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March 21, 2016

Via Email and Federal Express
(pgonda@sunnyvale.ca.gov)

Pete Gonda
Purchasing Officer
Purchasing Division
City Hall Annex
650 West Olive Avenue
Sunnyvale, CA 94086

Re: Primary Treatment Facility Package 1
DeSilva Gates Construction, LP/Mountain Cascade, Inc. JV's
Response to Bid Protest of Anderson Pacific Engineering
Construction, Inc.

Dear Mr. Gonda:

This firm represents the DeSilva Gates Construction, L.P. ("DGC")-Mountain Cascade, Inc. ("MCI") joint venture ("JV"), which is the low bidder for the primary Treatment Facility Package 1 ("Project") for the City of Sunnyvale ("City"). On March 16, 2016, Anderson Pacific Engineering Construction, Inc. ("Anderson Pacific"), the second low bidder, submitted a bid protest. For the reasons set forth below, the bid protest fails, and the contract should be awarded to the JV, the lowest responsible and responsive bidder.

A. The JV's Bid Was Properly Considered.

Anderson Pacific's allegation that the JV's bid can not be considered by the City on the ground that the JV purportedly did not meet the minimum safety requirements set forth in the City's Invitation for Bids ("IFB") is incorrect.

In Part D: CONTRACTOR'S SAFETY RECORD, the IFB provides: "For a Bidder's bid to be considered, the Bidder shall each meet at least two of the three minimum safety standards as specified herein." (IFB, Section 00460-11; emphasis added.) Here, the "Bidder" is the JV, not DGC or MCI, individually.

Similarly, the Experience Modification Rate form, for example, states that

"To qualify, you must not have a three-year average Workers' Compensation Experience Modification Rate less than or equal to the value specified.

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This form shall be submitted by the primary contractor.”

(IFB, Section 04600-13; see also Recordable Incident Rate and Lost Time Incident Rate forms, which use identical language (Section 04600-14 to 04600-15); emphasis added.)

“You” and the “primary contractor” is the “Bidder,” here, the JV. Further proof is that the JV has the operative contractor’s license, not DGC or MCI, individually.

Based on an analysis of the Bidder’s statistics (not DGC or MCI’s statistics, individually) it is clear that the JV meets the specification requirement of meeting at least two of the three minimum safety standards:

Category	The Requirement (= or <)	DGC	MCI	Bidder (the JV)
EMR	1.0	.74	.997	.8685
RIR	3.4	2.43	3.96	3.195
LTIR	.90	.87	.99	.93

As shown, by averaging the EMR, RIR and LTIR numbers for DGC and MCI, the Bidder meets two of the three safety standards, as required: the EMR at .8685 and the RIR at 3.195. Likewise, if we add together the raw data of each JV partner and do the RIR calculation and the LTIR calculation for the Bidder, the joint venture has a three-year average RIR of 3.01 (2013-3.20; 2014-3.25; 2015-2.58) and an LTIR of .094 (2013-1.34; 2014-0.46; 2015-1.03). Since its three- year average EMR (see chart) is lower than 1.0 and its RIR (see chart and as calculated with raw data) is less than 3.4, the Bidder meets two of the three safety standards. Since the Bidder met two of the three the safety standards, the JV’s bid was properly considered.

B. The JV’s Bid Was Responsive.

An agency must determine whether a bid is responsive to the call of bids, that is, whether the bid promises to do what the bidding instructions demand. (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 764.) Usually, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1342.)

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“A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations] However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential.” (*Ghillotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904, quoting 47 Ops.Cal.Atty.Gen. 129, 130 (1966)). Indeed, the public agency has “inherent discretionary power” to disregard minor or insubstantial variations from bid specifications. (*Taylor Bus Service, supra*, 195 Cal.App.3d at 1342.)

A deviating bid must be set aside only “if the deviation is capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders.” (*Ghillotti, supra*, 45 Cal.App.4th at 908.) “These considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case. ***They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder.***” (*Id.* at 908–909, emphasis added.)

