



Office of the City Manager

ACTION CALENDAR
June 2, 2020
(Continued from May 12, 2020)

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Scott Ferris, Director, Parks Recreation & Waterfront
Subject: Contract: ERA Construction, Inc. for Strawberry Creek Park Play Area and Restroom Renovation Project

RECOMMENDATION

Adopt a Resolution:

1. Approving the plans and specifications for the Strawberry Creek Park Play Area and Restroom Renovation Project, Specification No. 20-11382-C; and
2. Accepting the correction of the sum of bid items for ERA Construction, Inc.'s bid; and
3. Accepting the bid of the lowest responsive and responsible bidder, ERA Construction, Inc.; and
4. Rejecting the bid protest of Suarez and Munoz Construction, Inc., the second lowest bidder; and
5. Authorizing the City Manager to execute a contract and any amendments, extensions or other change orders until completion of the project in accordance with the approved plans and specifications, with ERA Construction, Inc., for the Strawberry Creek Park Play Area and Restroom Renovation Project at 1260 West Street, Berkeley, CA 94702, in an amount not to exceed \$900,122, which includes a contract amount of \$782,715 and a 15% contingency in the amount of \$117,407.

FISCAL IMPACTS OF RECOMMENDATION

Funding is available in the Measure T1 Fund and Parks Tax Fund, and was included in the second annual appropriations ordinance of FY2020. No other funding is required, and no other projects will be delayed due to this expenditure.

Contract funding

ERA Construction, Inc. (lowest bid).....	\$782,715
15% Contingency	\$117,407
<hr/>	
Total construction cost	\$900,122

Source of funds

Measure T1 Fund	\$385,026
(511-52-545-000-0000-000-461-663110-PRWT119011)	
Parks Tax Fund.....	\$515,096
(138-52-545-000-0000-000-461-663110-PRWT119011)	
<hr/> Total funding	<hr/> \$900,122

CURRENT SITUATION AND ITS EFFECTS

The existing playground and restroom at Strawberry Creek Park at 1260 West Street, Berkeley, CA 94702 are in need of renovations. The project includes the renovation of the 5-12 year olds playground area, removal and replacement of the restroom facility, and improvements to other site amenities in conformance with current ADA standards.

BACKGROUND

The project was advertised for bids on Monday, March 23, 2020, and bids were opened on April 14, 2020. The City received eight bids, from a low base bid of \$787,435 to a high base bid of \$1,215,000.

Suarez & Munoz Construction, Inc. (“SMC”) was the apparent low bidder at \$787,435. ERA Construction Inc. (“ERA”) was the apparent 2nd lowest bidder at \$793,215. Evaluation of bids were conducted as outlined in the Project Manual, Document 00 2113 Instructions to Bidders – Paragraph 3.02 “Evaluation of Bids.” Staff found a mathematical error in the summation of bid items in the total base bid price by ERA. Upon evaluating the total base bid price based on bid items, it was found that the correct sum was \$782,715. According to the Project Manual, Document 00 2113 Instructions to Bidders – Paragraph 3.02 “Evaluation of Bids”, “discrepancies between the indicated sum of any column of figures and the correct sum thereof will be resolved in favor of the correct sum.” Staff determined that ERA was the lowest bid and posted revised bid results on April 23, 2020.

On April 28, 2020, the City received a bid protest from SMC, now the second lowest bidder. Though the protest was submitted after the original bid protest deadline, the City extended the bid protest deadline due to the posting of the revised bid amounts. SMC protested, among other things, two issues from the low bidder, ERA. A copy of the bid protest was sent to ERA to provide them an opportunity to respond to the protest issues. ERA’s response was then forwarded to SMC for their opportunity to respond to ensure that all parties had an opportunity to present all facts and arguments in support of their positions.

City staff, including staff from the City Attorney's office, carefully reviewed and investigated the protest and responses. The first issue was regarding ERA's lack of an experience modification rate rating ("XMOD"). The second issue was regarding ERA's omission of the resume of their proposed safety manager's safety and health qualifications and experience. The City had previously asked ERA for the resume and it was provided by ERA.

Based on the City's review of the bid protest and responses, the City's findings are as follows:

Regarding the Experience Modification Rate, per Project Manual Document 00 4513, Statement of Qualifications, the City may disqualify the bidder as non-responsible if the XMOD rate is in excess of 1. In this case, the bidder does not qualify for an XMOD rating. The City reviewed the items provided by ERA, including loss record, and documents provided in their Statement of Qualifications for responsiveness and responsibility. The City finds that ERA's lack of an XMOD is not due to a lack of experience or high exposure to claims. The City does not find enough evidence to consider the bidder as non-responsible.

Regarding ERA's resume for their Safety Manager, ERA has submitted this information. The City finds that ERA's failure to submit a resume at time of bid was an inconsequential defect that could not have affected the amount of ERA's base bid or given ERA an advantage or benefit not allowed other bidders. (Ghilotti Construction v. City of Richmond (1996) 45 Cal.App.4th 897, 904).

While caselaw provides the City with discretion to waive inconsequential defects in a bid, we cannot do so when the defect may affect the amount of the bid. (See Ghilotti Construction v. City of Richmond (1996) 45 Cal.App.4th 897, 904 ("... a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential".)) Here, the failure to qualify for an Experience Modification Rate does not indicate a lack of responsiveness or responsibility given that documentation of the "DNQ" was provided. The concern regarding lack of submission for the resume of the safety manager did not affect ERA's base bid. ERA's defect was inconsequential and did not provide the bidder with an advantage so, as explained below, is waivable.

In cases where courts have determined that a defect was not waivable such as in MCM Construction, Inc. v. City and County of San Francisco (1998), 66 Cal.App.4th 359 and Valley Crest Landscape, Inc. v. City Council (1996) 4 Cal.App.4th 1432, those defects were in the nature of typographical or arithmetical errors that would have provided the respective low bidders the right to withdraw their bids pursuant to Public Contract Code section 5103. Here, ERA's mathematical error in the summation of bid items was evaluated under Document 00 2113 and its error would not have provided it with a basis to withdraw its bid. ERA's failure to provide the resume of the safety manager does not impact in any manner the determination of the low bid nor does it provide ERA with an

unfair advantage. Thus, their defects are inconsequential which the City may waive. (See MCM Construction, Inc. v. City and County of San Francisco at 375 (“...waiver of an irregularity in a bid should only be allowed if it would not give the bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond.”)¹

Staff determined that ERA was the lowest responsive and responsible bidder. Staff conducted references checks and received satisfactory feedback. Staff recommends that a contract for this project be awarded to ERA Construction, Inc.

The Living Wage Ordinance does not apply to this project since construction contracts are, pursuant to City policy, subject to State prevailing wage laws. The contractor will need to submit a Certification of Compliance for the Equal Benefits Ordinance. The contract will be subject to the Community Workforce Agreement.

ENVIRONMENTAL SUSTAINABILITY

The construction contract includes requirements to comply with the City’s Environmentally Preferable Purchasing Policy. The project is a renovation of a developed urban site and therefore will not negatively affect natural habitat.

RATIONALE FOR RECOMMENDATION

The renovation of the existing 5-12 year olds play area and restroom facility are needed as part of the City’s ongoing program to repair, renovate, and improve accessibility at non-compliant or aging Parks facilities. The City does not have in-house labor or equipment resources to complete this renovation project.

ALTERNATIVE ACTIONS CONSIDERED

None

CONTACT PERSON

Scott Ferris, Director, Parks Recreation & Waterfront, 981-6700

Evelyn Chan, Supervising Civil Engineer, Parks Recreation & Waterfront, 981-6430

Attachments:

1: Resolution

2: Bid Results

¹ An additional concept that guides the City’s decision to waive ERA’s inconsequential defect is that the City must act in the public interest rather than in the private interest of a disappointed bidder. “The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.” (Ghilotti, 45 Cal.App.4th 897, 909, citing Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal.4th 161, 176.) Waiver of ERA’s inconsequential defect is especially appropriate here where the defect did not affect the determination of the low bidder.

