

CITY COUNCIL MEETING OF
July 1, 2009
VERBATIM TRANSCRIPT – ITEM 52

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
BRAD JERBIC, City Attorney
LOIS TARKANIAN, Councilwoman
RICKI Y. BARLOW, Councilman
STEVE WOLFSON, Councilman
MARK FERRARIO, Law firm of Greenberg Traurig, appeared on behalf of Flagship Construction
KATHY RAINEY, Purchasing and Contracts Manager
JOHN MOWBRAY, Fennemore Craig, appeared on behalf of APCO construction
STAVROS S. ANTHONY, Councilman
SCOTT ADAMS, Chief Urban Redevelopment Officer

46 minutes

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27 **MAYOR GOODMAN**

28 Item Number 52 is discussion and possible action regarding award of Bid Number 08.15341.04-
29 LED, Las Vegas Museum Phase 3, Rehabilitation for the Las Vegas Museum of Organized
30 Crime and Law Enforcement located at 300 Stewart Avenue and the construction conflicts and
31 contingency reserve set by Finance and Business Services. An award recommended to APCO
32 Construction. This item is being heard at this portion of the agenda pursuant to our
33 understanding from our last meeting. I have a – conflict, based on the fact that I own a certain
34 piece of property with some of the principals involved with APCO and therefore, I’ve been
35 advised that I have to abstain, which I now do and I’ll turn it over to the Mayor Pro Tem.

36

37 **MAYOR PRO TEM REESE**

38 Thank you, Your Honor. We get started here. The Mayor read it into the record. City Attorney
39 Jerbic, please.

40

41 **BRAD JERBIC**

42 Thank you. Before we go any further, Councilwoman, I believe you abstained –

43

44 **COUNCILWOMAN TARKANIAN**

45 Yes.

46

47 **BRAD JERBIC**

48 – the last time around too, just on a general statement that you –

49

50 **COUNCILWOMAN TARKANIAN**

51 ‘Cause I did not feel that I could be objective.

52

53 **BRAD JERBIC**

54 Very good. I wanted to start with that so that we all understand the rules here this morning.
55 Normally, when we have seven people and two people have recused, you get opinion letters from
56 the City Attorney in advance. It reduces the size of the government body to five and three out of

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57 five would carry today on a vote. In this particular case, because one of the abstentions is not
58 based on NRS 281A, there's no opinion letter and therefore, the size of the governing body is six
59 and four are required to carry the day on the vote on this.

60 Having said that, at the last Council meeting, as you heard, the staff, when we opened the bids
61 this time around for the museum, APCO was the low bidder. The, there was a protest filed,
62 which I would like to give copies of at this point in time to all of you, and one for myself.

63
64 **MAYOR PRO TEM REESE**

65 May I keep one for the record, please? Thank you.

66
67 **BRAD JERBIC**

68 I'm also gonna handout to everyone staff's response to that bid protest. Mr. Mayor Pro Tem,
69 one of the things I'm gonna ask you and the Council to determine, before going over this
70 morning's hearing is, to what the scope of the information is going to be. Let me read to you
71 verbatim the Nevada Revised Statute, 338.142 governs protests to bids before public bodies.
72 And in this case it says, a person who files or who bids on a contract may file a notice of protest
73 regarding awarding of the contract with the authorized representative by the public body within
74 five business days after the date the bids were opened by the public body or its authorized
75 representative. It goes on to say, number two, the notice of protest must include a written
76 statement setting forth with specificity the reasons the person filing the notice believes the
77 application provisions of the law were violated. It then goes on to talk about how you post a
78 bond, how the government can require a bond and how everything is stayed. You can't award
79 the contract until after the governing body resolves the bid protest. That's why you're here
80 today, is this bid cannot be awarded until you resolve the protest.

81 I was asked by Councilman Wolfson before the meeting and it came up at the last meeting, once
82 you file a protest, are you limited to what's in that protest. And I think, that's a similar question
83 this morning. I think when you read the NRS there aren't blunt words that say you're limited to
84 the words of your original protest and nothing more. But I think when you read part one and part
85 two together, you have five days to file a protest. In this particular case, the protest was filed by
86 Flagship. It was within five days. It met those requirements.

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87 But it says you have to list with specificity what your complaint is. I think that means that when
88 you file that letter, you don't get say, we protest, we think we're the low bidder and not them.
89 You gotta tell us why you think it. Why you think they're not qualified. Why you think you're
90 the low bidder. I don't think you get to keep coming in and taking another bite at the apple,
91 another bite at the apple, and – including ad hoc reasons that have come up at Council meetings.
92 So, I think this morning you're limited to the letter that's dated February 12th, 2009 and staff's
93 response dated May 29th, 2009, which address the original protest.

