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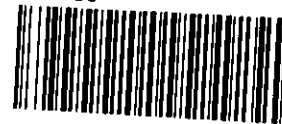
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A-09-594674-J
226038



DISTRICT COURT

CLARK COUNTY, NEVADA

Flagship Construction Company,

Plaintiff,

v.

The City of Las Vegas,

Defendant.

Case No.: A-09-594674-J

Dept. No.: XXII

VERIFIED COMPLAINT

Exemption from Arbitration
(Equitable and Declaratory Relief Requested)

COMES NOW, the Plaintiff, FLAGSHIP CONSTRUCTION COMPANY, ("Flagship"), by and through its attorneys, the law firm of Greenberg Traurig, and hereby complains and alleges against Defendant CITY OF LAS VEGAS (the "City") as follows:

PARTIES

1. Flagship is and at all relevant times herein, is a foreign corporation duly licensed and qualified to do business as a contractor in Clark County, Nevada.

2. The City is and at all relevant times herein, a political subdivision of the State of Nevada.

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GENERAL ALLEGATIONS

A. Initial Bid

3. In September of 2008, the City published an "Invitation to Bid" for the Project identified as Bid No. 08.15341.04-LED ("Initial Bid").

4. In connection with solicitation of bids for the project, the City issued Contract Documents & Construction Specifications which include among other items an invitation to bid, instructions to bidders, general conditions, and bid forms (collectively "Bid Documents").

5. Section 13.02 of the Instructions to Bidders ("ITB") lists criteria the City would consider in determining whether a bidder is a responsible bidder. Among those criteria was ITB Section 13.02(c), "whether the Bidder has experience in Historical Rehabilitation having successfully completed (1) project during the ten (10) years immediately preceding the date of submission similar to the Work required by the Owner."

6. On September 4, 2008, the Mandatory Pre-Bid Conference was held for the Initial Bid. At this Pre-Bid Conference, there was some confusion as to whether the Bid Documents required the General Contractor and/or its Superintendant to have experience with historical renovation.

7. City representative Lloyd Davis stated in response to a general contractor's request for clarification that the City will evaluate the lowest bidder even if the bidder does not have experience with a historical rehabilitation. Lloyd stated it was one criteria that the City *may* consider.

8. At the public bid opening, all bid numbers and all 5% subcontract bidders were announced publicly. One hour later, 1% subcontract bidders also become public record.

9. Flagship emerged as the lowest bidder in the Initial Bid. Flagship cited its experience with the La Concha Lobby Renovation for the Neon Museum Project. The La Concha Lobby is listed on the Historical register due to its thin shell concrete structure designed in 1961 by renowned African American Architect Paul Revere Williams. The scope of the project required extensive asbestos abatement, selective demolition, historical salvage, reassembly and restoration. It was not registered as being completed pursuant to the Secretary of

1 Interior's Standards for Rehabilitation, but the work was completed pursuant to those standards
2 nonetheless.

3 10. Flagship received a telephone call from Lloyd Davis in which Mr. Davis stated
4 that the City Staff intended to recommend that the City award Flagship the Project as the lowest
5 bidder. During that conversation, Mr. Davis confirmed that the Le Concha information
6 submitted by Flagship was acceptable to the City.

7 11. However, upon information and belief Flagship alleges that on October 2, 2008,
8 APCO submitted its bid protest against Flagship's bid. APCO claimed that (1) Flagship
9 identified two subcontractors that were not adequate in order to bid shop that particular scope of
10 work after the Project was awarded, and (2) that Flagship's La Concha project did not meet the
11 Secretary of Interior Standards for Historical Renovation.

12 12. Flagship submitted supplemental information to the City demonstrating that its
13 Subcontractors were qualified to complete the scope of work for which they were listed, and that
14 the La Concha project did in fact meet Secretary of Interior Standards for Historical Renovation,
15 despite not being registered.

