these are credibility
698 issues, APCO didn't disclose this, and they should have disclosed it. They should have disclosed
699 the North Las Vegas situation, but I – respect Mr. Mowbray, APCO'S attorney, who'll come up
700 here. Maybe they resolved that, and I – had that caveat before.

701 I am reading from minutes of another public body that speak to problems with APCO. And so, I
702 don't think APCO was the lowest, responsive and responsible bidder in this situation. And I'm
703 troubled by the failure to disclose these items, which would have then prompted a vetting, and
704 that didn't happen.

705

706 **BRAD JERBIC**

707 Mr. Ferrario, I don't – mean to interrupt the Council here, but I want to try and focus this issue,
708 so we have a good record.

709

710 **MARK FERRARIO**

711 Okay.

712

713 **BRAD JERBIC**

714 I – want to ask our attorney, Mr. Ridilla, and Mr. Cervantes, the allegation that's been made that
715 they were non-responsive to Section 13.02 N, is that accurate or not?

716

717 **JOHN RIDILLA**

718 Thirteen, there's actually a paragraph at the end of Section 13.02, which describes fact that that
719 the contractor needs to submit a project that they successfully completed to meet the
720 requirements of the specifications. On that successfully completed project, if there's litigation or
721 arbitration, they should disclose it. They're not obligated to disclose arbitration or litigation on
722 other projects, only the project they success, successfully completed to fulfill the requirements of
723 the specifications.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

724 **BRAD JERBIC**

725 So, in other words, the – project has to be one similar to what you’re asking for in this bid spec, a
726 rehab of an historic building or whatever the limitations are. So, tennis courts that were built by
727 the City, which is the subject of the arbitration right now, or other projects would have to be
728 similar to this. And it’s your opinion that they’re not and, therefore, not required to be disclosed.

729

730 **JOHN RIDILLA**

731 Correct. They didn’t submit that single project to fill the requirements of the specifications. In
732 fact, they met the requirements of the specifications through their superintendent, which we
733 relayed in the second bid, where it could be the firm or the superintendent. They fulfilled that
734 through the superintendent, and I know Jorge can speak to the qualifications of APCO’S
735 superintendent ‘cause an ex, fairly extensive amount of work was done contacting the City of
736 Los Angeles’ folks about that.

737

738 **MARK FERRARIO**

739 But did –

740

741 **BRAD JERBIC**

742 That having been said, I want us to hear Mr. Ferrario (inaudible).

743

744 **MARK FERRARIO**

745 I’d like – to respond to that last point first because this is what’s troubling to me about this
746 because I’ve been doing this a long time. And part of the process, a very important part of the
747 public bid process is the meetings that are had, pre-bid, where you meet with staff and you have
748 a dialogue about what – is this all about, what do I need to have in there.

749 Listen to what Mr. Davis was telling the bidders the first time around when my client succeeded
750 on this very issue. Question, then he goes, “Well, we’ll evaluate it.” An attendee says, “So then
751 it’s the subject of criteria.” And this had to do with whether the – contractor had to have a
752 historic experience. “All I’m saying is, they, these are items that it says right here the owner
753 may take into consideration, including but not limited to, the criteria listed below. Okay.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

754 Okay.” Then there’s a further clarification. “If the superintendent has the experience required
755 that will meet the requirement for the general contractor, size and type of project, must have the
756 scope – and size, but superintendent can qualify on behalf of the GC.” That’s what the bidders
757 walked out of that first pre-bid meeting understanding. I guess everyone but APCO when they
758 filed their protest when they didn’t win.

759 On this other issue, I think you’ve got to read these documents as a whole, and if – the City
760 Attorney is now saying that a contractor, who’s applying for a public works project, does not
761 have to disclose instances where it is involved in litigation dealing with a failure to perform the
762 contract, such that you can make these qualitative evaluations, that would be news to me. And I
763 think that would be troubling and would be the need to rewrite your specs, because I don’t read it
764 as narrowly as the City Attorney does. I think that you have to read these as a whole, and the
765 only way it makes sense is you need to qualitatively evaluate whether or not this party is gonna
766 be able to perform on this contract.