94 The original protest, as you can see, raised three reasons that the second low bidder believed that
95 APCO is not qualified or should not receive the bid, in this case. All of those reasons are
96 addressed by staff. I can go into them in detail if you want to but I think they were pretty well
97 cashed out at the last Council meeting. I'll be glad to address them if you – see fit.

98
99 **MAYOR PRO TEM REESE**

100 Mr. – Jerbic, just a moment, please. I would like to have the listening – audience and those in
101 attendance today brought up to speed. With, Councilman Barlow wasn't here at our last meeting
102 but he has since been briefed on this a couple times, and he is up to speed today. Also, for
103 Councilman Barlow's information, I know it is in his – Ward, but we have asked, I have – asked
104 Councilman Wolfson to be ever so cognizant and he's going to be making a recommendation for
105 us today to follow.

106
107 **COUNCILMAN BARLOW**

108 Okay. And just for the record, I did on Monday, as well as last night, go back and on line
109 listened to all of the public comment from the Council via the internet, and had an opportunity to
110 really dissect all of the information that was brought forward on the previous Council meetings.
111 So, I am fully aware of – what the discussions were in my absence, and I am fully prepared to
112 move forward with a recommendation today as well.

113
114 **MAYOR PRO TEM REESE**

115 Okay.

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116 **COUNCILMAN BARLOW**

117 Thank you.

118

119 **MAYOR PRO TEM REESE**

120 Thank you. Mr. Jerbic?

121

122 **BRAD JERBIC**

123 Very good. Again, I would like to have you address a similar question, if we're limited to the
124 first letter of protest that was filed by Flagship and the City's response. I have submitted both of
125 those on the record now and I'm prepared to answer any questions if you have. If you wanna go
126 beyond that, let me know, and we can go beyond that too.

127

128 **MAYOR PRO TEM REESE**

129 Thank you. Are there any questions? Councilman Wolfson? Any comments?

130

131 **COUNCILMAN WOLFSON**

132 No questions, no questions or comments.

133

134 **MAYOR PRO TEM REESE**

135 Thank you. I think it's relevant that we have Mr. Ferrario present shortly his, some of his
136 rebuttal and stuff. Then we'll hear from APCO'S attorney. Mr. Ferrario?

137

138 **MARK FERRARIO**

139 Thank you, Mayor Pro Tem Reese. Mark Ferrario, here on behalf of Flagship, with the law firm
140 of Greenberg Traurig.

141

142 **MAYOR PRO TEM REESE**

143 We have – received your letter, by the way, and we have addressed some of those concerns
144 individually.

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145 **MARK FERRARIO**

146 I – thought we were past the issue that Mr. Jerbic raised and I thought we passed that at the last
147 hearing because we did consider things that were in addition to what was contained in the
148 original protest. And I appreciate the candor of Mr. Jerbic in telling the Council that it's
149 certainly is not black and white in the statutes, as to what you can consider in a bid protest. And
150 I think what you have to do is step back and look at what the overall purpose of these bid statutes
151 are and we addressed that in our – paper that we sent to you yesterday.

152

153 **BRAD JERBIC**

154 If I could, I don't mean to interrupt, Mr. Ferrario, and I – do want to show him something I do
155 want to read for the Council too. This is a Resolution that this Council adopted in 1989 and it's
156 a Resolution adopting procedures for the protest of the, of awards and contracts.

157

158 **MAYOR PRO TEM REESE**

159 You need – to speak into the microphone, please.

160

161 **BRAD JERBIC**

162 I'm sorry. I was talking to Mr. Ferrario at the same time. This is a procedure adopted by the
163 Council for resolving bid protests. The very last paragraph of Attachment A to this says, the
164 protestor shall provide such additional information requested by the City which deems pertinent
165 to the consideration of the protest. The written protest shall identify all of the issues and
166 arguments which support the protestor's claim that the award of the contract should not be made
167 as proposed by the City. And any and all subsequent appeals of the decision rendered upon the
168 protest, shall be limited solely to the issues and arguments set forth therein, and shall not include
169 any new or additional issues or arguments. That's a policy adopted by the City Council in a
170 Resolution in 1989. So, it's that statute and this Resolution that causes me to recommend that
171 you are limited to the three. With that, I apologize to Mr. Ferrario for the interruption and we'll
172 let him continue.

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173 **MARK FERRARIO**

174 Well, actually, that's an interesting interpretation 'cause that would mean if the City staff doesn't
175 ask a question, you cannot expand on it. But I would submit that we've also crossed that
176 threshold because at the last meeting this Council asked questions that we addressed. We put in
177 additional information. This Council wanted us to address those additional items and that's what
178 got us here today. So, I think we actually satisfied that criteria, because this Council had valid
179 concerns about what we believe is a flawed bid process. And so, to again go back to where Mr.
180 Jerbic started, I don't think on this record, you are in any way limited to the three things that we
181 could find within the five days after the award of this bid to APCO. And the reason I say that is,
182 we would never have known that the City failed to fulfill its duties under Chapter 338, until the
183 process unfolded.

