

December 13, 2022

Michael Thompson
The Boring Company

[REDACTED]
Bastrop, Texas 78602
[REDACTED]

SUBJECT: DOT 10183: Design-Build-Finance-Operate-Maintain: SJC Airport to Diridon Station Connector Request for Proposals

Dear Mr. Thompson,

On November 8, 2022, the City of San José (“City”) accepted Proposals for the SJC Airport to Diridon Station Connector (“Airport Connector”) Project. After carefully reviewing the Proposals for Responsiveness and Responsibility according to Section 7.2 of the RFP, the City has determined that The Boring Company’s Proposal is not responsive and is therefore disqualified from further consideration.

Reason for Determination:

Section 7.2.1(1) of the Airport Connector Project Request for Proposals (“RFP”) specifies that the City may deem a Proposal non-responsive and disqualify it from further consideration if “[the Proposal] does not fully comply with any instructions or requirements contained in this RFP, including the appendices and forms, including where any part of the Proposal is missing from the Proposal package.” The Proposal submitted by The Boring Company contained missing and incomplete elements, as well as elements that failed to fully comply with the instructions and requirements contained in the RFP.

Analysis:

I. Financial Capacity and Experience Requirements.

The Boring Company submitted a Proposal that failed to include all of the Financial Capacity and Experience information required by the RFP.

The Boring Company (“TBC”) failed to provide in its Proposal two required financial submittal elements:

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- Financial statements for the last three fiscal years (per RFP Section 7.4.1(3)(a)); and
- TM Form E (Financial Summary Certification) (per RFP Section 7.4.1(3)(a))

In addition, The Boring Company failed to submit a Funding Letter that included all of the material elements required by Appendix C, Table C-2, Tab 3.4 of the RFP. Specifically, the Funding Letter submitted by The Boring Company did not provide details regarding where and how The Boring Company's first-loss at-risk capital (assumed to be \$150 million) will be sourced and a description of how competing allocation and capacity issues are considered between several project opportunities that The Boring Company might be pursuing simultaneously.

The Boring Company was provided an opportunity to correct the deficiency by submitting the missing Financial Capacity and experience elements and declined to do so.

On November 30, 2022, the City sent a letter to The Boring Company entitled "Requests for Clarification: DOT 10183: Design-Build-Finance-Operate-Maintain: SJC Airport to Diridon Station Connector Request for Proposals ("RFP")." The letter requested that The Boring Company correct the deficiencies in their Proposal by submitting the missing financial statements and TM Form E and re-submitting a compliant Funding Letter. On December 5, 2022, The Boring Company provided the following response to the City's request:

"For privacy reasons, TBC is unable to provide the requested financial documents. For this reason, TBC furnished letters of financial standing to express its current financial condition. However, TBC is open to considering other methods of information sharing to address questions associated with this RFP."

The Boring Company's response is inadequate on multiple grounds:

1. The "letter of financial standing" provided by The Boring Company is insufficient to fulfill the requirements of the RFP. That is, The Boring Company has not simply provided the same information required by the City in a different format.
2. Public competitive bidding requires that all vendors be held to the same standards. Allowing The Boring Company to fulfill the RFP's financial submittal requirements through some "other" (undisclosed) method not provided to other vendors would not be consistent with the City's commitment to running a fair, competitive and transparent procurement process.
3. Section 4.4 of the RFP contains language advising potential Proposers about exceptions to the California Public Records Act's disclosure requirements, including those for confidential, trade secret, and proprietary information. In

addition, California Public Code Section 20101 states that financial statements submitted to a public entity in connection with a public works procurement “shall not be public records and shall not be open to public inspection.”

The Financial Capacity and Experience deficiencies in The Boring Company’s Proposal cannot be waived.

While the City reserves the right to waive minor informalities, irregularities, and apparent clerical mistakes in the Proposals, the financial submittal requirements contained in the RFP are material to the City’s evaluation and eventual selection of a partner to deliver the Airport Connector Project on a long-term, market risk revenue design-build-finance-operate-maintain basis. A Proposer’s financial status and history get to the very heart of a Proposer’s ability to do just that.

II. Technical Experience Requirements.

The Boring Company presented projects in form TM Form D that do not meet the submittal requirements in their totality.

Section 7.4.1(2) of the RFP requires Proposers to submit a minimum of four reference projects that demonstrate their prior experience with projects with a total project cost at the time of award or completion is at least \$40 million in June 30, 2022 dollars. Of the four projects submitted by The Boring Company, one (Las Vegas Convention Center Loop) had an unspecified cost and two (Resorts World-LVCC Connector and Hawthorne Tunnel) had costs that fell below the \$40 million threshold. Only the Vegas Loop project meets the required \$40 million threshold.

The Boring Company was provided an opportunity to clarify whether or not their submitted projects met the City’s experience requirements and were unable to do so.

The City’s November 30, 2022 letter requested that The Boring Company correct the deficiencies in their Proposal by clarifying how their submitted projects met the City’s experience requirements. The Boring Company’s response, received on December 5, 2022, failed to demonstrate that the projects in question met the requirements stated in the RFP.

The Technical Experience deficiencies in The Boring Company’s Proposal cannot be waived.

As previously stated, the City reserves the right to waive minor informalities, irregularities, and apparent clerical mistakes in the Proposals. However, the City considers project experience requirements to be substantive content and City practice is to never waive a Proposer’s failure to comply with such requirements.

III. Development Team and Project Delivery Experience Requirements.

The Boring Company submitted projects in form TM Form B that do not meet the RFP's submittal requirements in their totality.

Section 7.4.1(1) of the RFP requires Proposers to submit a minimum of two reference projects that demonstrate their prior experience with projects where the total amount financed (or required to be financed) at financial close was at least \$40 million in June 30, 2022 dollars. Of the four projects submitted by The Boring Company, one (Las Vegas Convention Center Loop) had an unspecified cost and two (Resorts World-LVCC Connector and Hawthorne Tunnel) had costs that fell below the \$40 million threshold. Only the Vegas Loop project meets the required \$40 million threshold.

In addition, at least one of the submitted projects must be one in which the Proposer's controlling Equity Member made a first loss at risk capital contribution into the ultimate special-purpose vehicle/project company of more than 5 percent and retains or has retained its investment position for more than 5 years from the project's Substantial Completion. Of the four projects submitted by The Boring Company, one (Hawthorne Tunnel) had an unspecified Substantial Completion date, one (Resorts World-LVCC Connector) was completed in 2022, one (LVCC Loop was completed in May 2021), and one (Vegas Loop) is 10% complete. As such, The Boring Company could not demonstrate that it has retained its investment position for more than 5 years for any of the projects presented.

The Boring Company was provided an opportunity to clarify whether or not their submitted projects met the City's experience requirements and were unable to do so.

The City's November 30, 2022 letter requested that The Boring Company correct the deficiencies in their Proposal by clarifying how their submitted projects met the City's experience requirements. The Boring Company's response, received on December 5, 2022, failed to demonstrate that the projects in question met the requirements stated in the RFP.

The Development Team and Project Delivery Experience deficiencies in The Boring Company's Proposal cannot be waived.

As previously stated, the City reserves the right to waive minor informalities, irregularities, and apparent clerical mistakes in the Proposals. However, the City considers project experience requirements to be substantive content and City practice is to never waive a Proposer's failure to comply with such requirements.

IV. Managing and Partnering Approach Requirements.

The Boring Company submitted a PDA Phase 1 Schedule that does not meet the RFP's submittal requirements in their totality.

Appendix C, Table C-3, Tab 3.3 of the RFP requires Proposers to provide a schedule addressing the performance milestones set out in Exhibit 3 of Appendix D of the RFP, including the submittal of a draft feasibility report 120 days from Notice to Proceed (NTP). The Boring Company's schedule listed the draft feasibility report at 132 days from NTP. Similarly, The Boring Company's schedule listed a Final Feasibility Validation Report & Final Outline Project Plan, which the RFP required be submitted at 210 days from NTP, was listed at 216 days in The Boring Company's Proposal. Finally, The Boring Company's schedule listed the Technical Feasibility Assessment (Concept Design) & Financial Feasibility Assessment Progress Memo at 84 days from NTP, where the RFP required it to be within 75 days.

The Boring Company was provided an opportunity to provide the City with a compliant PDA Phase 1 Schedule and failed to do so.

The City's November 30, 2022 letter requested that The Boring Company correct the deficiencies in their Proposal by providing a PDA Phase 1 Schedule that complied with the requirements of the RFP. The Boring Company responded by providing a revised PDA Phase 1 Schedule that still showed a Technical Feasibility Assessment (Concept Design) & Financial Feasibility Assessment Progress Memo at 84 days from NTP, contrary to the RFP requirements that it be provided within 75 days of NTP.

The PDA Phase 1 Schedule deficiencies in The Boring Company's Proposal cannot be waived.

As previously stated, the City reserves the right to waive minor informalities, irregularities, and apparent clerical mistakes in the Proposals. However, the City considers the Proposer's PDA Phase 1 Schedule to be substantive content that cannot be waived.


Given that The Boring Company's Proposal did not fully comply with the requirements contained in the RFP, its Proposal is non-responsive and will not be further evaluated.

The City of San José appreciates your interest and effort in preparing and submitting a Proposal for this project. If you have any questions about the procurement process or the City's decision, please contact the procurement manager listed below.

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Lauren Profeit
CIP Procurement Manager
City of San Jose


San José, CA 95112