“Whether in any given case a bid varies substantially or only inconsequentially from the call for bids is a question of fact.” (47 Ops.Cal.Atty.Gen., *supra*, at p. 131.) The factual issue to be resolved is whether the variation resulted in an unfair competitive advantage in the bidding process.” (*Ghillotti, supra*, 45 Cal.App.4th at 906.) “Waiver of an irregularity in a bid should only be allowed if it would ***not*** give the bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond. [Citation.]” (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1444, citing *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1178–1181; emp. added.)

Here, Section 00460, Certification of Bidder’s Experience and Qualifications, Paragraph 8.4.b provides:

For the Owner to consider the Bidder properly experienced in work of similar nature to this project, the Bidder must list at least \$50 million in construction volume on no more than seven (7) and not less than three (3) projects completed within the last five (5) years at industrial, commercial, or public works facilities or transportation projects. The Bidder must list ***only*** projects of the following types:

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1. Earthmoving and fill
2. Site preparation involving major earthmoving and fill
3. Highway involving earth moving (paving component is not to be included in the \$ value).

(IBF Section 004600-2 to 04600-3; emphasis added.)

For this joint venture, JV participant DGC is an earthmoving and fill contractor, and JV participant MCI is a pipe contractor. Accordingly, DGC listed its project experience regarding earthmoving and fill, as required. On the other hand, since it is not an earthmoving company and will not perform that function on this Project, MCI did not fill out the earthmoving section of the specifications. The fact that MCI did not fill out this section of the specifications is not in the nature of a typographical or arithmetical error; but rather a mistaken submission of a bid. That is, MCI determined that since DGC, and not MCI, will be performing earthmoving, it did not need to fill out this section of the bid. As a question of judgment (versus a typographical/mathematical error), the JV bidder could not seek relief under Public Contract Code 5103. Indeed, MCI followed the instructions. It did not list any earthmoving and fill projects since it has no projects which meet the experience criteria -- "The Bidder must list *only* projects of the following types: 1. Earthmoving and fill; 2. Site preparation involving major earthmoving and fill; and 3. Highway involving earthmoving (paving component is not to be included in the \$ value). In short, the "mistake" either was not a mistake at all or was not a mistake that would qualify for relief under Public Contract Code 5103. Since the JV bidder could not seek relief from its bid, the variation of MCI not filling in earthmoving experience did not result in an unfair advantage over other bidders. Accordingly, based on the legal authorities discussed herein, the City is free to disregard this minor or insubstantial variation from the bid specification. The fact that MCI did not fill out the section of the bid regarding earthmoving projects is at most, a minor deviation since during the Project, DGC will perform the earthmoving and DGC did fill out this section. MCI will provide and install pipe, and since the IBF did not call for MCI to list its prior pipe projects, it did not do so.

Importantly, while Paragraph 8.4.b provides that "...each participant in the Joint Venture shall meet this prior project experience requirement...", it further expressly provides that "...*the Owner reserves the right to accept a bidder's qualifications that do not meet the experience requirements listed above.*" (Emphasis added.) In short, Anderson Pacific is asking the City to exercise its discretion and determine that the JV Bid is nonresponsive, even though the low Bidder, as an entity, has clearly established its experience in performing highway projects involving major earthmoving and fill components. If the City so exercises its discretion and rejects the JV bid, the City and the public will be required to pay more for the Contract. Under *Ghilotti*, the facts should be analyzed in light of the public interest, not the private interest of a

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disappointed bidder, here, Anderson Pacific. “It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.” (45 Cal.App.4th at 908-909.) Arguably, such a decision would be an abuse of the City’s discretion.