184 Now, Mr. Jerbic was very candid with you when he said there isn't anything black and white in
185 the statutes that limit us to three issues. Okay. But there is something that's black and white in
186 the statutes, and it says, the City shall do certain things in regard to considering a bid. And in
187 this case, the City did not fulfill its duties under Chapter 338 because you heard from staff and
188 Mr. Jerbic that it is their opinion that they cannot consider the on-going dispute with APCO in its
189 evaluation of APCO'S bid. We didn't learn that until the process unfolded. There would be no
190 way for us to know that until we had the dialogue with the City. So, the Statute 338, which we
191 addressed in the – paper that we gave to you yesterday, mandates that you consider whether
192 APCO breached any contract with a public agency during the time you're evaluating whether
193 APCO is a responsive and responsible bidder. The City didn't do that. So, this process has been
194 flawed from the start, based upon what we believe was an erroneous position adopted by the City
195 Attorney's Office, vis-a-vis, how you would deal with on-going disputes involving APCO. We
196 wouldn't have known that but for the dialogue we had at the last meeting.

197 So, I disagree with Mr. Jerbic that we're limited to three things that we could find in the five
198 days we had to file the protest. Those three things impacted other areas and as we did more
199 investigation we brought those to the attention of this Council. One of the things that has still
200 yet to be addressed, and even the filing by APCO in – anticipation of this meeting, was the City
201 of Las, the City of North Las Vegas Library project, where APCO, according to the minutes

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from that body, were found to be in violation of that public contract and assessed liquidated damages.

So, I really, as you step back, and I think if you look at the paper that we presented, the purpose of these statutes is to get a responsive and responsible bidder. I am struggling with the position taken by the City Attorney's Office and staff to limit your analysis of all relevant factors. That to me is contrary to the obligation imposed upon a public body by NRS 338 and I don't understand why we're trying to limit the analysis here when we have brought forth things that are, should be of real concern to this body before you award a contract to APCO who you're in litigation with and you have contended breached a contract and you have spent close to eight hundred, probably more than \$800,000 asserting that claim. To say that you can't look at that situation, turns this process on its head and violates NRS 338. Also –

MAYOR PRO TEM REESE

I just, I – gotta interrupt you a second. I also have a little bit of a problem. According to staff, I mean, you guys are fighting the – bid process. You're protesting this bid, this application and what I've been told, that you're in third position. That you're – classified as a non-responsive bidder, and I – just can't understand why you're putting such time and effort into fighting this award bid.

MARK FERRARIO

You know, I appreciate that question, Mayor Pro Tem Reese and – I think we have to look at this as a process. The process that we're in right now is APCO is awarded the bid. I don't know if we're, I think we're number two, based upon my dialogue with Ms. Rainey. In fact, I don't really, I – can go into that if you'd like. At one point –

MAYOR PRO TEM REESE

No, I'm gonna ask Ms. Rainey –

MARK FERRARIO

Okay.

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232 **MAYOR PRO TEM REESE**

233 – if I could. Ms. Rainey, where – in fact is –

234

235 **KATHY RAINEY**

236 They are the apparent second low-bidder, however, they're in non-responsive. They're not a
237 responsible bidder because neither Flagship or their superintendent are qualified.

238

239 **MARK FERRARIO**

240 Well, and we haven't got to that point yet because I haven't had a chance to address the concerns
241 of City staff on that. What we have is bits and pieces of information from them, which we
242 believe we can refute. We don't think that the information they got regarding the qualification
243 of our superintendent was accurate. And one thing I'm pretty sure I can demonstrate is, the City
244 has not done the type of investigation it did on our application that it did on APCO'S application
245 regarding certain subcontractors. But procedurally, Mayor Pro Tem, we're not there yet,
246 because if we fall into, if we're into second place, okay, and you disqualify APCO, then they're
247 gonna have to render an opinion on our application. I'll have a chance at that point in time to
248 address any issues formally, okay, as opposed to informally that staff may have. I – think I know
249 what they're talking about. It goes to the qualifications of our superintendent. From the bits and
250 pieces of information that we got, I think we can refute those, but I –

251

252 **MAYOR PRO TEM REESE**

253 Well, see, where – you're headed us? We've already – been through all this stuff.

254

255 **MARK FERRARIO**

256 Yeah, you're correct.

257

258 **MAYOR PRO TEM REESE**

259 And so, I – feel quite comfortable in Councilman Barlow being brought up to sta, to snuff, where
260 we're at and why. And I would like to cut through all of the – that and get right to the nuts and
261 bolts.