767
768 **JOHN RIDILLA**

769 I think if you do read it as a whole –
770

771 **MAYOR PRO TEM REESE**

772 No, no, no, no, we’re not – going to go there. He’s made his point; you’ve made your point. I –
773 will allow you maybe three minutes after we hear, I’m sure we’re gonna hear from APCO’S
774 attorney or Jorge, do you want to speak first?
775

776 **JORGE CERVANTES**

777 Yes, Councilman. I just want to clarify a couple of things he brought up on the North Las Vegas
778 issue. We did follow-up with North Las Vegas, part of the bidding process. We did, I talked to
779 the Director of Public Works in North Las Vegas. They pulled out their records. There were no
780 liquidated damages. There was a settlement that was made at the end, but no liquid damages
781 were assessed on that – one case.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

782 **MAYOR PRO TEM REESE**

783 Thank you. I see an attorney standing back there in the back. I didn't –

784

785 **MARK FERRARIO**

786 I will move over.

787

788 **MAYOR PRO TEM REESE**

789 I will disclose the fact that Mr. Bilbray (sic) represented me in a case 12 or 13 years ago, and I –

790 don't, I haven't had any contact with Mr. Mowbray since that time, to my knowledge. I think

791 he's been before the City Council a couple of times. I made that – disclosure at that time. I

792 don't feel like I'm gonna be threatened here one way or the other. I think I can make a decision

793 based upon the facts (inaudible) –

794 **BRAD JERBIC**

795 I'm aware of the matter. I don't believe there's any continuing –

796

797 **JOHN MOWBRAY**

798 Right.

799

800 **BRAD JERBIC**

801 – representation, Mr. Mowlbray (inaudible).

802

803 **JOHN MOWBRAY**

804 There is not, Your Honor. I, and – in addition, there's no creditor or debtor relationship, which

805 would also require (inaudible).

806

807 **COUNCILMAN WOLFSON**

808 Mayor Pro Tem, please?

809

810 **MAYOR PRO TEM REESE**

811 Yes.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

812 **COUNCILMAN WOLFSON**

813 May I please see the bidding documents that contained the section that we were just debating as
814 to whether or not bidder must provide information?

815

816 **MAYOR PRO TEM REESE**

817 Mr. Mowbray, please.

818

819 **JOHN MOWBRAY**

820 Yes, John Mowbray, Fennemore Craig, 300 South Fourth Street, 14 Floor, on behalf of APCO
821 Construction, the successful lowest responsive bidder for this project. I do need to make a
822 disclosure and that disclosure is as follows. I actually formed the non-profit entity at 300
823 Stewart Avenue Corp, Corporation on behalf of the City that will be managing the museum once
824 it's done. I'm not appearing today on that capacity but simply here as APCO'S advocate.

825 I'd like to point out that there's been some discussion about the differential in the different bids.
826 The way I calculated it and as indicated in the addendum to today's material, we're talking about
827 a significant number. APCO came in after a full and fair vetting in the (inaudible) and bid in
828 \$11,512,000 to complete this restoration project for the City of Las Vegas. The next bid, from
829 Flagship, came in at twelve million six hundred sixty-four thousand six hundred twenty-nine,
830 and we're talking about a differential there of \$1,152,629. Those are significant dollars. There
831 were significant 10 years ago, five years ago and even more significant today, given the tight
832 constraints of the budget and the fiscal impact on the City.

833 The City staff has vetted all of the protests purported by Flagship. They found them to be
834 without merit. I would defer to staff. I was gonna get up and talk about the North Las Vegas
835 project but staff did its homework, vetted that out and indicated they had a good resolution. So, I
836 would recommend and advocate that you follow your staff's recommendation, award the
837 contract to the lowest responsive bidder, which is APCO Construction. Thank you.

