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CITY MANAGER'S OFFICE
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SEP 13 1989

DEPARTMENT OF
GENERAL SERVICES

OFFICE OF THE DIRECTOR

CITY OF SACRAMENTO
CALIFORNIA

September 12, 1989
SS:Admin:FM:SA:hh

5730 - 24TH STREET
BUILDING FOUR
SACRAMENTO, CA
95822-3699

916-449-5548

APPROVED
BY THE CITY COUNCIL

DIVISIONS:

City Council
Sacramento, California

SEP 19 1989

COMMUNICATIONS
FACILITY MANAGEMENT
FLEET MANAGEMENT
PROCUREMENT SERVICES

Honorable Members in Session:

OFFICE OF THE
CITY CLERK

SUBJECT: RECOMMENDATION OF BID AWARD FOR COMMODITIES AND/OR SERVICES

SUMMARY

Attached is a tabulation of sealed proposals received by the City Clerk for furnishing material in accordance with specifications adopted by the City Council.

FINANCIAL DATA

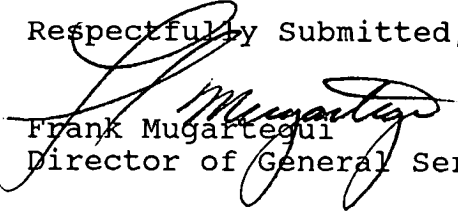
Available Balance

Bid No. 1343: 415-500-YA06-4820 \$3,500,143.35

RECOMMENDATION

It is recommended that, in the City's best interest, the City Council accept the lowest responsive and responsible proposal submitted as follows:

<u>Bid No.</u>	<u>Bidder</u>	<u>Items Awarded</u>	<u>Contract Amount</u>
1343 - Clay Cap Material For City Land- fill (Attachment #1)	Don Manley & Sons 9340 Gerber Road Sacramento, CA 95829	All	\$1,434,733.98

Respectfully Submitted,

Frank Mugardegui
Director of General Services

Recommendation Approved:


Walter J. Slipe
City Manager
1 Attachment

September 19, 1989
All Districts

ATTACHMENT #1

BID NO. 1343 - CLAY CAP MATERIAL FOR CITY LANDFILL

<u>Bidder</u>	<u>Bid Total</u>	<u>Payment Terms</u>	<u>Net Bid</u>
John Nicolici and Paul Nicolici	\$2,259,963.00	Net	\$2,259,963.00
Don Manley & Sons Trucking	\$1,843,573.50* =====	1.5%-30 days	\$1,815,919.90* =====
North American Refractories Co.	\$2,542,860.00	N/A	\$2,542,860.00
Syblon-Reid Co.	\$1,945,701.00	Net	\$1,945,701.00
Yuba Trucking Inc.	\$1,889,473.50	Net	\$1,889,473.50

Total Award of Contract To: Don Manley & Sons Trucking
 9340 Gerber Road
 Sacramento, CA 95829

Total Amount of Contract: \$1,434,733.97*

Original Estimated Cost: \$1,160,000.00

User: City Landfill

Due Date: August 15, 1989

*Clay material being supplied weighs less than originally forecast, thus allowing a reduction in tonage required to obtain the same coverage.

Total No. of Bids Solicited	No. of M/WBE Bids Solicited	No. of M/WBE Responses	Award to M/WBE Vendor?
22	2	0	No

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CITY CLERKS OFFICE
CITY OF SACRAMENTO
SEP 19 4 15 PM '89

LAW OFFICES OF
DE LA VERGNE & McMURTRY
A PROFESSIONAL CORPORATION
1730 I STREET, SUITE 260
SACRAMENTO, CALIFORNIA 95814-3017
(916) 441-1978
TELECOPIER (916) 446-8053

PLEASE REFER TO
89-2801
OUR FILE NO.
WP50\KH\LTR154.DWM

September 19, 1989

City Council
CITY OF SACRAMENTO
915 I Street
Sacramento, CA 95814

Re: Protest of Proposed Bid Award to
Don Manley & Sons Trucking (Item 27)

Members In Session:

This firm represents Yuba Trucking, Inc., the second lowest bidder for the bid package titled "Clay Cap Material for City Landfill." The Director of General Services has recommended that the bid be awarded to Don Manley & Sons Trucking, the low bidder.