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262 **MARK FERRARIO**

263 I, I'm just saying, procedurally, I don't think we're there. I – they haven't, if they, if you say
264 today you can't award to APCO, then they're gonna have to tell us whether we're the second
265 bidder, and if we're not, they're gonna have to tell us why and we'll be able to address that –
266

267 **MAYOR PRO TEM REESE**

268 Okay, so –

269

270 **MARK FERRARIO**

271 – in the normal course.

272

273 **MAYOR PRO TEM REESE**

274 – what, the point I'm trying to get to is, we've already got to the conclusion that, you know,
275 where we need to be. I mean, as far as everything we went through at the last meeting and we –
276 realized, we received your information. So, if you have any additional stuff you wanna put on
277 the record today, feel free to do that at this time.

278

279 **MARK FERRARIO**

280 And I appreciate that opportunity. The one final thing that I would say, couple of points I wanna
281 make. When we left the last hearing, Councilman Wolfson, I think it was spot on in his request
282 of Mr. Jerbic to analyze 338, and in particular the subsection we were talking, which I just
283 referenced which mandate that the City take – a look at certain things. Mr. Jerbic comes back
284 today and says, well, really what we should do is – kinda focus on those three things. He still
285 hasn't answered Councilman Wolfson's question, in my opinion. I think we'd answered that –

286

287 **MAYOR PRO TEM REESE**

288 Well, I – will allow Councilman Wolfson plenty of opportunity to redirect or ask you questions
289 before –

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290 **MARK FERRARIO**

291 I believe we answered that in the – pleading or not, excuse me, it's trial lawyer coming out of
292 me, in the document that we provided to you. Beyond that, I think we addressed the flaws in
293 APCO'S bid at the – last hearing. And I would just point out in the submittal by APCO, they do
294 not address the North Las Vegas Library situation. They do not address the fact that Cogent, the
295 sub that was really the – subject of much discussion, at – least as of the last hearing, was in a
296 revocation status with its license at the Contractor's Board. And so, I think when you step back,
297 if you look at it and you compare this to the first process where staff said, well, there was an
298 ambiguity in the bid documents, certainly, and – we disagreed with that, when we were the first,
299 first in line for the bid, there's certainly an ambiguity in the flawed process this time around. So,
300 if it was appropriate to rebid because of the ambiguity first time around, then it's appropriate this
301 time to rebid.

302 The one thing I know that on this record in light of NRS 338 in the invitation to bid rules, this
303 contract should not go to APCO, given the fact that staff and this Council had not considered
304 fully APCO'S history and performance, and in particular history and performance on public
305 works projects. With that, I think that the Council –

306

307 **MAYOR PRO TEM REESE**

308 Thank you.

309

310 **MARK FERRARIO**

311 – should deny the award to APCO.

312

313 **MAYOR PRO TEM REESE**

314 Thank you.

315

316 **MARK FERRARIO**

317 Thank you.

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318 **MAYOR PRO TEM REESE**

319 Are they any questions of Mr. Ferrario? Mr. Mowbray, we'd be glad to hear from you.

320

321 **JOHN MOWBRAY**

322 Thank you. Excuse me. Thank you. I will be brief. I would follow City Attorney Brad Jerbic's
323 recommendation, stay within the four corners of the bid protest. Staff has vetted those three
324 concerns, found them that not be with merit. The issue that was raised at the last hearing
325 pertaining to the tennis court project was fully vetted by this Council in December 7th, 2005. If
326 we're going to go outside of the record, I would like to supplant the record with the transcript of
327 that hearing, which I've given a copy to Mr. Jerbic. However, I would strongly recommend that
328 you stay within the four corners of the bid protest and staff's response. And I'll reiterate, staff
329 fully vetted those three concerns, found them to be –

330

331 **MAYOR PRO TEM REESE**

332 We need – your name for the record, please.

333

334 **JOHN MOWBRAY**

335 Oh, I'm sorry. John Mowbray, formerly of 15th Street, back in the '50s, currently at 300 South
336 Fourth Street. Still downtown, still within the City of Las Vegas. But I would strongly urge the
337 Council to stay within the four corners of the protest and the response from the City. The City
338 has recommended that APCO be considered the lowest responsive bidder. And there is a
339 differential here; this wasn't mentioned. We're talking about a differential between the two bids
340 of over a million one hundred and forty thousand dollars. And we used to say representing Mr.
341 Hughes, that's a big hunk of change. So, nothing further. Thank you. Any questions?

