

## **RESOLUTION NO. 2013 - 067**

### **A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK ADOPTING THE PLANS & SPECIFICATIONS AND AWARDED THE CONTRACT TO DESILVA GATES CONSTRUCTION, LP FOR THE WILFRED AVENUE IMPROVEMENT PROJECT CITY PROJECT NO. 2010-05**

**WHEREAS**, the plans and specifications for the Wilfred Avenue Improvement Project No. 2010-05 was designed by Kimley-Horn & Associates, and approved by the Deputy City Engineer; and

**WHEREAS**, the Project was advertised for bids on February 8, 2013 and four (4) City Staff opened bids for the Wilfred Avenue Improvement Project No. 2010-05 on March 27, 2013; and

**WHEREAS**, the project utilized the A+B bid method, also referred to as cost plus time bidding. A+B bidding is a method of determining the lowest responsible bidder and the number of working days for a project by requiring the contractor to bid competitively with respect to both the construction cost and project duration.

**WHEREAS**, three (3) bid proposals were received for the Wilfred Avenue Improvement Project No. 2010-05 ranging in price from \$10,845,757.00 to \$14,196,195.00 and Working Days ranging from 90 to 95 for work east of Langner Avenue; and

**WHEREAS**, the City engaged Vali Cooper & Associates, Inc. to review all bids for responsiveness; and

**WHEREAS**, Vali Cooper & Associates, Inc. determined that DeSilva Gates Construction, LP submitted the lowest A+B bid and is the lowest responsive and responsible bidder; and

**WHEREAS**, on April 9, 2013, a duly noticed public meeting was held on the approval of the plans and specifications and the award of the contract; and

**WHEREAS**, the Wilfred Avenue Improvement Project was previously approved by the City pursuant to a Notice of Exemption on September 25, 2012. The City filed a notice of exemption with the County Clerk on September 26, 2012, who posted it that same day through October 29, 2012.

**NOW, THEREFORE**, the City Council of the City of Rohnert Park does hereby resolve, determine, find and order as follows:

**SECTION 1. Findings.** The City Council hereby finds as follows:

1. The above recitals are true and correct and are hereby incorporated into this Resolution as findings of the City Council of the City of Rohnert Park.

2. In making its findings the City Council relied upon and hereby incorporates by reference all of the bid materials, correspondence, staff reports and all other related materials.
3. The plans and specifications for the Wilfred Avenue Improvement Project No. 2010-05 are hereby approved and adopted.
4. The award of the contract for the Wilfred Avenue Improvement Project is not subject to CEQA because the Wilfred Avenue Improvement was previously found by the City Council to be categorically exempt from CEQA and this award is a subsequent action on and implementation of that Project. Awarding the contract does not involve any substantial changes to the Project, nor would such award cause new or more severe environmental impacts. For those reasons, neither the obligation to comply with nor is the statute of limitations on that prior are re-triggered by this toward implementing the project.

**SECTION 2. Award of Contract.** The City Council hereby resolves as follows

1. In accordance with California Public Contract Code Section 20160 and following any other applicable laws, the City Council of the City of Rohnert Park hereby finds the bid of DeSilva Gates Construction, LP, for the Wilfred Avenue Improvement Project No. 2010-05 to be the lowest, responsive bid and waives any irregularities in such bid in accordance with applicable law including, but not limited to, the lack of designation by DeSilva Gates Construction of the name of the bridge manufacturer in its bid.
2. The City Manager is hereby authorized and directed to execute a contract, in substantially similar form to the Agreement attached hereto as Attachment 1 and incorporated by this reference, subject to final review, including non-substantive modification, by the City Attorney, with DeSilva Gates Construction, LP, for the amount of Ten Million Eight Hundred Forty-Five Thousand, Seven Hundred Fifty-Seven dollars (\$10,845,757.00) and ninety five (95) Working Days for work east of Langner Avenue and one hundred eighty-five (185) Working Days for work west of Langner Avenue in accordance with the bid documents and applicable law upon submission by DeSilva Gates Construction, LP, of all documents required pursuant to the Project bid documents; and is also authorized to approve cumulative contract change orders up to fifteen percent (15%) of the value of the original contract; and is also authorized to take such actions as are reasonably necessary to implement the contract with DeSilva Gates Construction, LP .
3. City staff is hereby directed to issue a Notice of Award to DeSilva Gates Construction, LP, for this project.
4. This Resolution shall become effective immediately.

