

April 3, 2017

Ms. Jennifer Dauer  
Diepenbrock Elkin Gleason LLP  
500 Capitol Mall, Suite 2200  
Sacramento, CA 95814

Dear Ms. Dauer,

**Subject:** Protest letter from Ms. Jennifer Dauer dated January 23, 2017  
**Reference:** 1) City of San Jose Request for Proposal RFP # 15-16-01  
2) City of San Jose Memorandum dated January 11, 2017: "Innovative LED Streetlight Replacement RFP"

The City of San Jose (City) received the subject protest letter dated January 23, 2017 submitted by Diepenbrock Elkin Gleason LLP on behalf of Philips Corporation regarding the City's RFP 15-16-01 for Innovative LED Streetlight Replacement. Please accept this letter as the City's decision to decline Philips' request to reject Siemens' proposal because it was non-responsive and over-scored; to reject Black & Veatch's proposal because it was over-scored; and award the contract to Philips as the only responsive proposal that was properly scored.

Background:

The proposal evaluation team was comprised of nine members with representation from the City Manager's Office, Real Estate, and the Departments of Finance, Information Technology, Transportation, and Public Works. Team members evaluated and scored proposal sections consistent with their professional expertise. Scoring was done individually, with team meeting follow-ups to discuss individual scores and agree on a final score for each scoring element. Each evaluator had to complete a conflict of interest and confidentiality statement prior to reviewing any proposal.

The proposal review and evaluation process is described in Section 12 of the RFP (Reference 1). The process took place over fifteen months and included a review of written proposals, oral interviews and presentations, a site visit, written clarifications, and two Best and Final Offers. Throughout this process, the proposals were scored and then re-scored (if required) as additional information was submitted, presented, or demonstrated to the evaluation team. The final scoring was very close, with only 3% separating the top ranked finalist Siemens with bottom ranked Philips.

Section 21.1 of the RFP states that Staff will make a final award recommendation to San Jose City Council (Council); the City may commence negotiations with one or more proposers; and the City reserves the right to negotiate project deliverables and negotiate costs.

On January 13, 2017, the City issued a Notice of Intended Award to all Phase 2 proposers, along with the staff report (Reference 2) recommending that the Council approve commencement of negotiations with top ranked Siemens for the conversion of approximately 39,285 LED luminaries with smart controllers, including a pilot installation of at least 1000 anyCOMM controller units, and other necessary testing and appropriate guarantees. The final agreement will be brought back to Council later for final approval and contract execution.

The Notice of Intended Award included the Phase 2 finalist scores for each evaluation criteria that was described in the RFP. In addition, scoring detail was included for each evaluation criteria along with a summary of the evaluator notes for each of the sub-criteria.

On January 23, 2017, the City received a protest on behalf of Philips protesting the recommendation of award of contract to Siemens.

### **Discussion - Siemens:**

The protest contends that the Siemens proposal was non-responsive to the Project Goals and Objectives as stated in the RFP, which should result in their automatic disqualification. Notwithstanding the issue of non-responsiveness, the protest further contends that Siemens' proposal was over-scored by the evaluation team in several areas because Siemens is not providing the controllers, the controllers are untested, and the recommended pilot to test the controllers might result in delays that might impact the RFP requirement to complete installation by December 2018.

A proposal must be responsive to the material requirements of the RFP. To waive a material requirement for one proposer may result in an unfair competitive process because all the participants are not being treated equally. The protest states that there were two material requirements of the RFP that were not met by Siemens:

- 1) The successful bidder had to provide both streetlights and the wireless control management systems. Award to Siemens will not result in the award of a single contract for both the streetlights and the controllers because Siemens proposed that the City negotiate a separate agreement with anyCOMM for the commissioning and warranty support of the controllers. Therefore, Siemens' proposal should be disqualified from consideration.
- 2) Due to the untested nature of the controllers and the City's recommendation to conduct a pilot for the initial 1000 units, Siemens will not be able to meet the City's requirement of completing installation of the streetlights and wireless control systems by December, 2018. This implementation deadline was a requirement of the RFP; therefore, Siemens' proposal must be disqualified.

*The successful bidder had to provide both streetlights and the wireless control management systems.*

The RFP did not require the award of a single contract. Instead, the RFP required that *proposals* had to include installation of streetlights and controller units (italics added). There was no requirement in the RFP that there could only be one agreement from a proposed solution. In addition, there are several sections in the RFP where the City discusses its right to make multiple awards (RFP Sections 13.1, 13.2, 13.3, 15.1, 21.1).

Siemens originally proposed a turnkey proposal where they were responsible for the installation and commissioning of the streetlights and controllers. In their first Best and Final Offer submission, they proposed a separate agreement with anyCOMM for the commissioning and warranty of the controllers proposing that a separate agreement would result in a more efficient controller commissioning process and lower the overall project cost by \$166,000. Siemens would still be responsible for the acquisition and installation of the streetlights and controllers. Under either scenario, Siemens' proposal met the RFP requirement of including the installation of streetlights and controller units. Finally, the City is under no obligation to accept the two agreement scenario and in fact is not recommending two agreements. Instead, Staff is recommending that the City negotiate a pilot agreement with Siemens "that include appropriate guarantees of anyComm's performance."