RESOLUTION NO. ##,###-N.S.

CONTRACT: ERA CONSTRUCTION, INC. FOR THE STRAWBERRY CREEK PARK
PLAY AREA AND RESTROOM RENOVATION PROJECT

WHEREAS, the playground and restroom at Strawberry Creek Park are in need of renovation; and

WHEREAS, the City has neither the in-house labor nor the equipment necessary to undertake this project; and

WHEREAS, an invitation for bids was duly advertised on March 23, 2020, bids were opened on April 14, 2020, and the City received eight bids; and

WHEREAS, upon receipt and review of submitted bids, a mathematical error was found in ERA Construction, Inc.'s bid, which upon calculation of the corrected sum, makes ERA Construction, Inc. the lowest bid; and

WHEREAS, upon receipt of a bid protest, review of the submitted bids, and careful consideration, the bid from the apparent low bidder, ERA Construction, Inc., was deemed responsive; and

WHEREAS, ERA Construction, Inc. was the lowest responsive and responsible bidder, and references for ERA Construction, Inc. were provided and checked out satisfactorily; and

WHEREAS, funding is available in the Measure T1 Fund (Fund 511), and the Parks Tax Fund (Fund 138).

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Plans and Specifications for Specification No. 20-11382-C for the Strawberry Creek Park Play Area and Restroom Renovation Project are approved.

BE IT FURTHER RESOLVED that the correction of the sum of bid items for ERA Construction, Inc.'s bid is accepted; and a construction contract is awarded to ERA Construction, Inc. as the lowest responsive and responsible bidder for a total contract amount of \$782,715; and the bid protest of Suarez and Munoz Construction, Inc., the second lowest bidder is rejected.

BE IT FURTHER RESOLVED that the Council of the City of Berkeley authorizes the City Manager to execute a contract and any amendments, extensions, or change orders until completion of the project in accordance with the approved plans and specifications with ERA Construction, Inc. for the Strawberry Creek Park Play Area and Restroom Renovation Project in an amount not to exceed \$900,122, which includes a contract amount of \$782,715 and a 15% contingency in the amount of \$117,407 for unforeseen

circumstances. A record signature copy of the agreement and any amendments to be on file in the Office of the City Clerk.



City of Berkeley

Abstract of Bids Worksheet


Finance Department
General Service Division

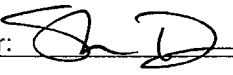
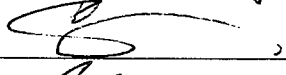
For: Strawberry Creek Park Play Area and Restroom Renovation Project

Specification#: 20-11382-C

Bid Date:

	Bidders	BB	Ad	Base Bid	Nuc Free	Work Force Comp	Opp. States	Living Wage	EBO
1	SPOSETO	✓	✓	\$939,560. ⁰⁰					
2	ERA Construction, Inc.	✓	✓	\$793,215. ⁰⁰					
3	Suarez + Munoz Con. Inc.	✓	✓	\$787,435. ⁰⁰					
4	CF Contracting, Inc.	✓	✓	\$1,098,800. ⁰⁰					
5	Cazadoro Const. Inc.	✓	✓	\$981,000. ⁰⁰					
6	Bay Construction Co.	✓	✓	\$986,200. ⁰⁰					
7	Redwood Engineering Const.	✓	✓	\$838,933. ⁰⁰					
8	Sahoo Inc.	✓	✓	\$1,215,000. ⁰⁰					
9									
10									

Bid Recorder: DARRYL SWEET 4/14/20 

Bid Opener:  4/14/20 

Project Manager: Isaac Carnegie 4/14/20 