It is our client's position that Don Manley & Sons Trucking is not the lowest responsible bidder because that firm does not possess a contractor's license authorizing it to do the work required by the bid specifications. In addition, our client believes that the award of the bid to any of the bidders without the requirement of a payment (labor and materials) bond clearly violates Section 3247 of the California Mechanic's Lien Law and may place the City in financial jeopardy if the contractor defaults. Finally, the award of the contract in its present form may violate various provisions of the California Labor Code.

Nature of Proposed Bid Award

The Procurement Services Division has described the bid as a contract for materials rather than a public works contract. The bid specifications require the contractor to acquire and deliver to the City Landfill at 28th and A street approximately 306,000 tons of clay cap material. The clay cap material is to be placed by the contractor throughout the eastern portion of the landfill at stockpile sites designated by City staff. If the contractor uses a belly dump truck (as opposed to an end dump truck) it must also provide a crawler tractor and operator to service the stockpiles of clay cap. The clay material will be used by City employees to put a cap on the eastern portion of the landfill. The contractor is not responsible for spreading, grading or compacting the clay cap.

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The bid specifications require the transportation costs and clay cap material costs to be separately stated by each bidder. The lowest two bidders indicated that approximately 80 percent of their unit prices were for transportation costs and 20 percent were for material costs. The bid documents do not expressly require the contractor to possess an appropriate contractor's license issued by the State of California. In addition, the bid documents do not require the contractor to provide the City with a payment bond. Finally, the bid documents do not expressly provide for the payment of prevailing wages by the contractor. The work is to be completed by August 31, 1990.

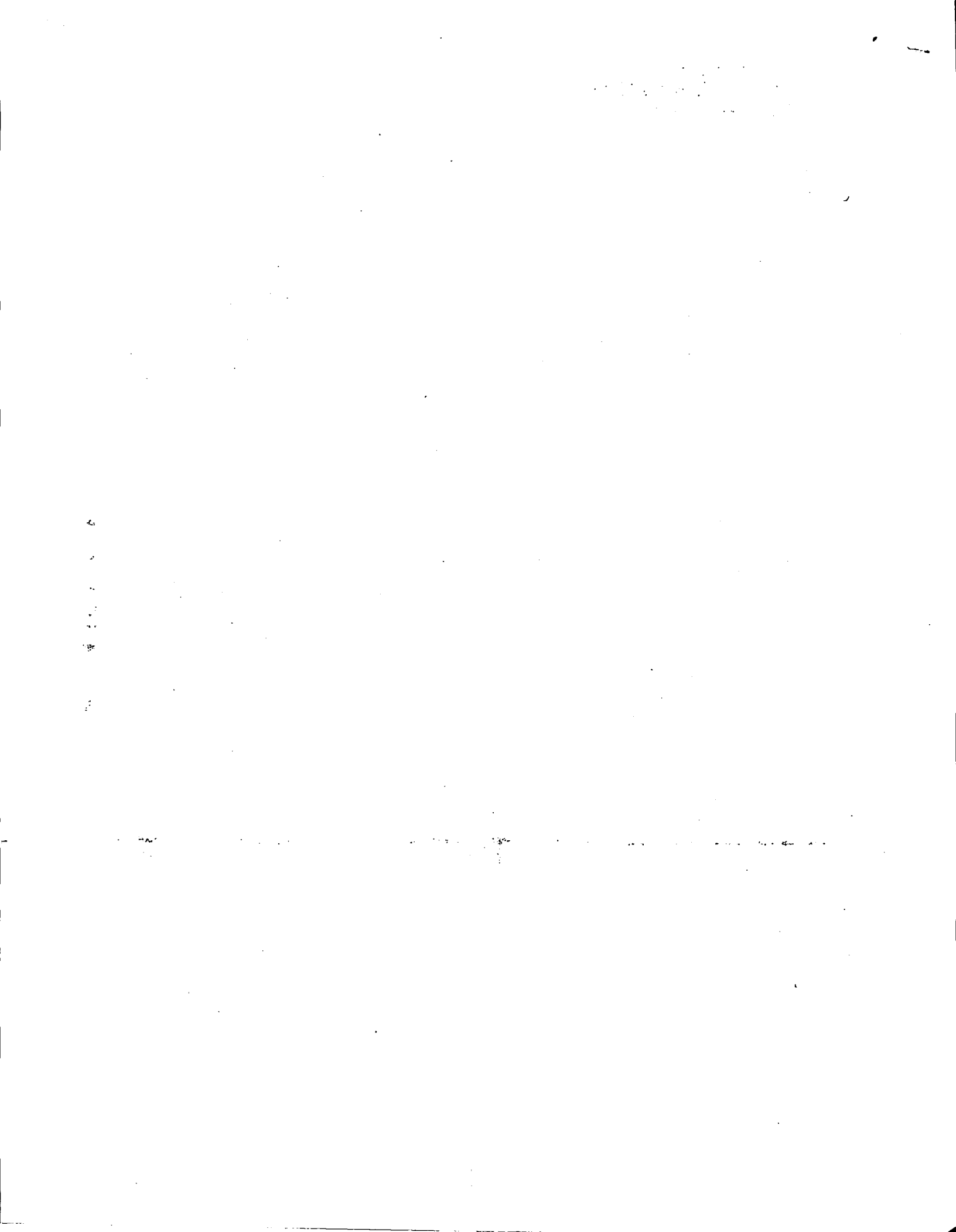
Don Manley & Sons Trucking Is Not
the Lowest Responsible Bidder

