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February 12, 2009

Via Fax (702) 464-2578 and Regular Mail

Kathleen C. Rainey
Manager of Purchasing and Contracts
City of Las Vegas
400 Stewart Avenue
Las Vegas, Nevada 89101

Re: Bid Protest of APCO Construction
Project: Las Vegas Museum Phase 3 – Rehabilitation
Bid No. 08.15341.04-LED (Revised)
Our Client/Original Successful Bidder: Flagship Construction
Company, LLC

Dear Ms. Rainey,

Flagship Construction Company, LLC ("Flagship") hereby files a formal bid protest with regard to the bid of APCO Construction ("APCO") for the Las Vegas Museum Phase 3 Project (the "Project") which was bid on Thursday, February 5, 2009. APCO does not qualify as a responsive or responsible bidder as detailed by the following:

APCO fails to demonstrate the requisite experience required to qualify as a responsible bidder.

To be the responsive and responsible bidder, APCO must show either that it has historical renovation experience or that its superintendant has historical renovation experience. *See Bidders Instructions, Section 13.02(c) attached as Exhibit 1.* APCO must also show that it has similar experience to this Project in size and scope. *See Exhibit 1 at Section 13.02(o).* APCO has failed to demonstrate that it has the required experience with historical renovation and/or projects of similar size and scope. Further, APCO failed to demonstrate that its superintendant has the required experience for historical renovation and/or projects of similar size and scope. Accordingly, APCO cannot qualify as a responsive or responsible bidder.

APCO failed to demonstrate it has experience with historical renovation and/or projects of similar size and/or scope.

APCO has never completed a project matching this Project in size or scope. Further, APCO does not have any experience with the restoration of historic buildings. Accordingly, APCO does not qualify to be General Contractor on the Project.

Submitted at City Council
Date 7/1/09 Item 52



The Bidders Instructions require that APCO have "successfully completed at least one (1) project with similar scope as the work specified on the Specialty Work Qualification form." *See Exhibit 1, at Section 13.02(o).* APCO must have experience in restoration of buildings "having successfully completed one project during the last ten years according to the US Secretary of the Interior's Standards for the Treatment of Historic Properties." *See Exhibit 1, at Section 13.02(c).* None of the projects identified by APCO in its List of Completed Projects meets these criteria.

APCO listed several projects including: Cannery Casino Theater Addition, CB4 Window Wall Replacement at the McCarran International Airport, the Aliante Library construction, Las Vegas Paving Office addition, Iron Mountain Phase III addition. *See APCO's List of Completed Projects attached as Exhibit 2.* Cannery Casino Theater Addition is the largest of these projects, comprising a 66,445 Square Foot addition and a contract award of \$17,400,000. While this project is similar in size, it was not a historic project, and no renovation work was required. It is dissimilar in scope, and it does not demonstrate any experience that relates to restoration of historic buildings. The remaining projects are dissimilar in both scope and size, and in sum are insufficient to establish the requisite experience. Accordingly, APCO should be disqualified as a responsible bidder for the Project.

APCO fails to demonstrate that its Superintendant has experience in restoration of historic buildings.

APCO identified Brian D. Benson as its Superintendant assigned to oversee the Las Vegas Museum Project. Benson does not qualify to be a superintendant on the Project.

The Bidders Instructions require APCO's designated Superintendant to have "experience in restoration of historic buildings having successfully completed one project during the last ten years according to the US Secretary of the Interior's Standards for the Treatment of Historic Properties." *See Exhibit 1, Section 13.02(c).* APCO states that its Superintendant has experience in the restoration of historic buildings. *See APCO's Responses to Questions on Attachment 6, attached hereto as Exhibit 3.* APCO points to Benson's experience supervising the renovation of an exterior elevator shaft for the Los Angeles City Hall Seismic Retrofit and Historical Renovation. *See Benson Resume and Clark Construction Letter attached hereto as Exhibit 4.* Benson supervised the installation of glass and brass materials in the exterior elevator. While the Los Angeles City Hall renovation project is a 911,000 square foot project with a cost of over \$100 Million. In all probability, the elevator renovation component must represent a very small percentage of the overall Las Angeles project.

Benson did not act as an overall superintendant on any historical restoration project within the past 10 years. The elevator portion of the Las Angeles renovation project is dissimilar to the LV Museum Project, and Benson's marginal experience does not meet the requirements set forth in the Bidders Instructions. APCO should be disqualified as a responsible bidder.

APCO failed to disclose that it was removed from Gemstone Project and sued for related breach of contract.