Here, the JV did not gain an unfair advantage by submitting its bid. In *Menefee*, the court found that under Public Contract code section 5103, the statute for relief of bidders on public contracts, the only mistakes which could release a bidder from its bid are typographical or arithmetical errors, not mistaken submission of a bid. The statute provides that relief is only allowed if the bidder can establish that: “[t]he mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.” (Pub. Contract Code § 5103 subd. (d).) *Menefee* made clear that the statute clearly does not contemplate relief from the mistaken *submission* of a bid. (*Menefee*, *supra*, 163 Cal.App.3d at 1181.) *Menefee* held that where a bidder had failed to sign the bid on the appropriate line, the bid was nevertheless valid because it was signed elsewhere. The relief sought was not for a typographical or arithmetical error, but for a mistaken submission of a bid. Consequently, the bidder could not be released from its bid. Since relief was not available, the irregularity could be waived. (*Id.*)

In *Valley Crest*, on the other hand, the low bidder, North Bay, submitted a bid showing that 83% of the work would be done by subcontractors, despite the specification that provided at least 50% of the work would be done by the bidder. Valley Crest objected to North Bay’s bid, and the city gave North Bay the opportunity to supplement its bid with additional information, noting that if it did not, it would deem the bid unresponsive and the contract would be awarded to Valley Crest. North Bay responded by stating the percentages were not correct and submitted new percentages. The court found that the North Bay bid contained a material defect that could not be waived because the City gave North Bay an unfair advantage by establishing a ground for it to withdraw its bid without having to forfeit its bond. (41 Cal.App.4th at 1432.) “Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid. As such, under Public Contract Code section 5103, North Bay could have sought relief...[It] had a benefit not available to other bidders; it could have backed out. Its mistake, therefor, could not be corrected by waiving an ‘irregularity.’” (*Id.* at 1442.)

Finally, in *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, the Court of Appeal held that the City acted within its discretion in waiving a defect in the low bidder’s bid. There, the low bidder omitted the first page of its bond in the

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submitted bid. The court affirmed the City's finding that the omitted page of the bid was an inconsequential deviation from the competitive bidding requirements. (*Id.* at 1199.)

CONCLUSION

In conclusion, the Bidder met two of the three safety standards, and therefore its bid was properly considered by the City. Likewise, the failure of the JV Bid to include information about MCI's earthmoving and fill experience either was not a "mistake" or was a waivable minor irregularity. For each of the foregoing reasons, the JV's bid was properly considered and responsive. The City should award the Contract to the JV, the lowest responsible and responsive bidder.

If you have any questions or concerns, or need further information, please contact me at your earliest convenience.

Very truly yours,



John W. Busby II

cc: Timothy L. McInerney, Esq.
Michael Willcoxon, Esq.
Client

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April 4, 2016

Via Email
(pgonda@sunnyvale.ca.gov)

Pete Gonda
Purchasing Officer
Purchasing Division
City Hall Annex
650 West Olive Avenue
Sunnyvale, CA 94086

**Re: Primary Treatment Facility Package 1
DeSilva Gates Construction, LP/Mountain Cascade, Inc. JV's
Response to City of Sunnyvale March 29, 2016 Initial Determination of Non-
Responsiveness for Primary Treatment Facility Package 1 (SPW16-19)**

Dear Mr. Gonda:

This firm represents the DeSilva Gates Construction, L.P. ("DGC")-Mountain Cascade, Inc. ("MCI") joint venture ("JV"), which is the low bidder for the primary Treatment Facility Package 1 ("Project") for the City of Sunnyvale ("City"). We are in receipt of your letter dated March 29, 2016 wherein you advise that after review of the bids in detail the City has initially determined that the JV bid is non-responsive. The JV takes issue with the City's conclusions and believes that it is in fact the lowest responsible and responsive bidder. In this regard, we respond to your conclusions as follows.

Minimum Safety Standards

With regard to the minimum safety standards required by the bid documents, the JV clearly provided all information for both joint venture partners in its bid submission. The bid requirements specifically require that for each of the three safety standards, the Bidder provide a current three year average. The bid form was certainly not designed to accommodate these calculations for a joint venture bidder that had two sets of averages for the three requirements. Consequently, the JV should not be disqualified for a defect that was contained in the bid form when all relevant data had been provided by the JV at the time of bid submission.

For ease of reference we include the safety calculations for the JV from our previous correspondence.