342

343 **MAYOR PRO TEM REESE**

344 Any questions? Hearing none, Mr. Jerbic, anything else you'd like to add?

345

346 **BRAD JERBIC**

347 I do. I – made an error earlier when I said that the Resolution was adopted in 1989 –

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348 **MAYOR PRO TEM REESE**

349 You made an error? Put that on the record.

350

351 **BRAD JERBIC**

352 Yeah. Believe me, we probably have a long check list, you can put this on it. It's Resolution 89-
353 2004. It was adopted in 2004 not in 1989, the Resolution that sets forth the procedures for
354 protesting bids. The, I would like to say, just – so it is in the record, because it was stated by Mr.
355 Ferrario, that one, Cogent Electric, which is a subcontractor named by APCO, the original
356 protest by Mr. Ferrario and his client was that they were unable to get a bond. The new protest is
357 that they are, they have a suspended license. The fact is they do have a suspended license. The
358 Code understands that, it anticipates it, the State law does and they are, APCO is allowed to
359 substitute a new electrical subcontractor under law provided that the total bid amount that they
360 submitted to the City is not exceeded. And, so that addresses that issue.

361 Again, with respect to APCO'S performance and I find myself in a very awkward position here
362 because it's not \$800,000 that Mr. Ferrario said; it's \$2.7 million we've spent defending the
363 tennis court litigation, that's arbitration that's been going on for over a couple of years. It's odd
364 to be in a position to have fought so hard to defend the City's position in that case, and yet be
365 here today and recommending that very same person that we're in arbitration with, as the low
366 bidder for this particular project. But the fact of the matter is APCO, this is not the first project
367 APCO has done for the City since the tennis court dispute. They were awarded the contract for a
368 portion of the Centennial Hills project. They performed well on that. They were awarded a
369 contract for work at the Waste Water Treatment Plant. They, because of their performance,
370 actually earned a bonus on that particular project. With that particular record in mind, I don't
371 believe there is sufficient evidence on the record to show that they're not responsive and
372 responsible for purposes of this project. And so, with that, we recommend APCO be awarded
373 the project as the lowest responsive and responsible bidder.

374

375 **MAYOR PRO TEM REESE**

376 Thank you. Any –

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377 **COUNCILMAN WOLFSON**

378 Mayor Pro Tem?

379

380 **MAYOR PRO TEM REESE**

381 I'm sorry. Councilman?

382

383 **MAYOR PRO TEM REESE**

384 Councilman Anthony?

385

386 **COUNCILMAN ANTHONY**

387 Thank you Mayor Pro Tem. Obviously, there's a conflict in the bidding process here and we
388 could probably talk about this forever, but I'm going to be voting no on this particular agenda
389 item for a different reason. I don't believe we should be spending \$11.5 million on a museum
390 right now. These are risky times, uncertain times, budgets are tight, revenues not coming in and
391 it's my belief that we should put this project on hold until the economy turns around, and at that
392 time we can start working on a museum. So, I just don't think we need to be spending the
393 money at this time. So, I'm going to be voting no on that for that particular reason. It has
394 nothing to do with the bid process.

395

396 **MAYOR PRO TEM REESE**

397 Thank you.

398

399 **COUNCILMAN WOLFSON**

400 Mayor Pro Tem.

401

402 **MAYOR PRO TEM REESE**

403 Yes, just a moment. Mr. Adams could you explain to us where the money's coming from for
404 this project?

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405 **SCOTT ADAMS**

406 Scott Adams, Chief Urban Redevelopment Officer, the funding for this – particular award of
407 contract is coming from a combination of Redevelopment Agency funds and the Interfund loan
408 that you recently approved, which is supported with Redevelopment Agency money. So, one
409 can construe that both the, both sources of funding that support this contract are coming from the
410 Redevelopment Agency and not the General Fund.

411

412 **MAYOR PRO TEM REESE**

413 And that money that is coming from the Redevelopment Agency, what is it in place to provide
414 for the citizens of Las Vegas?

415

416 **SCOTT ADAMS**

417 Well, under Statute, Redevelopment Agency dollars are required to be spent within the
418 Redevelopment area for the furtherance of the objectives of the Redevelopment Plan. As you
419 know, this project has been a, an integral part of our overall redevelopment strategy within the
420 downtown area. So, one could clearly say that the implementation of the completion of this
421 museum is consistent with the redevelopment objectives of the Redevelopment Plan.

422

423 **MAYOR PRO TEM REESE**

424 But there is no money coming from the General Fund?

425

426 **SCOTT ADAMS**

427 That's correct.

428

429 **MAYOR PRO TEM REESE**

430 Thank you. Councilman Wolfson?

431

432 **COUNCILMAN WOLFSON**

433 Mr. Jerbic, may I see two documents, please? The first one is the ITB, Instruction to Bidders
434 Documents, the second one is the Resolution that you referred to. One of the things about this

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435 process is that we, as arbiters and findings of facts up here, get documents late and we're
436 informed about things minutes or seconds before we have to push a button to cast a very
437 important vote. This is probably something that, you know, and I – don't want to delay this. I
438 wanna go forward today. I think that we've beat this horse enough, but perhaps the Council,
439 each one of us, should be provided with a copy of this Resolution. What's this?