838

839 **MAYOR PRO TEM REESE**

840 Any – questions of Mr. Mowbray?

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

841 **COUNCILMAN ANTHONY**

842 I – have just a question.

843

844 **MAYOR PRO TEM REESE**

845 Please.

846

847 **COUNCILMAN ANTHONY**

848 Okay, so, I understand that we – we’re supposed to give this to the lowest bidder and there’s
849 other things that we need to think or I need to think about before I vote. But I guess what I need
850 to know is, is part of my decision making process, can I consider the current lawsuit that’s
851 pending between the City and APCO? Can I take that into consideration when I vote?

852

853 **MAYOR PRO TEM REESE**

854 Mr. Jerbic.

855

856 **BRAD JERBIC**

857 I think the advice from staff is no. I, let me make a little bit of a record on this too. It is not with
858 any joy I give this advice because we have been in a long, drawn out very expensive arbitration
859 with APCO that both sides are fiercely partisan about. Staff did try to present facts to this
860 Council some time ago to demonstrate that APCO was not a responsible bidder, and the decision
861 was made at that time to not disqualify. Having that record as background, I think that if there
862 were any challenge to awarding to APCO based on the fact that they’re not responsible now,
863 without any hearing on the tennis court litigation, without any facts being generated and with the
864 previous record that rejected disqualification at that point in time, that we would not be
865 successful in court defending that determination.

866 So, it would be my advice to you based on what I’ve just said that you should not consider that
867 litigation, as much as it pains me to say that.

868

869 **COUNCILMAN WOLFSON**

870 Mayor Pro Tem?

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

871 **MAYOR PRO TEM REESE**

872 Yes.

873

874 **COUNCILMAN WOLFSON**

875 The document that was handed to me is titled Post Bid Opening Rules and Procedures. These
876 are the bid documents?

877

878 **KATHY RAINEY**

879 (Inaudible)

880

881 **COUNCILMAN WOLFSON**

882 It says, determination, this is 13.02, determination of responsible, and there's language in here
883 which says, as a prereq, pre-requisite to the award of the contract, the lowest bidder or the best
884 bidder must be a responsible bidder as determined by the owner. In determining such
885 responsibility, the owner, that's us, may take into consideration, including but not limited to, the
886 criteria set below. And Subsection E says, whether the bidder has breached any contracts with
887 the public agency or a person in this state or any other state during the five years immediately
888 preceding the date of submission of the bid.

889 Now, I guess that's a question of fact whether or not they've breached any contract. Now, we're
890 in litigation over the tennis courts, over breach of contract, are we not, among other things?

891

892 **BRAD JERBIC**

893 I believe that – you could – argue that.

894

895 **COUNCILMAN WOLFSON**

896 Okay.

897

898 **BRAD JERBIC**

899 For practical purposes, they did not follow the contract –

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

900 **MAYOR PRO TEM REESE**

901 That's – good enough, Sir.

902

903 **COUNCILMAN WOLFSON**

904 I guess my point is –

905

906 **MAYOR PRO TEM REESE**

907 That's good enough.

908

909 **COUNCILMAN WOLFSON**

910 – and this is Mr. Ferrario's point, I'm not trying to advocate for either side, I'm trying to
911 understand, is Mr. Ferrario's position would be that at the very least they should have disclosed
912 that. They would say, we didn't breach any contract. We're not in a breach of contract litigation
913 or arbitration. But I think it's pretty clear they are.

914 Then Subsection I, under 13.02, in determining the responsible bidder says, whether during the
915 five years immediately preceding the date of submission of the bid, the bidder has, as a result of
916 causes within the control of the bidder or a subcontractor or a supplier of the bidder, failed to
917 perform any contract. This is the same thing. It's a question of fact whether there's been a
918 breach of contract or whether APCO has failed to perform under the contract involving the
919 tennis courts.

920 But I guess my position in thinking out loud is, that at least it should have been disclosed. It
921 wasn't disclosed. If it wasn't disclosed, they're not a responsible bidder. If they're not a
922 responsible bidder, then we don't have to award the contract to them. Now, I'm not saying that's
923 my conclusion. I'm just trying to understand the issue.