*Due to the untested nature of the controllers and the City's recommendation to conduct a pilot for the initial 1000 units, Siemens will not be able to meet the City's requirement of completing installation of the streetlights and wireless control systems by December 2018*

The RFP stated under Project Goals, Objective and Requirements that "successful proposer(s) will complete installation of all LED streetlights with wireless control and management by December 31, 2018." (RFP Section 2.1.3). In addition, the RFP stated that proposals that failed to meet this requirement would be disqualified from further consideration. The RFP, issued in August 2015, did not specify a contract start date, therefore, each proposer addressed this requirement by submitting a project plan that assumed a project start date based their best estimate of when the selection process and subsequent contract negotiations would conclude. The following table summarizes the project timeline for the finalists:

<b>Proposer</b>	<b>Assumed project start date</b>	<b>Project completion date</b>	<b>Elapsed time (in months)</b>
Black and Veatch	May 2016	January 2018	19 months
Philips	April 2016	December 2018	32 months
Siemens	December 2016	December 2018	24 months

When the evaluation team evaluated the project completion requirement, they considered each project plan including the reasonableness of any assumptions made by the proposers, and concluded that each proposer met the requirement. While the December 2018 requirement to complete the project may have been a reasonable target at the time the RFP was written, the evaluation team could not foresee how long it would take to complete the proposal evaluation and contract negotiation process. Realistically, the project will start no earlier than July 1, 2017, which means Black and Veatch, who proposed the shortest project timeline of 19 months, would complete the project in February, 2019.

In addressing the December 2018 project completion requirement, each proposal made reasonable assumptions about when the project would start, and presented project plans in sufficient detail to be considered responsive to this requirement.

The protest raises further concerns that Siemens *appears* unlikely (italics added) to meet the December 2018 installation deadline because the robust feature set of the anyCOMM controllers are untested, prompting the City to negotiate with Siemens for a pilot phase for at least 1000 controller units with necessary testing and appropriate guarantees. Notwithstanding that none of the proposers can meet the December 2018 completion date based on their timelines as discussed above, any impact to the overall project timeline will not be known until the pilot agreement is negotiated and the pilot is complete.

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The RFP allows the City to negotiate project deliverables and associated costs with the recommended proposer.

*Siemens' proposal was over-scored in several areas, primarily having to do with the controller unit and project timeline.*

The protest makes numerous claims of excessive scoring by the evaluation team of Siemens proposal. Over-scoring is questioned in several areas including; “modernity of technology”, “user friendly city”, “safe city,” “inclusive city,” “other benefits,” “speed to deployment,” and “increased clutter.” The basis for over-scoring falls into two general categories:

- 1) The controllers will be purchased directly from anyCOMM, therefore Siemens should not receive any credit for their features and functionality. In addition, Siemens is shifting all associated risk to anyCOMM with the recommendation of separate agreements with Siemens and anyCOMM.
- 2) Siemens received credit for controller features that are untested and unsubstantiated. The City did not request a demonstration of the controllers during the evaluation process, and anyCOMM has not been able to install controllers in any substantial quantity on a separate demonstration partnership agreement they had with the City.

As discussed earlier, the RFP required that proposals address the installation of both streetlights and controllers. The pilot agreement with Siemens will address all claims made in their proposal, with the appropriate assignment of risk and guarantees.

Siemens was scored lower in areas related to untested and unsubstantiated features. Specifically, Siemens scored the lowest in the evaluation categories of “stability and reliability” (10/20 points), “expertise in deploying any other solutions that might be proposed as part of the proposal” (5/20 points) and “reference check responses” (6/10 points).

As documented in Attachment A of the Council Memorandum (Reference 2), the evaluation team did conduct a site visit to anyCOMM on August 26, 2016. The purpose of this visit was to tour anyCOMM’s manufacturing facility and receive product demonstrations. The results of the demonstration and site visit were factored into Siemens’ scores.

#### **Discussion – Black and Veatch (B&V):**

The protest contends that the B&V proposal was over-scored in three out of 27 criteria that were scored (excluding the City’s Local and Small Business Preference). Specifically, B&V was over-scored for “total proposal valuation”, “generate revenue from a single source”, and “user friendly city”. In each instance, the evaluation team’s summary comments regarding the strengths and weaknesses of each proposal are acknowledged and not refuted. However, the protest contends that the evaluation team got it wrong and improperly rewarded B&V with excessive scores. The basis for the over scoring falls into two categories:

- 1) B&V did not propose revenue guarantees and revenues will come from separate contracts with B&V partners instead of a single contract with B&V.

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- 2) B&V was given “credit” for features that will not be provided under a contract with B&V and can be procured from other sources through separate competitive purchases.

As stated above, the evaluation team acknowledged each of these concerns in the evaluation summary. While none of the proposers proposed a 100% revenue guarantee, B&V did propose a greater number of revenue sources than the other two proposals. That some of these sources of revenue can be procured separately is not disputed, however, B&V submitted a proposal responding to a very competitive Request for Proposal which is far different from a single or sole source scenario that you describe. Staff further reports that these risks might be mitigated by pursuing guarantees through the contract negotiation process.

### **Conclusion**

The City thoroughly and fairly evaluated and scored all proposals against the criteria set forth in the RFP. Allegations that Siemens’ proposal was not responsive were not substantiated. For each evaluation criteria, the City was transparent in providing scoring detail that openly discusses the strengths and weaknesses of each proposal. Every issue that was raised to support allegations of over scoring was already raised by the evaluation team who reached a different conclusion. Risks for each proposal were described, with recommendations on how such risks might be mitigated during the negotiation and contract process. The recommended pilot agreement with Siemens will address these risks and demonstrate the production readiness and robust features of the controller. If the City cannot conclude negotiations with Siemens or if the pilot is not successful, then Staff will return to Council with an alternate recommendation.

After careful review, I have determined that the City’s RFP process was followed, Siemens’ proposal was responsive, and there is no evidence to support allegations that there was any oversight or negligence on the part of the evaluation team that resulted in over-scoring of either Siemens’ or B&V’s proposal.

You may appeal this decision to the San Jose City Council by filing a written appeal with the City Clerk within ten calendar days from the date of this letter.

Sincerely,

Mark Giovannetti  
Deputy Director, Department of Finance