**SECTION 3. Severability.** All portions of this resolution are severable. Should any individual component of this Resolution be adjudged to be invalid and unenforceable by a body of competent jurisdiction, then the remaining resolution portions shall continue in full force and effect, except as to those resolution portions that have been adjudged invalid. The City Council of the City of Rohnert Park hereby declares that it would have adopted this Resolution and each section, subsection, clause, sentence, phrase and other portion thereof, irrespective of the fact that one or more section, subsection, clause sentence, phrase or other portion may be held invalid or unconstitutional.

**DULY AND REGULARLY ADOPTED** by the City Council of the City of Rohnert Park this 9<sup>th</sup> day of April 2013.



**CITY OF ROHNERT PARK**

Pam Stafford  
Pam Stafford, Mayor

**ATTEST:**

JoAnne Buergler  
JoAnne Buergler, City Clerk

Attachment: Draft Contract

AHANOTU: AYE BELFORTE: AYE MACKENZIE: AYE CALLINAN: AYE STAFFORD: AYE  
AYES: ( 3 ) NOES: ( 0 ) ABSENT: ( 0 ) ABSTAIN: ( 0 )

CONTRACT

WILFRED AVENUE IMPROVEMENTS

PROJECT NO. 2010-05

THIS AGREEMENT, made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2013, by and between DeSilva Gates Construction, hereinafter called "Contractor", and the City of Rohnert Park, hereinafter called "City".

WITNESSETH:

WHEREAS, the City Council of said City has awarded a contract to Contractor for performing the work hereinafter mentioned in accordance with the sealed proposal of said Contractor.

NOW, THEREFORE, IT IS AGREED, as follows:

1. Scope of Work: The Contractor must perform all the work and furnish all the labor, materials, equipment and all utility and transportation services required to complete all of the work of construction and installation of the improvements more particularly described in the Resolution adopted by the City Council of said City on April 9, 2013, the items and quantities of which are more particularly set forth in the Contractor's bid therefor on file in the office of the City Clerk, except work done or to be performed by others.

2. Time of Performance and Liquidated Damages: The Contractor must begin work within (3) three calendar days after official notice by the City Engineer to proceed with the work and must diligently prosecute the same to completion within the number of working days bid on the schedule of bid prices submitted with the Contractor's bid. The Contractor acknowledges and agrees that time is of the essence with respect to Contractor's work and that Contractor shall diligently pursue performance of the work.

In the event the Contractor does not complete the work, except work west of Langner Avenue, within the number of days bid or within such further time as said City Council must have authorized, the Contractor must pay to the City liquidated damages in the amount of Nine Thousand Six Hundred Dollars (\$9600) per day for each and every day's delay in finishing the work beyond 95 working days. In the event the Contractor does not complete all the work, within 185 working days or within such further time as said City Council must have authorized, the Contractor must pay to the City liquidated damages in the amount of Eight Thousand Three Hundred Dollars (\$8300) per day for each and every day's delay in finishing the work beyond the completion date so specified. Additional provisions with regard to said time of completion and liquidated damages are set forth in the specifications, which provisions are hereby referred to and incorporated herein by reference.

3. Payments: Payments will be made by City to the Contractor for said work performed at the times and in the manner provided in the specifications and at the unit prices stated in Contractor's bid.

The award of the contract is for a total amount of \$10,845,757.00.

