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March 27, 2017

Mr. Pete Gonda
City of Sunnyvale, Purchasing Division
City Hall Annex
650 West Olive Avenue
Sunnyvale, CA 94086
pgonda@sunnyvale.ca.gov

Re: City of Sunnyvale Primary Treatment Facility Package 2
Public Works Project No. UY-16/01-20
BID PROTEST

Dear Mr. Gonda:

This letter is in response to the letter to you of March 22, 2017, from P. Randolph Finch, Jr., attorney for Flatiron West, Inc. In that letter, among other arguments, Mr. Finch insists that the City cannot reject Flatiron West's bid without holding a hearing on the matter. That is inaccurate: giving Flatiron West notice of the City's determination that Flatiron West's bid was nonresponsive and an opportunity to respond is all that was necessary.

Mr. Finch argues that the basis for the City's preliminary determination that Flatiron West's bid was not responsive -- that its list of similar projects completed within the past five years did not satisfy the criteria set forth in the bid documents -- was actually a finding of nonresponsibility, not a finding of nonresponsiveness. The implication of the difference between the two is that the former, being based on undisputed facts, requires less due process than would the latter, which might require that the City offer Flatiron West a hearing on the issue.

That Flatiron West, Inc., did not list at least five different similar projects with a total value of more than \$250 million completed within the five years preceding the bid is undisputed and indisputable. The fact that Flatiron West cannot claim sufficient experience to satisfy the bid criteria makes their bid nonresponsive, but it does not impugn the responsibility of the company.

Public Contract Code §1103 defines a "Responsible Bidder" as one "who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract." Here, it cannot be said that, only because Flatiron West has not, within the past five years, completed \$250 million worth of similar projects, it is not sufficiently trustworthy or fit to perform the contract. However, it can be said, based solely on its bid, that it does not have the experience specifically required by the bid documents, regardless of whether it is possible that a less qualified bidder might be nevertheless responsible.

Thus, the City's initial determination of nonresponsiveness was both the correct finding and was indisputably correct based solely on the face of Flatiron West's bid. Under those circumstances, the due process to which Flatiron West is entitled is satisfied with notice of the City's finding and an opportunity to respond; no hearing is required. *Taylor Bus Serv. v. San Diego Bd. of Educ.* (1987) 195 Cal. App. 3d 1331, 1341-1342:

"A determination of nonresponsiveness on the other hand is less complex. The district or agency has, before soliciting bids, exercised its business and governmental judgment in defining a set of requirements for the work to be done. Responsiveness can be determined from the face of the bid and the bidder at least has some clue at the time of submission that problems might exist. In most cases, the determination of nonresponsiveness will not depend on outside investigation or information and a determination of nonresponsiveness will not affect the reputation of the bidder. Given the predetermination of bid specifications, and given the more apparent and less external nature of the factors demonstrating nonresponsiveness, less due process is reasonably required with that determination than when nonresponsibility is declared."

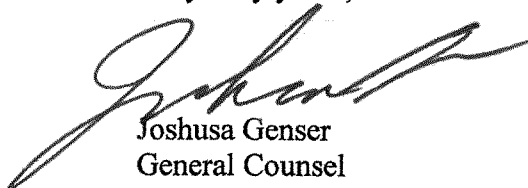
The City, therefore, may maintain its finding that Flatiron West's bid was nonresponsive without holding a hearing.

FlatironWest, in its letter, obfuscates the identity of the bidder. The bidder was Flatiron West, which is a subsidiary of Flatiron Construction. In arguing the experience of Flatiron West, the letter makes numerous references to "Flatiron", which are actually references collectively to several of Flatiron Construction's other subsidiaries. Flatiron West cannot, itself, satisfy the bid criteria for experience with similar projects.

Finally, although your determination of nonresponsiveness did not address the issue, there remains the question of whether Flatiron West's ICSC is performing all of the required scope. That would be a question of both responsiveness and responsibility.

Overaa respectfully requests that Flatiron's bid be disqualified.

Very truly yours,



Joshua Genser
General Counsel

cc: P. Randolph Finch, Jr.
pfinch@ftblaw.com