Based on an analysis of the Bidder's statistics (not DGC or MCI's statistics, individually) it is clear that the JV meets the specification requirement of meeting at least two of the three minimum safety standards:

Category	The Requirement (= or <)	DGC	MCI	Bidder (the JV)
EMR	1.0	.74	.997	.8685
RIR	3.4	2.43	3.96	3.195
LTIR	.90	.87	.99	.96

As shown, by averaging the EMR, RIR and LTIR numbers for DGC and MCI, the Bidder meets two of the three safety standards, as required: the EMR at .8685 and the RIR at 3.195. Likewise, if we add together the raw data of each JV partner and do the RIR calculation and the LTIR calculation for the Bidder, the joint venture has a three-year average RIR of 3.01 (2013-3.20; 2014-3.25; 2015-2.58) and an LTIR of .094 (2013-1.34; 2014-0.46; 2015-1.03). Since its three-year average EMR (see chart) is lower than 1.0 and its RIR (see chart and as calculated raw data) is less than 3.4, the Bidder meets two of the three safety standards. Since the Bidder met two of the three safety standards, the JV's bid was properly considered.

The City has "initially determined" that the JV bid is non-responsive. This is clearly not the case with regard to the JV's safety record. The safety record goes to the issue of responsibility. There can be no question that the JV is responsible as determined by the above analysis.

Prior Experience

With regard to the requirement to list "... at least \$50 million in construction volume on no more than seven (7) and not less than three (3) projects completed within the last five (5) years at industrial, commercial or public works facilities or transportation projects" of the following types:

1. Earthmoving and fill
2. Site preparation involving major earthmoving and fill
3. Highway involving earth moving

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The JV listed those projects for the JV partner DGC that will be performing the earthwork on this project. The other JV partner, MCI, has had significant experience in moving large excavated quantities of soils. We attach herewith as Exhibit "A" relevant job history which would have been included with the bid had the bid specs been clear. This experience has been in relation to pipeline installation involving excavation and backfill of large diameter pipes. All of the excavation and backfill was performed by MCI, not subcontractors.

For example, on the Davis Water Supply Project, 101,000 cyds of earth was excavated for 76,000 l.f. of trench for 30" through 42" steel pipe. 83,000 cyds of backfill material was placed and compacted around and over the top of the pipe to finish grade.

On the Contra Costa Water District Project, after 4,000' of 120" concrete water pipe was installed and backfilled in a former canal alignment, levees on each side totaling 192,000 cyds were pushed in, compacted and levelled.

On the San Joaquin Eastern Segment Pipeline, 82,000 cyds of backfill material was placed and compacted around and over the top of 53,000 l.f. of 78" steel water pipe.

On this project, the JV anticipated MCI would perform the work of building the junction structure and furnishing and installing the 63 inch diameter pipe including the outfall. MCI will perform all excavation, placement, and compaction of trench backfill. Consequently, no information was provided for MCI's earthmoving and fill experience in the bid form.

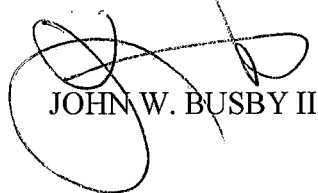
The City's strict interpretation that each participant in a joint venture shall meet the prior project experience requirement leads to the conclusion that the City had no intention of recognizing a joint venture bidder such as the JV that bid on this project. Such a strict construction of the specs effectively serves to exclude joint venture bidders wherein each joint venturer has a particular area of expertise. This JV bidder is comprised of two of the most prominent public works contractors in Northern California. DGC's expertise is in earth moving and MCI's expertise is in pipeline work. For the City to fail to recognize these facts is more than surprising. The savings available to the City of Sunnyvale from the JV bid is approximately \$75,000. In this current economic environment we fail to understand how the City cannot avail itself of this economic opportunity.

At this juncture we believe the City has but two options available to it. The first is to award the contract to the lowest responsible responsive bidder, the JV. Alternatively, the City could reject all bids and republish this contract for public bidding. This of course, could subject the City to the loss of the financial advantage it has currently been offered.