4. Component Parts and Interpretation: This contract must consist of the following documents, each of which is on file in the office of the City Clerk and all of which are incorporated herein and made a part hereof by reference thereto:

- a) This Agreement
- b) Notice Inviting Sealed Proposals
- c) Instruction and Information to Bidders
- d) Accepted Proposal, with all attachments and certifications
- e) Faithful Performance Bond
- f) Labor and Material Bond
- g) Special Provisions
- h) Project Plans
- i) Revised Standard Specifications
- j) Standard Specifications
- k) Revised Standard Plans
- l) Standard Plans, County & City Standard Details
- m) Design Standards

In the event of conflict between these documents, the following order of precedence will govern: this contract; change orders; supplemental agreements and approved revisions to plans and specifications; special provisions; project plans; revised standard specifications; standard specifications; revised standard plans; standard plans; and supplemental project information. In the absence of a controlling or contrary provision in the foregoing, the *Standard Specifications* (2010 edition) of the California Department of Transportation shall apply to this project.

5. Independent Contractor: Contractor is and will at all times remain as to City a wholly independent contractor. Neither City nor any of its officers, employees, or agents will have control over the conduct of Contractor or any of Contractor's officers, employees, agents or subcontractors, except as expressly set forth in the Contract Documents. Contractor may not at any time or in any manner represent that it or any of its officers, employees, agents, or subcontractors are in any manner officers, employees, agents or subcontractors of City.

6. Prevailing Wages: Copies of the determination of the Director of the Department of Industrial Relations of the prevailing rate of per diem wages for each craft, classification or type of worker needed to execute this Contract will be on file in, and available at, the office of the City Clerk, Rohnert Park City Hall, 130 Avram Avenue, Rohnert Park, California 94928.

Contractor must post at the work site, or if there is no regular work site then at its principal office, for the duration of the Contract, a copy of the determination by the Director of the Department of Industrial Relations of the specified prevailing rate of per diem wages. (Labor Code § 1773.2.)

## Attachment 1

Contractor, and any subcontractor engaged by Contractor, may pay not less than the specified prevailing rate of per diem wages to all workers employed in the execution of the contract. (Labor Code § 1774.) Contractor is responsible for compliance with Labor Code section 1776 relative to the retention and inspection of payroll records.

Contractor must comply with all provisions of Labor Code section 1775. Under Section 1775, Contractor may forfeit as a penalty to City up to \$200.00 for each worker employed in the execution of the Contract by Contractor or any subcontractor for each calendar day, or portion thereof, in which the worker is paid less than the prevailing rates. Contractor may also be liable to pay the difference between the prevailing wage rates and the amount paid to each worker for each calendar day, or portion thereof, for which each worker was paid less than the prevailing wage rate.

Nothing in this Contract prevents Contractor or any subcontractor from employing properly registered apprentices in the execution of the Contract. Contractor is responsible for compliance with Labor Code section 1777.5 for all apprenticeable occupations. This statute requires that contractors and subcontractors must submit contract award information to the applicable joint apprenticeship committee, must employ apprentices in apprenticeable occupations in a ratio of not less than one hour of apprentice's work for every five hours of labor performed by a journeyman (unless an exception is granted under § 1777.5), must contribute to the fund or funds in each craft or trade or a like amount to the California Apprenticeship Council, and that contractors and subcontractors must not discriminate among otherwise qualified employees as apprentices solely on the ground of sex, race, religion, creed, national origin, ancestry or color. Only apprentices defined in Labor Code section 3077, who are in training under apprenticeship standards and who have written apprentice contracts, may be employed on public works in apprenticeable occupations.

If federal funds are used to pay for the Work, Contractor and any subcontractor agree to comply, as applicable, with the labor and reporting requirements of the Davis-Bacon Act (40 USC § 276a-7), the Copeland Act (40 USC § 276c and 18 USC § 874), and the Contract Work Hours and Safety Standards Act (40 USC § 327 and following).