16 13. Upon information and belief thereon, Flagship alleges that on October 27, 2008,
17 with little or no investigation into Flagship's experience or subcontractor's qualifications, and
18 with no review of the subcontractor's ability to perform their scope of work, the City declared
19 that it was rejecting all bids, revising the Technical Specifications to be less restrictive, and
20 proceed with the issuance of a new bid proposal.

21 14. According to the City, the process for the Initial bid was flawed in that the Bid
22 Documents did not provide sufficient specifications for determining what constituted requisite
23 experience. In making this determination, the City ignored the clarifications made by Lloyd
24 Davis during the Pre-Bid Meeting.

25 15. Further, Flagship was placed at a significant disadvantage in the second bid, as
26 APCO and all other bidders knew their low number.

27 **B. Second Bid**

28 16. In January of 2009, the City solicited bids for Bid No. 08.15341.04-LED

1 (Revised) ("Second Bid").

2 17. In the Revised Bid Documents, the General Contractor can qualify if either the
3 General Contractor or the Superintendant has experience in Historical Rehabilitation having
4 successfully completed (1) project during the ten (10) years immediately preceding the date of
5 submission similar to the Work required by the Owner." This is exactly what Lloyd Davis said
6 during the first pre-bid meeting.

7 18. APCO Construction Company was identified as the lowest bidder on this Second
8 Bid. Flagship emerged as the second lowest bidder.

9 19. Flagship submitted its bid protest against APCO Construction identifying three
10 issues with its bid:

11 a. APCO failed to demonstrate the requisite experience required for
12 historical renovation;

13 b. APCO submitted bids from a subcontractor, Cogent Electric, that it knew
14 could not perform the work.

15 c. APCO is engaged in litigation for allegations of breach of contract, and
16 APCO was dishonest in at least this regard when submitting its bid to the City.

17 20. Upon information and belief Flagship alleges, the City failed to respond to
18 Flagship's bid protest until May 29, 2009 when it stated that APCO's bid was sufficient and the
19 City was to recommend APCO for award.

20 21. Within the City's response to Flagship's protest, it states "the bid documents
21 focus on non-performance after a trial on the merits, not based on allegations in ongoing
22 litigation between two private parties. The City is not considering the ongoing APCO/Gemstone
23 litigation until after trial on the merits or adjudication of this matter."

24 22. The bid documents included no limitation on the City prohibiting the City from
25 considering the merits of a pending litigation. In fact, Section 13.02(n) provides a means for
26 reviewing pending litigation in the context of the bidder's historical renovation experience.

27 23. Only after learning of this response did the facts emerge demonstrating that the
28 City was not properly evaluating bidders as required by NRS 338, and that the City was creating

1 new rules in the bidding process. Only at this point, did Flagship realize the City was not
2 conducting its review based upon the criteria set forth in NRS 338.1377, and it was changing the
3 rules mid-stream.

4 24. Upon information and belief thereon, the City did not begin its evaluation process
5 until after Flagship submitted its bid protest.

6 **C. City Council Hearings**

7 25. The City Council held a hearing on this matter on June 17, 2009. During that
8 hearing City Purchasing Department representative Kathy Rainey represented to the City
9 Council that during their review of APCO, they did not consider any facts relating to pending
10 litigation for any breach of contract by APCO.

11 26. The City Representatives argued that the Bid Documents limited the City's
12 inquiry into any breach of contract or failed project by APCO to only those projects that relate to
13 APCO's experience on the historical renovation project used to qualify for the project.

14 27. The City Representatives indicated that the Bid Documents only required APCO
15 to list breaches of contract or failed projects if they related to APCO's historical renovation
16 experience, and accordingly, APCO provided all requisite information on the bid documentation.

17 28. City Council members raised the legal question as to whether the City can
18 consider APCO's lawsuit against the City, and the City's counterclaim for breach of contract
19 when evaluating whether APCO is a responsible bidder pursuant to ITB 13.02(e) and (l).

20 29. City Council members raised the legal question as to whether the City can
21 consider APCO's lawsuit against the City, and the City's counterclaim for breach of contract
22 when evaluating whether APCO is a responsible bidder pursuant to ITB 13.02(e) and (l).

23 30. City Representatives argued in response that the City was not allowed to consider
24 any item that was not within the four corners of Flagship's bid protest.

25 31. City Council disregarded this argument and continued its inquiry as to whether it
26 could consider breaches of contract and failed projects by APCO, including without limitation
27 the Buffalo Hills Project matter.

28 32. City Attorney Brad Jerbic indicated that he would provide a legal opinion on that

1 issue.

2 33. APCO's counsel John Mowbray had the opportunity to respond to the questions
3 posed by City Council. Further, he admitted that the City had heard argument as an advisory
4 opinion beyond the confines of a bid protest by APCO in a separate matter only weeks before.
5 Councilman Reese confirmed that Mowbray would be provided a copy of the materials provided
6 for the hearing by Flagship, and that he would be given an opportunity to respond.

7 34. The City Council abeyed the matter until further advice could be provided.

8 35. On July 1, 2009, the City Council reconvened for further discussion of this matter.

9 36. In an effort to assist the City Council with the questions raised at the June 17,
10 2009 hearing, Flagship provided a legal opinion to all Council members who had not been
11 recused in this matter, the City Attorney Brad Jerbic, Counsel for APCO, and City Purchasing
12 Representatives.

13 37. No discussion was held as to whether the City Council can or should review any
14 breach of contract by APCO.

15 38. City attorney Brad Jerbic never provided the legal opinion requested by City
16 Council; instead, he again raised the argument that the City could not consider any matter
17 beyond the "four corners" of Flagship's protest.

18 39. Further, City Purchasing Department Representative acknowledged that NRS
19 338.142 required Flagship to submit its bid protest before the City's evaluation of bidders had
20 even begun.

21 40. The City Council then did an about face and summarily dismissed the question of
22 whether it must review APCO's breaches of contract with a public body and failed projects,
23 stating that the bid protest did not encompass those questions.

24 41. The City further summarily dismissed APCO's use of Cogent as a subcontractor
25 stating that the bid documents contemplate a situation in which a subcontractor is not properly
26 licensed.

27 42. With that determination, the City voted to award the Project to APCO.
28

D. City Evaluation of APCO

43. The City has an obligation to investigate all bidders as required pursuant to NRS 338.1379(2)(a) and NRS 338.1377 to determine whether that bidder is qualified to bid on a contract. The City is required to investigate this criteria regardless of whether any protest is ever lodged against the bidder.

44. Upon information and belief thereon, Flagship alleges that the City failed to evaluate APCO based upon NRS 338.1377, which specifically mandates a review of whether APCO has breached any contract with a public agency in this state or any other within the most recent 5 years (NRS 338.1377(5)), whether APCO's bid application is truthful and complete (NRS 338.1377(12)), and whether APCO failed to complete a project within the manner specified by the contract, time specified by the contract, or price specified by the contract (NRS 338.1377(13)).

45. Upon information and belief thereon, Flagship alleges that the City is aware of facts that relate to whether APCO is a responsible bidder, but failed to evaluate those facts in determining whether APCO is a responsible bidder, specifically:

a. The City is aware that ACPO is currently embroiled in a lawsuit against the City relating to the Centennial Hills Washington Buffalo Park ("Buffalo Hills Project"). In that litigation, the City asserts that APCO agreed to substantially completed the Buffalo Park Project by May 15, 2005, but failed to meet that deadline, then later abandoned the job on September 2, 2005. The City represented that this lawsuit to date has cost the City \$2.4 million in legal fees and costs.

b. The City is aware that APCO failed to disclose allegations of contract breaches in its bid application documents. On Attachment 6 of the Bid Documents APCO failed to respond accurately to the question "Has the bidder failed to perform any contract as a result of causes within the control of the bidder or a subcontractor or supplier of the bidder - "No."

c. The City is aware that APCO failed to complete the City of North Las Vegas Aliante Library project in a timely matter, and the City of North Las Vegas assessed liquidated damages, as a result. Although, those liquidated damages were later resolved through

1 settlement, APCO identified the Aliante Library Project in its list of completed projects, but
2 when asked if the project was completed late, APCO stated "No."

3 d. The City is aware that APCO is currently involved in a pending lawsuit
4 with Gemstone Construction in which breach of contract is alleged.

5 e. The City is aware that Cogent Electric cannot post a bond, and evidence
6 has been submitted that APCO was aware that Cogent Electric could not post a bond at the time
7 APCO submitted Cogent Electric as the subcontractor on this project.

8 f. The City allowed APCO to submit the experience of Superintendant Brian
9 Benson to represent its experience in historical renovation. Benson's initial description of
10 responsibilities in APCO's Second Bid documents identified his role in the Los Angeles City
11 Hall renovation to be limited to \$1.5 Million in renovations to an exterior elevator. Two separate
12 subsequent affidavits accepted by the City expanded this experience to include the oversight of
13 20 contractors and close to \$12 Million in renovations.

14 g. Further, the City allowed APCO to switch Wallalternative's stated project
15 experience from an unqualified New Orleans project to a similar project in Chicago. It should be
16 noted that Wallalternatives did not actually participate in either the New Orleans project or the the
17 project in Chicago. Instead it was Wallalternative's Field Director and Estimator, Richard Nieto
18 with that experience through his former employer National Decorating Service. Flagship could
19 not have known about the City's willingness to switch at the time of Flagship's bid protest, as the
20 City only made this decision in or about April of 2009.

21 46. Upon information and belief thereon, Flagship alleges that to the extent that the
22 City has investigated APCO for projects in the past and deemed these issues irrelevant, the City
23 did so within the context of erroneous legal advice from counsel advising that the City could not
24 consider pending litigation between APCO and the City because "the City has an obligation to
25 award to the lowest responsive and responsible bidder." Intimating that the City could not
26 consider the pending litigation between the City and APCO.

27 47. The Second Bid was flawed in that in its review of APCO's experience, the City
28 made every effort to expand APCO's superintendant's experience to fit the bid specifications

1 while ignoring APCO's dishonesty in the bid documents regarding breaches of contract, failed
2 projects, and listing a subcontractor it knew at the time could not bond.

3 48. The Second Bid was further flawed in that the City failed to conduct adequate
4 evaluation of all factors relevant to the criteria NRS 338 imposes on the City.

5 49. As a result, the City erroneously awarded the Las Vegas Museum Renovation
6 contract to APCO, who was the low bidder, but not qualified as responsible.

7 50. The City twice denied Flagship award of the Las Vegas Museum Renovation
8 contract after it was demonstrated to be the lowest bidder who was also responsible and
9 responsive.

10 FIRST CAUSE OF ACTION

11 (42 U.S.C. § 1938; Violation of Flagship's Fourteenth Amendment Right)

12 51. Flagship repeats and realleges each and every allegation set forth in paragraphs 1
13 through 48 as though fully set forth herein.

14 52. Flagship has the right under the Fourteenth Amendment of the United States of
15 America not to be deprived of property without due process.

16 53. Pursuant to NRS 338.1389, the City was required to award the Project to the
17 lowest responsive and responsible bidder.

18 54. Flagship was the lowest responsive and responsible bidder in the Initial Bid.

19 55. Flagship's Initial Bid complied with NRS 338.1389, the Instructions to Bidders,
20 and the clarifications provided by City Representative Lloyd Davis at the Pre-Bid Meeting.

21 56. The City erroneously rejected all bids and proceeded with a second bid.