440

441 **BRAD JERBIC**

442 That's the ITB.

443

444 **COUNCILMAN WOLFSON**

445 Okay. Is this Resolution a public document, which is available to anybody at –

446

447 **BRAD JERBIC**

448 Yes –

449

450 **COUNCLMAN WOLFSON**

451 – at anybody's request?

452

453 **BRAD JERBIC**

454 – both at this Council and an open meeting.

455

456 **KATHY RAINEY**

457 Excuse me.

458

459 **COUNCLMAN WOLFSON**

460 Okay.

461

462 **KATHY RAINEY**

463 The, excuse me Councilman Wolfson, that Resolution is included in our bid packages, every one
464 of our bid packages.

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465 **COUNCILMAN WOLFSON**

466 Our role today is pretty limited, is to determine whether or not this protest should be honored or
467 not, and or whether or not we should award this bid to APCO. Is that right?

468

469 **BRAD JERBIC**

470 That is correct.

471

472 **COUNCILMAN WOLFSON**

473 Whether or not we are in favor of paying for a mob museum or not is really outside our decision
474 today. Would you say that's true?

475

476 **BRAD JERBIC**

477 Let me – phrase it slightly differently. It's always within the discretion of this Council as to
478 whether or not you want to award bids. It's always within your discretion to not award a bid. It
479 can be any project, including this project. If you decided that it was wrong timing or you didn't
480 like it anymore or there was a change in priority, you always have that option of rejecting all
481 bids.

482

483 **COUNCILMAN WOLFSON**

484 Okay. What we are to decide today is whether or not APCO is a responsive and responsible
485 bidder, and there's a process that allows a protest and that protest was filed by Mr. Ferrario on
486 behalf of his client, and that protest is in the form of a letter dated February 12th, 2009. And that
487 is part of the process. There's, this is the method by which somebody files a protest. Is that
488 right, Mr. Jerbic?

489

490 **BRAD JERBIC**

491 That's correct.

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492 **COUNCILMAN WOLFSON**

493 The file, they – send a letter and they basically say that these are the reasons why we're
494 protesting a particular bid. And in this case Mr. Ferrario, on behalf of his client, Flagship, noted
495 three reasons why they were protesting a bid. This goes to our City staffers and Ms. Rainey, I
496 believe you reviewed that protest and you investigated it and you responded to it. And you
497 responded to it in the form of a responsive letter dated May 29th, 2009. Am I correct?

498

499 **BRAD JERBIC**

500 That's correct.

501

502 **COUNCILMAN WOLFSON**

503 So, what we did was we received a protest in writing from a protestor. We investigated the
504 claims or the reasons for the protest and we responded to it. We then come up for hearing two
505 weeks ago, and the question then becomes, should we consider other information. I think
506 reasonable people would agree that we have to draw the line somewhere. I mean, theoretically,
507 you could bring something up today, Mr. Ferrario. But what about APCO this, what about
508 APCO that. I mean, where do we draw the line on what we should consider.

509 Now, the trouble I'm having is that some of the documentation, whether it's in the IBT or what
510 have you, has very broad language. Language like we can consider any information and we can
511 consider this and we can consider that. Now Mr. Jerbic's advice is that we should restrict
512 ourselves to the three claims of protest as contained in Mr. Ferrario's letter. And I – agree with
513 that because we have to draw the line somewhere. But the bid documentation is troublesome for
514 me, and I think that Councilman Ross, is he here or is he gone?

515

516 **MAYOR PRO TEM REESE**

517 He's here in the back.

518

519 **COUNCILMAN WOLFSON**

520 Okay, he's listening in the back, said something at our last meeting about we have to tighten
521 these documents up. I – believe that too. One could argue that the IBT documents say and

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522 require all bidders provide certain information. Have you ever been in breach of any contract?
523 That's broad language. Rational people would acknowledge the fact that APCO is in serious
524 litigation with the City of Las Vegas and I would think that one of the claims is that they're in
525 breach of contract. So, on the one hand I could say, in my opinion, that APCO did not comply
526 with the bidding documents because, I think, one could argue, and this is what Mr. Ferrario was
527 arguing, that they didn't comply with the IB, ITB documentation by not being responsive to
528 these questions. But I think what we have to do is make a ruling based upon what we have in
529 front of us today, and these ITBs, Instructions to Bidders Documents, are available to everybody.
530 Everybody is on the same playing field. We've had a very, very open process. I think we've
531 given more time and attention to this particular protest than any other protest since I've been on
532 the Council. And I think we've vetted it as much as you can. We've had an open debate.
533 We've had an open discussion. But what I'm going to do is, I'm only going to consider in – my
534 motion, which I'm about to make, the three claims of protest as contained in Mr. Ferrario's
535 letter. I don't think we should go outside of it because we do have to draw the line somewhere.
536 Mr. Ferrario claimed three things. The City investigated those three claims and responded back
537 and that staff's recommendation is to award this contract to APCO. Isn't that right Ms. Rainey?