7. Hours of Labor: Contractor acknowledges that under California Labor Code sections 1810 and following, eight hours of labor constitutes a legal day's work. Contractor will forfeit as a penalty to City the sum of \$25.00 for each worker employed in the execution of this Contract by Contractor or any subcontractor for each calendar day during which such worker is required or permitted to work more than eight hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of Labor Code section 1810.

8. Apprentices: Attention is directed to the provisions in Sections 1777.5 (Chapter 1411, Statutes of 1968) and 1777.6 of the Labor Code concerning the employment of apprentices by the Contractor or any Subcontractor under him.

Section 1777.5, as amended, requires the Contractor or Subcontractor employing tradesmen in any apprenticeable occupation to apply to the joint apprenticeship committee nearest the site of the public works project and which administers the apprenticeship program in that trade for a certificate of approval. The certificate will also fix the ratio of apprentices to journeymen that will

## Attachment 1

be used in the performance of the Contract. The ratio of apprentices to journeymen in such cases must not be less than one to five except:

- A. When unemployment in the area of coverage by the joint apprenticeship committee has exceeded an average of 15 percent in the 90 days prior to the request for certificate, or
- B. When the number of apprentices in training in that area exceeds a ratio of one to five, or
- C. When the trade can show that it is replacing at least 1/30 of its membership through apprenticeship training on an annual basis statewide or locally, or
- D. When the assignment of an apprentice to any work performed under a public works Contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large, or if the specified task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman, or
- E. When the Contractor provides evidence that he employs registered apprentices on all of his Contracts on an annual average of not less than one apprentice to eight journeymen.

The Contractor is required to make contributions to funds established for the administration of apprenticeship program if he employs registered apprentices or journeymen in any apprenticeable trade on such Contracts and if other Contractors on the public works site are making such contributions.

The Contractor and any Subcontractor under him must comply with the requirements of Section 1777.5 and 1777.6 in the employment of apprentices.

Information relative to apprenticeship standards, wage schedules, and other requirements may be obtained from the Director of Industrial Relations, ex officio the Administrator of Apprenticeship, San Francisco, California, or from the Division of Apprenticeship Standards and its branch offices.

9. Labor Discrimination: Attention is directed to Section 1735 of the Labor Code, which reads as follows:

"A contractor must not discriminate in the employment of persons upon public works on any basis listed in subdivision (a) of Section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code, except as otherwise provided in Section 12940 of the Government Code. Every contractor for public works who violates this section is subject to all the penalties imposed for a violation of this chapter. "

## Attachment 1

10. Workmen's Compensation Insurance: In accordance with the provisions of Article 5, Chapter 1, Part 7, Division 2 (commencing with Section 1860) and Chapter 4, Part 1, Division 4 (commencing with Section 3700) of the Labor Code of the State of California, the Contractor is required to secure the payment of compensation to his employees and must for that purpose obtain and keep in effect adequate Workmen's Compensation Insurance.

The undersigned Contractor is aware of the provisions of Section 3700 of the Labor Code which requires every employer to be insured against liability for workmen's compensation or to undertake self-insurance in accordance with the provisions of that Code, and will comply with such provisions before commencing the performance of the work of this contract.

11. Indemnity and Insurance: To the fullest extent permitted by law, Contractor must indemnify, hold harmless, release and defend City, its officers, elected officials, employees, agents, volunteers, and consultants from and against any and all actions, claims, demands, damages, disability, losses, expenses including, but not limited to, attorney's fees and other defense costs and liabilities of any nature that may be asserted by any person or entity including Contractor, in whole or in part, arising out of Contractor's activities hereunder, including the activities of other persons employed or utilized by Contractor including subcontractors hired by the Contractor in the performance of this Agreement excepting liabilities due to the active negligence of the City. This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable by or for Contractor under Worker's Compensation, disability or other employee benefit acts or the terms, applicability or limitations of any insurance held or provided by Contractor and must continue to bind the parties after termination/completion of this Agreement.