In its bid documentation, APCO failed to disclose that on August 15, 2008 APCO was terminated as General Contractor on a \$78,938,160.00 contract with Gemstone Development West, Inc. ("Gemstone"). Further, APCO is currently engaged in litigation against Gemstone wherein Gemstone alleges that APCO manipulated subcontractor bids in order to exclude redline changes to the Architectural Plans in those bids, failed to provide adequate quality and workmanship, submitted invalid change orders for work contained within its contractual scope, failed to provide sufficient back up documentation for change order requests and caused numerous project delays. *See Gemstone Development West, Inc.'s Answer to Complaint and Counterclaims attached hereto as Exhibit 5. See also Review Journal Article Entitled "Work on ManhattanWest Project Suspended" attached hereto as Exhibit 6.*

Nonetheless, when asked whether APCO "failed to perform any contract as a result of causes within the control of the bidder or a subcontractor or supplier of the bidder," APCO answered "No." *See Exhibit 3, Question/Response No. 2.* When asked if APCO "failed to perform any portion of the Work that caused the Owner and/or others, i.e., the surety company, etc.) to exercise its right to complete the Work in the contract," APCO responded "No." *See Exhibit 3, Question/Response No. 3.* When asked whether APCO has been "involved in any failure to complete or breach of contract for any reason including customer directed suspensions, disbarments or disqualifications," APCO responded "No." *See Exhibit 3, Question/Response No. 4.* It is clear APCO's bid responses were inaccurate.

Further, the substantive allegations of the Gemstone litigation merits significant concern for the City. Gemstone's allegations raise questions regarding APCO's quality and workmanship, experience as a general contractor, billing practices and bid practices. Specifically, Gemstone alleges that APCO specifically instructed subcontractors to ignore redline changes to the architectural drawings when placing their bids. *See Exhibit 5 at p. 14, ln. 23-30.*

APCO has submitted a bid from a subcontractor who has represented that it cannot obtain performance bonds for the Project.

APCO identified Cogent Networks as its subcontractor for electrical work. However, on or about February 5, 2009, Cogent declined to provide a bid for Flagship on this Project. Cogent's Vice President, Donna Bradley stated to Flagship representatives that Cogent would not be bidding this project because they already knew they could not obtain a sufficient performance bond to qualify for the Project. *See the Affidavits of Cadwell Collins and Linda Newsted attached hereto as Exhibit 7.* Cogent indicated that it had lost nearly six million dollars in work in the past months due to difficulty in supplying project performance bonds. *See Exhibit 7.* We believe this will be supported by other general contractors who approached Cogent to bid this project for them. As a result, we believe APCO has obtained bids from at least one subcontractor APCO knows will be unable to meet the project bonding specifications. One of the largest cost elements in any bid is the cost of bonding. APCO has based its current bid on a subcontractor bonding cost that cannot practically be obtained.

If Cogent cannot bond, this will lead APCO to bid shop Cogent's scope of work after the close of bidding. This bid shopping process will very likely raise APCO's final contract amount.

As you may recall, the City had previously recommended that Flagship be awarded the Las Vegas Museum Project, due to the combination of Flagship's historical experience and low bid. Unfortunately, the City then decided to reject all bids and hold a revised bid. Flagship suspects this decision was based at least in part upon APCO's Bid Protest submitted October 2, 2008. See *APCO's Original Bid Protest attached hereto as Exhibit 8*. Ironically, in its protest, APCO accused Flagship of bidding inadequate subcontractors with the intention to shop its bid. APCO states, "the Federal District Court of Nevada confirmed that N.R.S. §338.141 was enacted to prevent 'the evil of bid shopping' and to limit the practice of shopping for bids." See *Exhibit 8 p.2, ¶1*. APCO continued quoting testimony by an Associated General Contractors of America Representative to the Nevada legislature: "bid shopping is not a practice the state wants as part of public works projects...The construction industry believes bid shopping gives unfair advantage to those involved [i.e. general contractors who shop bids and subcontractors who peddle bids] is unethical and is adamantly opposed to the practice." Now, it appears that APCO will now have the opportunity to employ similar bid shopping tactics.

Flagship did not believe there was any basis for rejecting its bid under ITB 15 in October of 2008. See *Letters to the City on behalf of Flagship attached as Exhibit 9*. At the time the City made the decision to rebid the project, Flagship was concerned that the revised bidding would cause additional problems and lead to bid shopping. Unfortunately, Flagship's concerns have proven to be justified.

Flagship continues to believe that it is the lowest responsive and responsible bidder. This is true, especially in the context of Flagship's extensive construction experience combined with the extensive historical renovation experience of their proposed superintendant. Flagship requests that the City deem APCO's bid non-responsive and non-responsible, and proceed to award the Contract to Flagship.