538

539 **KATHY RAINEY**

540 That's correct.

541

542 **COUNCILMAN WOLFSON**

543 Okay. You've investigate the claims as contained in Mr. Ferrario's protest. You have found
544 them to not be of enough merit to – recommend approving the protest. In fact, you've found
545 them to be without merit and your recommendation is still to award this bid to APCO. Is that
546 right?

547

548 **KATHY RAINEY**

549 Correct.

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550 **COUNCILMAN WOLFSON**

551 What I would submit is that in the future, we need to due a review of this process, ‘cause I don’t
552 think the process is real clean. I think that there are areas or room for improvement. One of the
553 things I’d like to see is, Mr. Ferrario, you delivered this follow up letter to us. I got it yesterday.
554 I want our City Attorney to get this. I want a process put in place where our City Attorney is
555 informed of this and you were. You were ccd on this letter, Mr. Jerbic. But you have to be
556 given a sufficient amount of time to respond to this, so that the seven of us or in this case, the
557 five of us today, have enough information, have enough advice from our City Attorney to make
558 that the proper vote. But that’s for the future, what we do for improvement, what we do to make
559 this process better is for the future. Today’s decision is based upon the rules that are in place
560 today and the process that we’ve been involved with to date. I think that, although we can
561 criticize the process, although we can say that there’s room for improvement, it is what it is and
562 we have to make decisions based upon the information that we have today.

563 So, my motion is based –

564

565 **COUNCILMAN BARLOW**

566 Councilman?

567

568 **COUNCILMAN WOLFSON**

569 Sir.

570

571 **COUNCILMAN BARLOW**

572 I’m sorry. Before you make the motion, I have a question.

573

574 **COUNCILMAN WOLFSON**

575 Okay. Well, Mayor Pro Tem – is –

576

577 **MAYOR PRO TEM REESE**

578 Yes.

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579 **COUNCILMAN BARLOW**

580 Yes.

581

582 **MAYOR PRO TEM REESE**

583 Mr. Barlow?

584

585 **COUNCILMAN BARLOW**

586 Thank you, Councilman. I have a question prior to your motion. Ms. Rainey, looking at the
587 February 12th, 2009 letter that was submitted by Mr. – Ferrario and the response of May 29th,
588 what was the nature of the – response being in May versus sooner? Can you explain that,
589 please?

590

591 **KATHY RAINEY**

592 Definitely. The – statute requires that the protest come in within five days of the bid opening.
593 We had not even commenced the bid evaluation at that, at the time we received, and typically
594 this is true. When the bid evaluation begins, we are still waiting for all of the bid submission
595 documents to come in, and this is a very, very complicated bid evaluation process, required an
596 amount of due diligence on the part of the Public Works organization to investigate the –
597 projects and the specialty contractors. It's – not a typical project with the Historic Preservation
598 portions that we had to investigate and it took a great deal of time. And –

599

600 **COUNCILMAN BARLOW**

601 So, are you saying that the bid process had not been closed prior to you receiving the February
602 12th letter?

603

604 **KATHY RAINEY**

605 No, the bid evaluation process that takes place after receiving the bids. So, the bids – come in
606 and by statute the – one percent subcontractor listings are due within two hours and then
607 informational submittals are typically due within 24 hours, and then our bid evaluation due
608 diligence commences. And that evaluation took quite a bit of time; to check references, to
609 validate that the subcontractors, the specialty subcontractors met the Secretary of Interior

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610 Standards, that the superintendents, we had to collect affidavits on the superintendent to make
611 sure that we vetted out completely, that they were, that the superintendent was qualified. It – did
612 take quite a bit of time.

613

614 **COUNCILMAN BARLOW**

615 Okay. I guess where I'm confused then, then how would the applicant know that – they weren't
616 in the running for the bid if that were the case and – to draw up this letter or am I missing
617 something in the process –

618

619 **KATHY RAINEY**

620 Because they did a public –

621

622 **COUNCILMAN BARLOW**

623 – which you're sharing.

624

625 **KATHY RAINEY**

626 – information request immediately after the bid opening to get the APCO bid. That's very
627 typical. In today's environment that's very typical. The same day or next day after bid opening,
628 the second and third low bidders would do a public information request of the low bidder's bid
629 documents and then will begin their own bid evaluation of the low bidder.