The bid documents require the contractor to possess all licenses required by law to deliver the clay cap to the City landfill. We contacted the Contractors State License Board on September 18, 1989 and were informed that Don Manley and Sons Trucking does not hold any contractors license. A 1959 decision of the California Court of Appeals held that a trucking contractor transporting fill material from a quarry to the site of a freeway was a "contractor" for purposes of the Contractor's Licensing Law even though it did nothing more than deposit the materials at the job site. Leonard v. Hemreck 168 C.A.2d 142 (1959). We believe that it is evident that a low bidder who fails to possess a state license required for the performance of the contract cannot under any circumstance be determined to be the lowest responsible bidder. The very act of entering into a contract under such circumstances is a misdemeanor. (Business and Commercial Code Section 7028).

Accordingly, the City Council should reject the bid of Don Manley & Sons Trucking and award the bid to the next lowest bidder possessing the requisite state contractor's license. Our client, Yuba Trucking, Inc. possesses a valid C-12 Earthwork and Paving Contractor's license.

The Contractor Should Be
Required To Provide a Payment Bond

Although the Procurement Division has characterized this contract as a bid for materials rather than a public works contract, we believe that such a characterization is legally incorrect and places the City in a position of substantial risk.



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Section 3247 of the Mechanic's Lien Law requires an "original contractor" who is awarded a contract in excess of \$10,000 to provide the City with a payment bond (i.e. labor and materials bond) to ensure that all laborers and parties providing materials to contractor are paid. If the City fails to do so, the contract is void (38 California Attorney General's Opinions 143) and the City may be responsible for payment of all claims filed by unpaid laborers and materialmen. Magistretti Co. v. Merced Irrigation District (1972) 27. C.A.3d 270.

Although a party who only provides materials for a work of improvement (i.e. a "materialman") is not required to provide a payment bond, the California courts have found that minimal work by the contractor at a job site will convert what is otherwise a material contract into a construction contract requiring a payment bond (63 California Attorney General's Opinion 501).

We believe that the decision in Leonard v. Hemreck cited above clearly indicates that the bidder selected by the City will be engaged as a "original contractor" for a public works project and must, as a matter of law, provide the City with a payment bond. The failure of the City to require such a bond for a major project of this nature would place the City in a position of undue risk for no viable reason.

Potential Violation of Labor Code

In passing, it should also be noted that mischaracterization of the contract as a materials contract rather than a public works contract may result in the inadvertent violation by the City of various provisions of the California Labor Code relating to the payment of prevailing wages on public works contracts. In O.G. Sansome Co. v. Department of Transportation (1976) 55 C.A.3d 534, the California Court of Appeals held that trucking companies engaged to haul fill material to a job site were contractors rather than materialmen and were subject to the prevailing wage requirements of the Labor Code applicable to public works contracts. It should be noted that any officer or employee of the City who fails to comply with the prevailing wage requirements of the Labor Code may be guilty of a misdemeanor.

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Conclusion

On behalf of our client we respectfully request the staff recommendation be denied and that the contract be awarded to next lowest responsible bidder. We also recommend any party to whom the bid is awarded by required to comply with the payment bond requirements of the Mechanic's Lien Law and the prevailing wage requirement of the Labor Code.

Very truly yours,

Law Offices of
de la VERGNE & McMURTRY
A PROFESSIONAL CORPORATION

By: David W. McMurry
DAVID W. McMURTRY

DWM:kh

cc: Gene Hume, Esq.
Mr. Michael Lindeman