22 57. Although APCO was the lowest bidder in the Second Bid, the City failed to
23 conduct the evaluation of APCO as required by NRS 338.1379 pursuant to the criteria set forth
24 in NRS 1377.

25 58. As a result, the City failed to consider facts which would disqualify APCO as a
26 responsible bidder pursuant to NRS 338.1377.

27 59. Had APCO been appropriately disqualified, Flagship would have been the lowest
28 responsive and responsible bidder.

1 60. The City's award of the Project to APCO is in violation of NRS 338.1379 and
2 338.1377.

3 61. The City's actions constitute violation of procedural due process under the United
4 States Constitution in violation of 42 U.S.C. § 1983.

5 62. The City's decision to award the Project to APCO was an abuse of discretion in
6 violation of state law, and thus a violation of substantive due process under the United States
7 Constitution.

8 63. Flagship has been required to retain the services of counsel to prosecute this
9 matter and is entitled to an award of its costs and reasonable attorneys fees incurred herein.

10 **SECOND CAUSE OF ACTION**

11 **(Petition for Writ of Mandamus)**

12 64. Flagship repeats and realleges each and every allegation set forth in paragraphs 1
13 through 61 as though fully set forth herein.

14 65. Flagship seeks a Writ of Mandamus compelling the City to conduct its
15 investigation of APCO to determine whether APCO is a responsible bidder pursuant to the
16 process and criteria imposed by NRS 338 NRS 338.1379 and NRS 338.1377, as well as the Bid
17 Documents.

18 66. Flagship further seeks a Writ of Mandamus allowing this Court to intervene and
19 provide clarification of an important question of law, specifically whether NRS 338.1379 and
20 NRS 338.1377 require the City consider the breach of "any Contract with a public body," even if
21 the matter is pending in litigation when determining whether a bidder on a public works contract
22 is a responsible bidder.

23 67. The City's action of awarding the Project to APCO was an arbitrary and
24 capricious exercise of its discretion in contradiction of NRS 338.1389, NRS 338.1379 and NRS
25 338.1377, as well as the Bid Documents.

26 68. An important question of law was raised by the City Council when it asked its
27 City Attorney to provide a legal opinion as to whether the City can and/or must review any
28 breach of contract or any failed project in considering whether a bidder is a responsible bidder.

69. The City should have considered its own breach of contract claims against APCO in the pending lawsuit concerning the Washington Buffalo Park Project, wherein the City alleges that APCO failed to meet the project deadline of May 15, 2005 and then 122 days later on September 2, 2005 abandoned the project.

70. The City should have deemed APCO non-responsible and awarded the Project to Flagship, as the next lowest responsible and responsive bidder.

71. Flagship has no plain, speedy and/or adequate remedy at law

72. Flagship has been required to retain the services of counsel to prosecute this matter and is entitled to an award of its costs and reasonable attorneys fees incurred herein.

THIRD CAUSE OF ACTION

(Declaratory Relief)

73. Flagship repeats and realleges each and every allegation set forth in paragraphs 1 through 70 as though fully set forth herein.

74. Under NRS 30.010 et. Seq., the Uniform Declaratory Judgment Act, "any person... whose status or other legal relations are affected by statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

75. A judiciable controversy exists as Flagship has asserted a claim that the City violated NRS 338.1389, NRS 338.1379 and NRS 338.1377 and the Bid Documents by awarding APCO the Project as a non-responsible bidder when Flagship was twice identified as the lowest responsive and responsible bidder.

76. Flagship has a legally protectable interest in the controversy, i.e. its right as lowest responsible bidder to be awarded the Project.

77. The controversy is ripe for judicial determination because there is a substantial controversy between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

78. Accordingly, Flagship requests declaratory relief that the City is required to

1 consider the breach of any contract with a public body or failed project, even if litigation is
2 pending when determining whether a bidder is responsible.