630

631 **COUNCILMAN BARLOW**

632 So – it sounds like to me then that then that's somewhat of a , I don't want to use the term
633 loophole, but it kinda of skews things for the City, for example, in the sense of trying to get all of
634 our due diligence completed and arguments coming forward prior to the City for any entity that
635 has a bid process have an opportunity to vet all of the information that has been brought in.
636 Does that make –

637

638 **KATHY RAINEY**

639 It's what the law provides.

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640 **COUNCILMAN BARLOW**

641 Well –

642

643 **KATHY RAINEY**

644 They have five days, and so, in order for them to meet that five-day period, they have to get a
645 copy of the low bid and that's what they do. So, we haven't even had a chance to begin our own
646 process before they begin.

647

648 **COUNCILMAN BARLOW**

649 Before the arguments begin.

650

651 **KATHY RAINEY**

652 Correct.

653

654 **COUNCILMAN BARLOW**

655 Brad?

656

657 **BRAD JERBIC**

658 If I could, Councilman, I – see in the point that you made. There are all sorts of bids on all sorts
659 of projects; some are very simple, they're very simple responses that people submit, some of
660 them are very complex projects. But Ms. Rainey is exactly correct. NRS says five business days
661 and when the legislators adopted that provision, they knew that that gives you very short time, if
662 it's a big project or a little project, as a protestor to go through it and raise the issues. The, and –
663 so, that's what we're stuck with. This Council, again, took that language in the NRS and refined
664 in that resolu, 2004 Resolution and said, let us know, once let us know at all and we'll rule on it.
665 That's what we're here today for, is for you to make that ultimate ruling as required by State law.

666

667 **COUNCILMAN BARLOW**

668 Right. Thank you. Councilman?

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669 **COUNCILMAN WOLFSON**

670 Thank you, Mayor Pro Tem. And – I think that's the reason why I'm about to make the motion
671 that I am, is because that's the law and we've followed the law. The protestor filed their protest
672 within five days, the City responded, they did their investigation and within the parameters with
673 which were given, we have to make our decision. **So, my motion is to find that APCO is a**
674 **responsive and responsible bidder and to award this bid to APCO. (Motion carried with**
675 **GOODMAN and TARKANIAN abstaining and ANTHONY voting NO)**

676

677 **MAYOR PRO TEM REESE**

678 Thank you. You've heard the motion. I am going to make a comment before I vote, following
679 up on Councilman Wolfson's declarations about the process itself. In these trying times we're
680 going through, we know and we understand that we are going to be putting projects out for bid
681 and because of shortage of work, we are going to be put under a – microfilm –

682

683 **MAYOR GOODMAN**

684 Microscope.

685

686 **MAYOR PRO TEM REESE**

687 – microscope and we're going to be analyzed on every bid that we let out. So, we have to do
688 those things. I, I've said one time, a long time ago and I've said it again at the last meeting and
689 I'm going to say it one more time. When we have the pre, pre-bid meetings, okay, we don't
690 leave that room until everybody, every questions been asked and once they leave and if they
691 make a mistake on, they're excused, their bid is thrown out. We have to stick to that. We – have
692 to tighten it up.

693 And I am going to support the Councilman's motion because I – think to further our
694 redevelopment of downtown, we have to have projects like this and that's why we instituted the
695 Redevelopment Agency years ago. If we don't support them, then we're not doing the job we're
696 assigned to do. So, you've heard the motion, cast your votes, please. Please post. Motion
697 carries.

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698 **COUNCILMAN WOLFSON**

699 Mayor Pro Tem.

700

701 **MAYOR PRO TEM REESE**

702 Yes.

703

704 **COUNCILMAN WOLFSON**

705 If you don't mind. Mr. Ferrario, I read everything you submitted to us. I read your letter that
706 was hand-delivered yesterday. I think you make some valid points and that's why I made the
707 comments about some changes for the future.

708

709 **MARK FERRARIO**

710 And I appreciate that, Councilman Wolfson. And I just, maybe to complete the record here
711 'cause this may end up going to court. You asked if there was a Supreme Court case that spoke
712 to this and we provided that to you and I would just comment that it's in the record. And the
713 only other point I would make is, you – both talked about the process. It wasn't until we got the
714 May 29th letter that we actually knew that the City didn't complete the process as identified in
715 NRS 338 because it was in that letter they told us they weren't going to consider the pending
716 litigation. So, there would have been no way for us to address that back in February.

717 So, from my perspective, if you're gonna give integrity to the process, you have to give integrity
718 to the whole process. And I appreciate your comments and certainly people can read what Mr.
719 Jerbic provided to you to come to the contrary conclusion, but thank you for the consideration.

720

721 **(END OF DISCUSSION)**

722 /ac/da