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Contemporaneously herewith the JV is submitting its own bid protest of the Anderson Pacific bid. Therefore, for the reasons set forth above and the reasons set forth in our bid protest, we believe that the JV bid is the lowest responsible and responsive bid. Therefore, please advise when a hearing is to be held concerning the award of this contract. The JV intends to appear and address the City Council on these matters.

Very truly yours,



JOHN W. BUSBY II

JWB/jld
Enclosure

cc: Client
Timothy L. McInerney, Attorney for Anderson Pacific Engineering Construction, Inc.

EXHIBIT A

- b. For the Owner to consider the Bidder properly experienced in work of similar nature to this project, the Bidder must list at least \$ 50 million in construction volume on no more than seven (7) and not less than three (3) projects completed within the last five (5) years at industrial, commercial, or public works facilities or transportation projects. The Bidder must list only projects of the following types:

1. Earthmoving and fill
2. Site preparation involving major earthmoving and fill
3. Highway involving earth moving (paving component is not to be included in the \$ value).

All reference projects must include at least 60,000 CY of fill placement. The Bidder can include project(s) currently under construction, but only the total amount paid by the Owner(s) as of three (3) months prior to the bid date on uncompleted project(s) can be included in the construction volume for purposes of this certification. Any projects listed below which are not as defined above will not be considered by the Owner in meeting this experience requirement. For example, paving projects are not considered earthmoving.

Bidder also certifies that Bidder self-performed at least sixty percent (60%) of the Work on each of the projects listed below.

The Owner reserves the right to exclude any projects listed below that do not demonstrate the Contractor's ability to perform the work associated with this Project. Further, the Owner reserves the right to accept a Bidder's qualifications that do not meet the experience requirements listed above.

If the Bidder is a Joint Venture of two or more companies, each participant in the Joint Venture shall meet this prior project experience requirement and provide project information for each Joint Venture participant in the format below.

1. Project Name: DAVIS WATER SUPPLY PROJECT
Owner: WOODLAND-DAVIS CLEAN WATER AGENCY
Contract Price: 24,976,002 (excluding paving cost)
Construction Time: 514 Calendar Days
Date of Substantial Completion: JANUARY 2016

Name, Address, and Telephone Number of Owner's Representative:
ENRIQUE RAMOS/CH2MHILL
2485 NATOMAS PARK DR. STE 600
SACRAMENTO, CA 95833 619-208-6287

Description of Project (include CY of fill placement):
INSTALL 24,456 LF RAW WATER MAIN
42,304 LF 30" FINISH WATER MAIN

AND 6799 FINISH WATER MAIN
EXCAVATE 101,000 CUBIC YARDS & 83,333 CUBIC
YARD FILL.

2. Project Name: CANAL LEVEE ELIMINATION AND FLOOD PROTECTION
Owner: CONTRA COSTA WATER DISTRICT
Contract Price: 16,346,368 (excluding paving cost)
Construction Time: 424 Calendar Days
Date of Substantial Completion: 2/2015

Name, Address, and Telephone Number of Owner's Representative:

JAMES LAROT / CCWD 925-937-9010
241 BISSO LANE
CONCORD, CA 94524

Description of Project (include CY of fill placement):

INSTALLATION OF TEMPORARY & PERMANENT
COFFERDAMS, BYPASS PUMPING, UNWATERING,
CANAL, CONSTRUCTION OF ACCESS STRUCTURES
192,000 CUBIC YARDS OF FILLED PLACE

3. Project Name: SAN JOAQUIN PIPELINE WESTERN SEG.
Owner: SFPUC
Contract Price: 50,237,792 (excluding paving cost)
Construction Time: 788 Calendar Days
Date of Substantial Completion: 5/2013

Name, Address, and Telephone Number of Owner's Representative:

JOHN K/EPAL P.E. CCMT - PROJECT CONSTRUCTION MGR.
525 GOLDEN GATE AVE. SAN FRANCISCO, CA 94102
415-551-4603

Description of Project (include CY of fill placement):

INSTALLATION OF 53,000 LF OF 78" WELDED
STEEL EPOXY LINED WATERLINE, BANCHING
FROM 16 TO 38 FEET DEEP.
82,000 CUBIC YARD FILL.