3 79. Flagship further requests declaratory relief that APCO is a non-responsible bidder
4 pursuant to NRS 338.1389, NRS 338.1379 and NRS 338.1377.

5 80. Flagship further requests declaratory relief that Flagship is the lowest responsible
6 and responsive bidder pursuant to NRS 338.1389, NRS 338.1379 and NRS 338.1377.

7 81. Flagship has been required to retain the services of counsel to prosecute this
8 matter and, as such, is entitled to an award of its costs and reasonable attorneys fees incurred
9 herein.

10 FOURTH CAUSE OF ACTION

11 (Temporary Restraining Order and Preliminary Injunction)

12 82. Flagship repeats and realleges each and every allegation set forth in paragraphs 1
13 through 79 as though fully set forth herein.

14 83. On July 1, 2009, the City awarded the Project to APCO in violation of NRS
15 338.1389, NRS 338.1379 and NRS 338.1377.

16 84. Flagship has been irreparably harmed due to the unlawful, arbitrary and
17 capricious actions of Clark County, specifically, that the City has violated its fourteenth
18 amendment right to due process in its failure to follow the evaluation process laid out in
19 338.1389, NRS 338.1379 and NRS 338.1377.

20 85. A Temporary Restraining Order and Preliminary Injunction is necessary in this
21 case to prevent the public from incurring further unnecessary expense as a result of a non-
22 responsible contractor working on a public works project;

23 86. Flagship is entitled to the relief claimed, specifically, its request that this Court
24 enjoin the City from awarding the Project to APCO and instead award the Project to Flagship;

25 87. Flagship is likely to prevail on the merits;

26 88. Flagship requests a prohibitive injunction enjoining the City from awarding the
27 Project to APCO.

28 89. Flagship further requests mandatory injunction requiring that the City award the

1 Project to Flagship.

2 90. Flagship has been required to retain the services of counsel to prosecute this
3 matter and is entitled to an award of its costs and reasonable attorneys fees incurred herein.

4 WHEREFORE, Flagship herein prays for relief as follows:

5 1. For a Writ of Mandamus declaring the City's award of the Project to APCO
6 arbitrary and capricious, and providing clarification of NRS 338.1379 and NRS 338.1377
7 requiring the City to investigate and consider the breach of any contract with a public agency in
8 determining whether a bidder is responsible;

9 2. For Declaratory Relief that the City breached the provisions of NRS 338.1389,
10 NRS 338.1379 and NRS 338.1377 in its award of the Project to APCO;

11 3. For Temporary Restraining Order and Preliminary injunction enjoining the City
12 from awarding the Project to APCO and

13 4. For Mandatory Injunction requiring the City to award the Project to Flagship; or

14 5. In the alternative, For Mandatory Injunction requiring the City to re-bid the
15 Project;

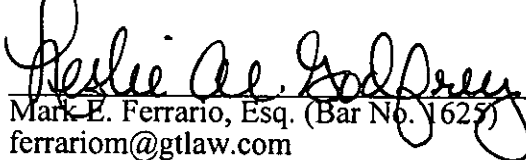
16 6. For attorneys fees and costs of suit; and

17 7. For such other relief that the Court deems just and proper.

18 DATED this 16th day of July, 2009.

19 Respectfully submitted,

20 GREENBERG TRAURIG, LLP

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Counsel for Plaintiff

VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss

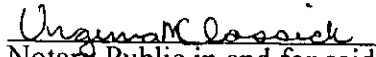
TERESA BOLSENDAHL, being first duly sworn, deposes and states:

That Flagship Construction Company, is the Plaintiff in the above entitled action, that I have read the foregoing Complaint on behalf of Flagship Construction Company, and knows the contents thereof; that the same is true of my own knowledge, except for those matters therein stated upon information and belief, and as to those matters she believes them to be true.


TERESA BOLSENDAHL

Subscribed and sworn to before me this

6th day of July, 2009.


Notary Public in and for said
County and State