Contractor shall procure and maintain throughout the time for performance of the work under this Contract the insurance required by the Special Provisions. The requirement that Contractor procure and maintain insurance shall in no way be construed to limit the Contractor's duty to indemnify City as provided in the paragraph above.

Contractor must also indemnify, hold harmless, release and defend the following to the same extent described above.

- A. The City of Rohnert Park, its officers, elected officials, employees, agents, volunteers and consultants.
- B. The Federated Indians of Graton Rancheria, its officers, elected officials, employees, agents, consultants and volunteers.
- C. Station Casinos, Inc., its officers, employees, agents and consultants and volunteers.
- D. Pacific Gas and Electric Company, its officers, employees, agents, and volunteers.
- E. AT&T, its officers, employees, agents, and volunteers.
- F. Comcast Cable, its officers, employees, agents, and volunteers.
- G. County of Sonoma, its officers, elected officials, employees, agents and volunteer.



12. City Right of Termination and Right to Complete the Work: The City may terminate the Contract at any time, with or without cause, upon 15 (fifteen) days written notice to the Contractor.

The City may terminate the Contract when conditions encountered during the work make it impossible or impracticable to proceed; or when the City is prevented from proceeding with the Contract by act of God, by law, or by official action of a public authority; or if the governing board of the Federated Indians of Graton Rancheria (the "Tribe") fails to transfer to the City in a timely manner the funds necessary to pay for the Work being performed by the Contractor under this Contract.

The City may terminate the Contract upon default by the Contractor. The occurrence of any of the following is a default by Contractor under this Contract:

- A. Contractor refuses or fails to prosecute the Work or any part thereof with such diligence as will insure its completion within the time specified or any permitted extension.
- B. Contractor fails to complete the Work on time.
- C. Contractor is adjudged bankrupt, or makes a general assignment for the benefit of creditors, or a receiver is appointed on account of Contractor's insolvency.
- D. Contractor fails to supply enough properly skilled workers or proper materials to complete the Work in the time specified.
- E. Contractor fails to make prompt payment to any subcontractor or for material or labor.
- F. Contractor fails to abide by any applicable laws, ordinances or instructions of City in performing the Work.
- G. Contractor breaches or fails to perform any obligation or duty under the Contract.

Upon the occurrence of a default by Contractor, the City will serve a written notice of default on Contractor specifying the nature of the default and the steps needed to correct the default. Unless Contractor cures the default within 10 days after the service of such notice, or satisfactory arrangements acceptable to City for the correction or elimination of such default are made, as determined by City, City may thereafter terminate this Contract by serving written notice on Contractor. In such case, Contractor will not be entitled to receive any further payment, except for Work actually completed prior to such termination in accordance with the provisions of the Contract Documents.

In event of any such termination, City will also immediately serve written notice of the termination upon Contractor's surety. The surety will have the right to take over and perform pursuant to this Contract; provided, however, that if the surety does not give City written notice of its intention to take over and perform this Contract within five days after service of the notice of termination or does not commence performance within 10 days from the date of such notice, City may take over the Work and prosecute the same to completion by contract or by any other

method it may deem advisable for the account and at the expense of Contractor. Contractor and the surety will be liable to City for any and all excess costs or other damages incurred by City in completing the Work.

If City takes over the Work as provided in this Section, City may, without liability for so doing, take possession of, and utilize in completing the Work, such materials, appliances, plant, and other property belonging to Contractor as may be on the site of the Work and necessary for the completion of the Work.

13. Substitution of Securities for Withheld Amounts: Pursuant to California Public Contracts Code Section 22300, securities may be substituted for any moneys withheld by a public agency to ensure performance under a contract. At the request and sole expense of the Contractor, securities equivalent to the amount withheld must be deposited with the public agency, or with a state or federally chartered bank as the escrow agent, who must pay such moneys to the Contractor upon satisfactory completion of the contract.