924

925 **JOHN MOWBRAY**

926 Well, I would like to address those points. First of all, the City has awarded two contracts since
927 the inception of the arbitration proceedings over the tennis court, two and both –

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

928 **MAYOR PRO TEM REESE**

929 But again – though, I don't wanna interrupt you, we're talking about one before that, and it's just
930 as important as those two that we awarded since then. And there – was, I think extenuating
931 circumstances, hasn't been brought out yet, of why we went ahead and awarded that contract for
932 Centennial Hills Cen, Center out there.

933

934 **JOHN MOWBRAY**

935 Well, and the other fact is, disclosures deem in part information that is not readily known. If
936 there's one entity in the state that is acutely aware of the on-going dispute between APCO and
937 the City over the tennis courts, it's actually the City and the staff. This was all vetted out.

938

939 **COUNCILMAN WOLFSON**

940 Let me –

941

942 **JOHN MOWBRAY**

943 What we could have done, are you suggesting –

944

945 **COUNCILMAN WOLFSON**

946 Mayor Pro Tem.

947

948 **JOHN MOWBRAY**

949 – Council --

950

951 **COUNCILMAN WOLFSON**

952 Forgive me. I agree with you. I'm not saying it's solely the responsibility of APCO. I would
953 submit, that perhaps, the City had some responsibility because they were aware of what we're
954 talking about.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

955 **JOHN MOWBRAY**

956 Well, I would also submit that that the arbitration has not been concluded yet. It's still in the
957 arbitration phase. There've been no findings of fact. And, what you're suggesting, taken to its
958 logic conclusion, would be that APCO would be blackballed from any job ever until that
959 arbitration is concluded. And that's not the case and that's not the law, and that should be the
960 decision of this Council.

961

962 **COUNCILMAN WOLFSON**

963 Mayor Pro Tem –

964

965 **MAYOR PRO TEM REESE**

966 Yeah.

967

968 **COUNCILMAN WOLFSON**

969 Please. The only thing I am suggesting in this analysis is that perhaps there should have been
970 information provided so that we could consider it. It's not a deal breaker, Mr. Mowbray. I'm
971 not suggesting that just because they're in arbitration and if they would have disclosed that, oh,
972 then we're not gonna award the contract to APCO. I'm suggesting that it's another factor for
973 this Council to properly consider. That's all.

974

975 **MAYOR PRO TEM REESE**

976 Thank you. Any – other questions from the Council? Mr. Ferrario, you got –

977

978 **MARK FERRARIO**

979 I just have one brief comment.

980

981 **MAYOR PRO TEM REESE**

982 Three – minutes.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

983 **MARK FERRARIO**

984 It won't even be three minutes. I just want to say, I appreciate you folks taking the time to
985 consider this. This is a, it's a difficult issue but if you would look at again, I would call your
986 attention to Tab 21, and this speaks directly to what was required to be disclosed on Attachment
987 6 in the bid. These are the meeting minutes dealing with APCO'S performance on the Aliante
988 Library project. Director Laruy, I'm going to butcher this name, told the board that the original
989 completion date for the library was January 25th. It was extended to February 25th, at APCO'S
990 request. When it was clear APCO would not finish the project by February 25th, they asked
991 when it would be done. The, their Project Manager, Joe Pelan, said that if she would give him
992 until March 10th, the project would be completed. The completion date was then extended again
993 in writing until March 10th, 2006. As the project was not even close to being completed on
994 March 10th, liquidated damages were instituted as of March 11th, 2006, at \$2,000 per day per the
995 contract.

996 And it goes on and it talks about the – liability being incurred by the Library Board for \$500 per
997 week for storage and then it goes down, it says Bob Garlow, Project Manager, reported that
998 APCO had scheduled a walk through to develop a punch list on March 21st. The architects, Mr.
999 Garlow and several of the pertinent consultants and inspectors arrived, and it was clear that
1000 APCO was nowhere near ready. The City's team instead developed a construction completion
1001 list which has been sent to APCO and Golden Welch. And then it says, Mr. Garlow spoke of the
1002 lack of performance, poor workmanship and the lack of attention to detail and stated he has
1003 repeatedly discussed these issues with APCO'S project superintendent.

1004 I think, at a minimum, something that reached that level in a public body should have been
1005 disclosed on APCO'S bid sheet. Now, whether there was an, again, I don't know what the
1006 resolution was, I don't know if there was a compromise on the LDs, but it certainly, that speaks
1007 to non-performance on the library project. With that, given you a lot of material, I – again, do
1008 not believe that APCO is the lowest responsive, responsible bidder, and I think that, for that
1009 reason, you should reject awarding this contract to APCO.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1010 **BRAD JERBIC**

1011 Mr. Mayor Pro Tem, before they go any further, I just wanted to do some housekeeping
1012 business. Mr. Ferrario, have you filed your materials with the Clerk already in addition with –

1013

1014 **MARK FERRARIO**

1015 Yes, yes, we did.

1016

1017 **BRAD JERBIC**

1018 And Ms. Rainey and Mr. Ridilla, are there any materials that the City has that you want to file
1019 with the Clerk at this time?

1020

1021 **KATHY RAINEY**

1022 Yeah, I – can certainly file the file I put together.

1023

1024 **BRAD JERBIC**

1025 I'm sorry to interrupt. I just wanna make sure the record had everything in it because I suspect
1026 litigation may flow from this.

1027

1028 **MAYOR PRO TEM REESE**

1029 Any, yes, Sir.

1030

1031 **COUNCILMAN ANTHONY**

1032 I guess – I need to know, I mean, Councilman Wolfson's point about the contract, did they
1033 breach the contract by not putting that information on, as far as, on the lawsuits? Is that a
1034 violation of the contract?

1035

1036 **MAYOR PRO TEM REESE**

1037 I – guess that's a decision we have to make. You – and I have to sit up here and we – have that
1038 ability to say yes or no.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1039 **COUNCILMAN WOLFSON**

1040 Mayor Pro Tem?

1041

1042 **MAYOR PRO TEM REESE**

1043 Yes.

1044

1045 **COUNCILMAN WOLFSON**

1046 Kathy, I'd be interested in either you or Jorge's response to that. Do you feel, now that we
1047 flushed it out a little, and I think that's why we're – having such a long discussion, is we're
1048 flushing out the issues.

1049

1050 **KATHY RAINEY**

1051 With – regard to –

1052

1053 **COUNCILMAN WOLFSON**

1054 Do you think they should have com, they should have provided information concerning, at least,
1055 the litigation that they're involved with the City, the arbitration over the tennis courts and maybe
1056 this North Las Vegas issue. Do you think that they should have been, do you think that APCO
1057 should have provided that information pursuant to Paragraphs E and L of 13.02 of the bidding
1058 documents?

1059

1060 **KATHY RAINEY**

1061 The, with regard to the North Las Vegas, the bid forms that we provide them ask for that
1062 information only for the projects that – they list as their experience. That was not one of the
1063 projects that they listed as pertinent experience, so we didn't give them the opportunity on the
1064 bid form to – do that. We don't ask that for every project that they've ever done in their history
1065 to provide that information. It's just not, it's not in any of the bid submittal forms that we ask
1066 them to submit.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1067 **MAYOR PRO TEM REESE**

1068 We just –

1069

1070 **KATHY RAINEY**

1071 With regard to the information regarding the on-going litigation with or arbitration with the City,
1072 it was not our expectation. We're well aware of the on-going arbitration. So, it wasn't
1073 something we were looking for. It wasn't something that was a surprise to us that they didn't
1074 submit. We did not provide nor do we in our normal bid process have a form specifically for
1075 bidders to provide that information. We usually, typically ask for it. If – you look at that section
1076 of 13.02, where I put the arrow, it's typically requested for project they're submitting with regard
1077 to that of similar type and scope.

1078

1079 **COUNCILMAN WOLFSON**

1080 Mayor Pro Tem.

1081

1082 **MAYOR PRO TEM REESE**

1083 Yes.

1084

1085 **COUNCILMAN WOLFSON**

1086 Who drafted this document? Is this a product of the City?

1087

1088 **KATHY RAINEY**

1089 It's a product of the City with the assistance of the City Attorney's Office.

1090

1091 **COUNCILMAN WOLFSON**

1092 I guess my observation would be that this documentation goes out to all of the bidders.

1093

1094 **KATHY RAINEY**

1095 Correct.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1096 **COUNCILMAN WOLFSON**

1097 So –

1098

1099 **KATHY RAINEY**

1100 It's in the instruction to bidders.

1101

1102 **COUNCILMAN WOLFSON**

1103 Sure. Bidder number one, I think, could easily rely and have an expectation that all of the

1104 bidders would comply with the document. And I guess it comes down to just a reasonable

1105 interpretation of what this means, and when it says that the –

1106

1107 **KATHY RAINEY**

1108 The, actually, in the Statute, it conforms almost directly with what the Statute says, shall be used

1109 to determine –

1110

1111 **COUNCILMAN WOLFSON**

1112 Okay.

1113

1114 **KATHY RAINEY**

1115 – what's to be considered responsive and responsible. So, we don't use, we don't add a lot of

1116 words to what the Statute says.

1117

1118 **COUNCILMAN WOLFSON**

1119 So, I guess the question then comes down, among others, is whether or not APCO complied with

1120 Section 13.02 E and L. E talks about, questioned whether the bidder has breached any contracts

1121 with a public agency and the City is a public agency, during the past five years, and whether they

1122 performed or performed any contracts. So, I guess that's a question of fact that we have to

1123 determine –

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1124 **KATHY RAINEY**

1125 Right. And the – guidance –

1126

1127 **COUNCILMAN WOLFSON**

1128 – whether or not they have complied –

1129

1130 **KATHY RAINEY**

1131 Right.

1132

1133 **COUNCILMAN WOLFSON**

1134 – with this bidding document.

1135

1136 **JOHN MOWBRAY**

1137 If may I interject, I believe that's only applicable if APCO was submitting a project of like kind
1138 for the one on the bid. Is that correct?

1139

1140 **MAYOR PRO TEM REESE**

1141 I – don't mean to –

1142

1143 **KATHY RAINEY**

1144 Yes.

1145

1146 **COUNCILMAN WOLFSON**

1147 (Inaudible).

1148

1149 **MAYOR PRO TEM REESE**

1150 I don't mean to interrupt. We – gave you ample time –

1151

1152 **KATHY RAINEY**

1153 Right.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1154 **MAYOR PRO TEM REESE**

1155 – and so we’re – going – back and forth now.

1156

1157 **JOHN MOWBRAY**

1158 Okay. Could I ask, just make a record, so we have a real clear record of the document,
1159 Councilman Wolfson is referring to.

1160

1161 **COUNCILMAN WOLFSON**

1162 Yes, what I was referring to is, I think, what Kathy provided to me –

1163

1164 **KATHY RAINEY**

1165 This is in the invitation to bid Section 13.02.

1166

1167 **COUNCILMAN WOLFSON**

1168 It’s – labeled letter D, Post-bid Opening Rules and Procedures.

1169

1170 **JOHN MOWBRAY**

1171 Very good.

1172

1173 **COUNCILMAN WOLFSON**

1174 And I was reading from Section 13.02, and I think, we should probably make a copy of this for
1175 the record too.

1176

1177 **MAYOR PRO TEM REESE**

1178 Thank you. And – I wanna put on the record also, I – know many, many years ago, I asked to
1179 clarify this bid, bidding process so we wouldn’t – be here on – items like this today. And one
1180 thing I stressed was every bidder has to be at the pre-bid conference, and none of ‘em are to
1181 leave that conference with any questions on their mind. And I – have a hardest, I have a hard,
1182 heartburn over the fact that we’re here on the second bid for the reasons stated on the record.
1183 And – it just bothers me to think that we – can award this protest and go out and rebid all over

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1184 again on stuff just like this bid pro, protest today. And I – think that if – we put out something
1185 for bid and we have somebody there that’s in charge, is there any questions, is there any
1186 questions before you leave? If they walk out and if they don’t perform, if they don’t put on that
1187 – bid list all those things, then they’re disqualified, automatically they’re disqualified. And so,
1188 maybe we don’t have enough bidders, maybe – it is too high. But to me, what we’re, what’s
1189 gonna happen here today, now, is we’re gonna have a project in the City of Las Vegas that’s
1190 gonna be detained for a couple more years, because of the bid process that we have.

1191 And I – love my staff; they do a great job for us. You know? But, to me, on the first bid, if
1192 people walked out of there with questions, then it’s their own fault. They shoulda (sic) been
1193 disqualified, and we give to the lowest bidder.

1194 Any other questions or comments?

1195

1196 **COUNCILMAN ROSS**

1197 I do –

1198 **MAYOR PRO TEM REESE**

1199 Thank you.

1200

1201 **COUNCILMAN ROSS**

1202 – Mayor Pro Tem.

1203

1204 **MAYOR PRO TEM REESE**

1205 Councilman Ross.

1206

1207 **COUNCILMAN ROSS**

1208 We just dealt with this a couple months ago, on another project in the City of Las Vegas, where
1209 the bid specifications weren’t – clear enough, apparently, for the bidding contractors. Betsy, you
1210 have got to direct, between you and Jorge, we’ve got to have better documents. And, I’m with
1211 Mayor Pro Tem; if contractor “A” does not comply with subsection “B” or “C,” they’re gone.
1212 There’s no leniency here. And if there’s information that we need to know, we need to know
1213 that. And I recognize how this came about and why they’re here and – the whole protest process,

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1214 and what it says in our bid documents. We've gotta do something better with those bid
1215 documents. I said it a couple of months ago; I said it four years ago. This isn't new. You cannot
1216 continue to put this Council and this Mayor in this position, to deal with these things and beat
1217 these things up for hours and hours at a time. There's got to be some clarity in there. We've got
1218 to know everything about that contractor, everything about that contractor. It's our Public
1219 Works. This is for the people of the City of Las Vegas. We need to know these things.

1220 And I don't know what the answers are. We're gonna have to rely upon you for those answers.
1221 And you made a comment, too, I think a couple months ago, that because the market's changed
1222 so much, construction's down so much, we're gonna see more of these. If that's the case, then
1223 get us in a better position with our bid documents, so we don't have to do this at a City, at the
1224 City Council level. It's clear, it's concise, and everybody knows that they're all playing on the
1225 same le, same – field. And, I'll just look to you for – the answers to that.

1226 But, it's quite frustrating for us to be put in this situation and have contractors not understanding.
1227 And, I'm with Mayor Pro Tem, you walk out of that bid, that pre-bid conference, you have
1228 questions, you better get 'em in. Make sure you understand the documents. I'm not pointing the
1229 finger at anybody. I'm not blaming one contractor or another, but we've got to find a better way
1230 to do this, especially in this economy. Thank you, Mayor Pro Tem.

1231

1232 **MAYOR PRO TEM REESE**

1233 Thank you. Any other comments or questions? I'd entertain a motion, please.

1234

1235 **COUNCILMAN WOLFSON**

1236 Mayor Pro Tem?

1237

1238 **MAYOR PRO TEM REESE**

1239 Yes.

1240

1241 **COUNCILMAN WOLFSON**

1242 First of all, is there, is time of the essence on this?

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1243 **KATHY RAINEY**

1244 The bids, yeah, the bids will expire on July 5th; they have already been extended 60 days.

1245

1246 **COUNCILMAN WOLFSON**

1247 If I abeyed this for two weeks, until our July 1st meeting, we're still under that timeframe; is that
1248 right?

1249

1250 **KATHY RAINEY**

1251 Correct.

1252

1253 **COUNCILMAN WOLFSON**

1254 Secondly, Mr. Jerbic, if I wanted to take this under advisement, I mean, I hate to use that term,
1255 but, if I wanted to flush it out a little bit more with staff, am I allowed, is this Council allowed to
1256 do that?

1257

1258 **BRAD JERBIC**

1259 Absolutely.

1260

1261 **COUNCILMAN WOLFSON**

1262 Okay. Mayor Pro Tem, I'm not sure how you feel about this, but –

1263

1264 **MAYOR PRO TEM REESE**

1265 Well, I would – wanna put on the record that we would limit the time just between the
1266 Councilmembers. I don't think we need a full blown representation again from either flag,
1267 Flagstone, or I mean, Flagship and/or APCO. I think we – can cut this down to just a little bit of
1268 time if you want to do that. I don't think we need to have a full blown presentation again.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1269 **COUNCILMAN WOLFSON**

1270 No, I – agree. So, my motion would be to abey this until our next meeting, which would be July
1271 1st. I don't think the expectation is to receive anymore presentations from either sides (sic),
1272 unless any of the Councilmembers –

1273

1274 **MAYOR PRO TEM REESE**

1275 – might have (inaudible) –

1276

1277 **COUNCILMAN WOLFSON**

1278 – voice a desire in the next two weeks. We can certainly have our own individual meetings with
1279 – the parties involved and staff. But I'm just not ready to make a motion either way right now.

1280

1281 **JOHN MOWBRAY**

1282 Well, Your Honor, I – understand that you were provided with a book of materials, which we
1283 have not seen, and there were some new things brought up today outside the four corners of the
1284 three items of the protest. Our position would be that you ought to stay within the three items
1285 addressed in the protest letter that were adequately addressed by staff and not enlarge it. Because
1286 if you're gonna consider these other materials that go beyond the scope, I was here two months
1287 ago and was given the courtesy by the Mayor to speak, but the same objection that, since, or we
1288 had not filed a formal protest; it was, basically, an advisory opinion.

1289 In this case, we need to stay, I think, within the record, the – (inaudible), process and the
1290 recommendations of staff and not go beyond that, because it wouldn't be fair then to consider
1291 what was added on today, and then not give us a chance to respond. I would just submit that we
1292 stick with the recommendations of staff and stay within the four corners of their
1293 recommendations.

1294

1295 **MAYOR PRO TEM REESE**

1296 I would allow –, if anything new is brought in to the next, at the next meeting, that you would
1297 have an opportunity to respond to that, yes. That – would be foolish if we didn't do that.

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1298 **MARK FERRARIO**

1299 And I will provide this gentleman with Mr. Mowbray with a duplicate copy of the book
1300 forthwith.

1301

1302 **MAYOR PRO TEM REESE**

1303 Thank you.

1304

1305 **COUNCILMAN WOLFSON**

1306 With that in mind, **my motion is to abey this until our July 1st meeting.** And I would like to
1307 ask Mr. Jerbic. Is it appropriate for this Council to ask you for a legal opinion? Now that we've
1308 flushed this out ad nauseam, my question is the applicability of that Section 13.02 that we were
1309 discussing, those sections, I think it's "E" and "L"–

1310

1311 **MAYOR PRO TEM REESE**

1312 "I", "E" and "I" –, yeah.

1313

1314 **COUNCILMAN WOLFSON**

1315 Okay. I thought it was "L" because it came after "K", but the two sections I read, is it
1316 appropriate, Mr. Jerbic, for us to ask you for a legal opinion?

1317

1318 **BRAD JERBIC**

1319 That's what we're here for, absolutely appropriate.

1320

1321 **COUNCILMAN WOLFSON**

1322 That's – part of my motion, I guess.

1323

1324 **MAYOR PRO TEM REESE**

1325 I don't always agree with you, though. You've heard the motion. Any question on the motion?

1326 Would it be – possible to make this a time certain?

CITY COUNCIL MEETING OF
June 17, 2009
VERBATIM TRANSCRIPT – ITEM 104

1327 **BEVERLY K. BRIDGES**

1328 Let's see, morning. You could put it as the first discussion item if you want to, in the morning.

1329

1330 **MAYOR PRO TEM REESE**

1331 That'll be fine. That'll be the first discussion item in the morning. You've heard the motion.

1332 Any questions on the motion? Hearing none, cast your vote, please. Please post. Motion

1333 carries. **(Motion carried with GOODMAN and TARKANIAN abstaining and BARLOW**

1334 **excused.)**

1335 **(END OF DISCUSSION)**

1336 /ac; lc; gpb/ac; lc