Sincerely,

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO

Leslie A. Godfrey for:

Mark E. Ferrario

MEF/lsg

cc: Nancy Paolino and Theresa Bolsendahl



S VEGAS CITY COUNCIL

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(INTERIM)

JZABETH N. FRETWELL
CITY MANAGER

Via Fax (702) 796-7181

May 29, 2009

Mark E. Ferrario
Kummer Kaempfer Attorneys at Law
3800 Howard Hughes Parkway
Seventh Floor
Las Vegas, Nevada 89169

Re: Evaluation Determination for APCO Construction Bid Protest
Project: Las Vegas Museum Phase 3 - Rehabilitation
Bid No. 08.15341.04-LED (Revised)

Dear Mr. Ferrario,

The Purchasing and Contracts Division of the City of Las Vegas has completed its evaluation of your protest on above project. Based on our evaluation it has been determined your protest is without merit. Following is an assessment and determination of each of your claims.

Claim #1: APCO fails to demonstrate the requisite experience required to qualify as a responsible bidder.

Your allegation is that APCO Construction failed to prove their ability to meet the criteria as stated in ITB 13.02(c) and 13.02(o) of the bid documents. ITB 13.02(c) states "Whether the Bidder has experience in restoration of historic buildings having successfully completed one (1) project during the last ten (10) years according to the US Secretary of the Interior's Standards for the Treatment of Historic Properties; or (clerical omission)¹ the Bidder's designated Superintendent has experience in restoration of historic buildings having successfully performed superintendent responsibilities on one (1) project, completed during the last ten (10) years, according to the US Secretary of the Interior's Standards for the Treatment of Historic Properties."

Determination:

- 1) APCO Construction's Superintendent, Brian Benson meets the qualification criteria as evidenced by work he completed on the Los Angeles City Hall project; therefore, APCO's listed projects did not have to meet the requirements listed in ITB 13.02(c). City staff received and verified documentation from the Los Angeles City Hall project Owner, James Treadaway, S.E., and the construction firm that the Mr. Benson's responsibilities included the oversight of 20 subcontractors for approximately \$12,000,000 in restoration of the building's historical features. Based on our conversations and documents, we have determined that the Superintendent meets the qualification criteria as outlined in ITB 13.02(c).
- 2) ITB 13.02(o) states "Whether the Bidder or its Specialty Subcontractor(s) have successfully completed at least one (1) project similar in type or scope as the work specified on the Specialty Work Qualification Forms." APCO Construction submitted the required Specialty Work Qualification Forms for each of the specialty subcontractors and City staff has received and verified the documentation for each of the Specialty subcontractors to confirm each meets the requirements for their specialty work on this project and determined each is acceptable.

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Submitted at City Council

Date 7/1/09 Item 52

¹ Attachment 6 and transcript from pre-bid meeting (January 13, 2009) clearly indicate either the

Claim #2: APCO failed to disclose that it was removed from Gemstone Project and sued for related breach of contract.

You further stated that APCO failed to properly answer the questions on Attachment 6 as it relates to this incident. In reviewing the documents provided by APCO Construction and provided as part of your protest, the City determined that APCO had not failed to properly respond to the questions on Attachment 6.

On the Gemstone project (also know as "Manhattan West"), APCO claims that the owner, Gemstone, failed to pay for completed base contract and change order work. APCO exercised their contractual and statutory rights to terminate work on the project due to non-payment, and Gemstone retained another prime contractor. In fact, shortly thereafter, Gemstone itself abandoned the project due to the lack of financing. In addition, APCO is pursuing payment from Gemstone for completed work.

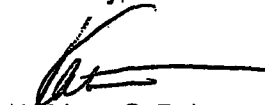
The bid documents focus on non-performance after a trial on the merits, not based on allegations in on-going litigation between two private parties. The City is not considering the on-going APCO / Gemstone litigation until after trial on the merits or other adjudication of this matter.

Claim #3: APCO has submitted a bid from a subcontractor who has represented that it cannot obtain performance bonds for the Project.

The subcontractor in question is Cogent Electric and based on documents submitted by APCO Construction and Cogent Electric, bonding for this project is not an issue. Further investigation by City staff with Cogent's bonding agency resulted in verification that Cogent will be able to obtain the required bonds for this project. A copy of verification from Cogent's bonding agent is attached to this letter.

In accordance with "Resolution No. 89-2004 - Attachment 13", you have three (3) business days after receipt of this decision to provide written notice of your intent to appeal this decision. Also, this letter confirms the meeting we scheduled yesterday to discuss the bid evaluation in more detail on Wednesday, June 3, 2009 at 4 pm. The written notice must be provided to the Purchasing & Contracts Manager who will forward the appeal for determination to the Director of Finance and Business Services. If an appeal is not received within the required timeframe then it will be assumed that the protest is resolved.

Sincerely,



Kathleen C. Rainey
Manager, Purchasing & Contracts

Encs: ITB Attachment 6
Pre-Bid Conference Transcript
Cogent Electric Bonding Verification

Cc: Cheri Edelman
John Ridilla
Jorge Cervantes
Mark Vincent
Nancy Paolino, Flagship Construction