Securities eligible for substitution under this section must include those listed in the California Public Contracts Code Section 22300 or bank or savings and loan certificates of deposit. The Contractor must be the beneficial owner of any securities substituted for moneys withheld and must receive any interest thereon.

Alternatively, the Contractor may request and the City shall make payment of retentions earned directly to the escrow agent at the expense of the Contractor. At the expense of the Contractor, the Contractor may direct the investment of the payments into securities and the Contractor shall receive the interest earned on the investments upon the same terms provided for in Section 22300 for securities deposited by the Contractor. Upon satisfactory completion of the Contract, the Contractor shall receive from the escrow agent all securities, interest, and payments received by the escrow agent from the City, pursuant to the terms of this section.

Any escrow agreement entered into pursuant to this section must contain as a minimum the following provisions:

- a. The amount of securities to be deposited;
- b. The terms and conditions of conversion to cash in case of the default of the Contractor; and
- c. The termination of the escrow upon completion of the contract.

14. General Provisions

A Authority to Execute. Each Party represents and warrants that all necessary action has been taken by such Party to authorize the undersigned to execute this Contract and to bind it to the performance of its obligations.

Attachment 1

B. Assignment. Contractor may not assign this Contract without the prior written consent of City, which consent may be withheld in City's sole discretion since the experience and qualifications of Contractor were material considerations for this Contract.

C. Binding Effect. This Agreement is binding upon the heirs, executors, administrators, successors and permitted assigns of the Parties.

D. Integrated Contract. This Contract, including the Contract Documents, is the entire, complete, final and exclusive expression of the Parties with respect to the Work to be performed under this Contract and supersedes all other agreements or understandings, whether oral or written, between Contractor and City prior to the execution of this Contract.

E. Modification of Contract. No amendment to or modification of this Contract will be valid unless made in writing and approved by Contractor and by the City Council or City Manager, as applicable. The Parties agree that this requirement for written modifications cannot be waived and that any attempted waiver will be void.

F. Counterparts, Facsimile or other Electronic Signatures. This Contract may be executed in several counterparts, each of which will be deemed an original, and all of which, when taken together, constitute one and the same instrument. Amendments to this Contract will be considered executed when the signature of a party is delivered by facsimile or other electronic transmission. Such facsimile or other electronic signature will have the same effect as an original signature.

G. Waiver. Waiver by any Party of any term, condition, or covenant of this Contract will not constitute a waiver of any other term, condition, or covenant. Waiver by any Party of any breach of the provisions of this Contract will not constitute a waiver of any other provision, or a waiver of any subsequent breach or violation of any provision of this Contract. Acceptance by City of any Work performed by Contractor will not constitute a waiver of any of the provisions of this Contract.

H. Interpretation. This Contract will be interpreted, construed and governed according to the laws of the State of California. Each party has had the opportunity to review this Contract with legal counsel. The Contract will be construed simply, as a whole, and in accordance with its fair meaning. It will not be interpreted strictly for or against either party.

I. Severability. If any term, condition or covenant of this Contract is declared or determined by any court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Contract will not be affected and the Contract will be read and construed without the invalid, void or unenforceable provision.

J. Venue. In the event of litigation between the parties, venue in state trial courts will be in the County of Sonoma. In the event of litigation in a U.S. District Court, venue will be in the Northern District of California.

Attachment 1

IN WITNESS WHEREOF, the City of Rohnert Park has caused these presents to be executed by its officers, thereunto duly authorized, and Contractor has subscribed same, all on the day and year first above written.

CITY OF ROHNERT PARK

DESILVA GATES CONSTRUCTION

\_\_\_\_\_  
City Manager Date  
Per Resolution No. 2013-067 adopted by the Rohnert Park  
City Council at its meeting of April 9, 2013

\_\_\_\_\_  
Name/Title Date

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney