

Law Office of David B. Abel



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August 4, 2015

COUNCIL MEMBER PAUL KORETZ, CHAIR
COUNCIL MEMBER DAVID E. RYU
COUNCIL MEMBER MARQUEECE HARRIS – DAWSON
Adam Lid - Legislative Assistant

Dear Council members and Legislative Assistant Lid:

This letter is provided on behalf of Avid Identification Systems, Inc. (“Avid”), concerning the notification of the council meeting to be held on August 5, 2015 at 9:00 A.M. concerning the RFP from the City of Los Angeles for microchipping of companion animals adopted from City shelters. Avid has been a supplier of microchips to the City for about 20 years, and Avid timely provided a proposal responsive to the requirements posted in the RFP. Another respondent, Found Animals Foundation, also submitted a proposal, however, it was not responsive and Found Animals Foundation was allowed to submit an alternative offer. This letter is provided on behalf of Avid to identify Avid’s concerns with respect to the Found Animals Foundation proposal and recent offer and the process for awarding the contract, and preserve Avid’s rights to appeal the award, if necessary.

With respect to the most recent offer from Found Animals Foundation to provide free transponders, Avid respectfully directs the attention of the city to the Cal.Bus. & Prof.Code § 17043 which prohibits the sale, within the state, of any product at less than the product's cost for the purpose of injuring competitors or destroying competition. Similarly, Cal.Bus. & Prof. Code § 17044 prohibits the use of a "loss leader." Cal.Bus. & Prof.Code § 17030 defines a "loss leader" in part as: "any article or product sold at less than cost: (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; ... (c) Where the effect is to divert trade from or otherwise injure competitors." In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186 [83 Cal.Rptr.2d 548, 973 P.2d 527], the California Supreme Court held that the term “purpose” in §17043 means: “that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition.” *Cel-Tech* also held that the “purpose” element of §17043 also applies to §17044. In addition, *Cel-Tech* held that even though the “purpose” limitation was not met, there may still be a claim for violation of §17205.

Found Animal’s proposal to provide free transponders arguably violates both §17043 and §17044 as well as §17205. Providing the transponders for free is below Found Animals Foundation’s cost since they are buying the transponders from a vendor, such as Datamars, which does not give its transponders away. Found Animal is making the offer because it cannot be awarded the contract on the terms of the RFP, both because it does not satisfy the requirements of the RFP and because it seeks to use the registration data, including pet owners personal data, for commercial purposes which is prohibited by the City and by the State of California. Providing the transponders for free to persuade the City to abandon the requirement of the RFP concerning the prohibition against using the data for commercial purposes would itself be a violation of the California Unfair Competition laws as the other legitimate bidders

who actually meet the RFP requirements were not provided an opportunity to compete in the same manner. Also, giving away transponders at below cost to take the business from Avid or another bidder with the intent to try and recoup the costs of sales via commercial sales activities that the City prohibits would not seem to be a viable defense to the assertion that the purpose of giving away the transponders was to exclude Avid and other bidders, applying the logic of *Cel-Tech* where cell phones were being offered at below cost (but not free) for the purpose of increasing sales of data plans by a company specifically authorized to sell data plans.

Avid also notes that one requirement of the original RFP is that the bidder must have 5 years of recent experience serving “government organizations the size of Los Angeles.” See RFP §V(C). The “size of Los Angeles” is defined as “nearly 4 million people and almost 500 square miles.” See RFP §I. Only Avid can satisfy that requirement because it has a history of serving the City of Los Angeles, as well as, for example, the city of Hong Kong, and indeed the entire Special Administrative Region of Hong Kong. Avid has been serving Hong Kong and Los Angeles for about 20 years. During that period of time Avid has shipped over 475 readers to the city of Los Angeles. Many of these readers have been upgraded over the years and additionally Avid has performed hundreds of repairs as needed by the City. Avid has been very diligent in supporting the needs of the City and has practiced the policy of repairing or replacing as many readers as the City requires.

Over the last 25 years Avid has responded to many RFPs throughout the United States. Avid has been fortunate and grateful for the many contract awards it has obtained and it has operated in a way to justify the trust extended to it by various government agencies. Avid has always given deference to the bidding and contracting process and respect to our competitors. The course this recent RFP has taken is outside any of Avid’s past experiences and Avid therefore seeks to preserve its rights concerning the events leading to this point and the City’s respective RFP policies and procedures for awarding contracts. Avid further respectfully submits that since the City has a municipal code requirement (section 53. 15.5), see RFP §1, to implant dogs and cats, taking any action that could possibly interrupt the continuity of the implanting program would be imprudent and it should either extend the present contract or update the RFP requirements and properly award a new contract to an entity that meets all of the RFP requirements.

Sincerely:

/s/ David B. Abel

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