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November 12, 2025

Via US Mail and Email

City of San Luis Obispo
Attn: Project Manager
919 Palm Street
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CityClerk@slocity.org
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Subject: Brough Construction, Inc. / City of San Luis Obispo
Righetti Ranch Parks – Community Park, Specification No. 200054

To the Project Manager,

This law firm represents Brough Construction, Inc. (“Brough”) the lowest responsive and responsible bidder for the Righetti Ranch Parks – Community Park, Specification No. 200054 (the “Project”) for the City of San Luis Obispo (the “City”). Brough is in receipt of the untimely bid protest made by Urban Habitat (“Urban”) expressing concerns about Brough’s bid on the Project.

Urban’s bid protest is without merit and should be rejected for the following reasons:

1. Brough is the lowest responsive and responsible bidder and should be awarded the contract.
2. Urban failed to timely issue its bid protest.
3. The bids were not required to list out a percentage of the total base bid amount with respect to specialty items. Therefore, Brough’s bid did not deviate nor did Brough gain an advantage either materially or immaterially.

I. THE LAW ON BID PROTEST

Before addressing the three issues you raised in your email, an understanding of the law on bid protests is important.

California law mandates that a public entity must competitively bid public works contracts and award the contract to the lowest responsible bidder that submits a responsive bid. *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368. These requirements are strictly enforced to protect taxpayers by inviting competition, which

helps “guard against favoritism, improvidence, extravagance, fraud and corruption,” *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal. 4th 161, 173. These public interests are what is important. *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 908-909. Allowing the disappointed bidder to invalidate the lowest bid on technical violations in hopes of securing the contract at a higher price frustrates these public interests rather than upholding them. Id.

So, first we need to remember that when looking at bid protests, if the bid is responsive, and promises to do what the City requested, that is the end of the inquiry.

When there is a Bid Protest, a public entity such as the City is limited in what it can look at. The test for responsiveness focuses on the four corners of the bid documents and does not consider information or details outside of the bid and the bid documents. *Great West Contractors* 187 Cal.App.4th at 1453-54.

It is established under California law that bids which substantially conform to a public agency’s request but contain some error or irregularity may be accepted if the error does not affect the amount of the bid or give the applicant an advantage that other bidders did not have. *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1198-1199. Therefore, bids must be evaluated from a practical, rather than hypothetical, standpoint, giving due consideration to the public interest being served. *Ghilotti* at 908-909; *MCM* at 370. These public interests are getting the best price and avoiding favoritism and corruption. *Domar* at 173.

Urban asks the City to ignore the public interest of contracting with the lowest bidder and instead wants the City to waste public funds. Even if there was a minor error, which there is not, the City must award to the lowest bidder.

In evaluating the responsiveness of a bid, it is “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 the bidder an advantage or benefit not allowed other bidders* or, in other words, if the variance is inconsequential.” Emphasis added, *Valley Crest Landscape, Inc., v. City Council* (1996) 41 Cal.App.4th 1432, 14401-41 citing *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 454 quoting *47 Ops.Cal.Atty.Gen.* (1966) 129, 130-31. A variance in a bid, therefore, will only be considered material if it (1) could have affected the total sum of the bid or (2) provided a bidder with a competitive advantage. Otherwise, the variance is inconsequential and waivable.

II. URBAN’S BID PROTEST IS UNTIMELY.

The bid document entitled “Notice of Bidders” specifies the bid protest timeline as follows:

Protests must be filed no later than five working days after either:

1. Bid opening date,
2. Notification of rejected bid.

The City opened the Project bids on Thursday, October 23, 2025. A working day excludes weekends and holidays. Therefore, five working days after October 23, 2025 is not October 28 but rather Thursday, October 30, 2025.

Urban's bid protest letter is dated November 6, 2025. This is a full week past the deadline listed in the Notice of Bidders. Therefore Urban's bid protest letter is untimely and must be rejected by the City. If the City fails to reject the untimely bid protest letter, then the City will not be abiding by the bid requirements and procedures. See MCM; Domar; Ghilloti.

In sum, the City should reject Urban's untimely bid protest letter and proceed to award the Project to Brough.

III. SPECIALTY ITEMS DID NOT NEED THE PERCENTAGE OF TOTAL BASE BID AMOUNTS.

Urban accuses Brough of failing to follow the bid instructions in Addendum No. 2 for Specification No. 2000054, Section 2-1.33A. One of the items that must be included is "7. Percentage of total base bid amount with your bid... percentage of each item subcontracted must be provided with the bid."

However, this same Addendum No. 2 specifies that the fifth paragraph of Section 5-1.13A must be replaced, with part of the replacement language reading:

Excluding items designated with an "S" on the Bid Item List. "S" indicates specialty items of work. The value of specialty items of work is not included in the calculation.

This revision clarifies that specialty items listed in the bid do not need the additional information specifying the line item's percentage of the total base bid amount. Brough's base bid contains 118 bid items: 113 non-specialty items that did contain the percentage of the total base bid amount and only 5 specialty items that did not include the percentage of the total base bid amount. Thus, Brough followed the bid specification instructions including the revised specifications in Addendum No. 2.

Even if Brough was supposed to include the percentage of the total base bid amount for the 5 specialty items, this is a minor clerical error that does not materially affect Brough's bid because Brough complied with the requirements for the 113 non-specialty items.

The pricing of Brough's base bid was clear and allowed the City to correctly compare Brough's bid with other bids. Brough's base bid clearly listed the cost of each of the 118 bid items, plus the total amount of all 118 bid items in Bough's base bid. Thus, Brough did not gain either a material or immaterial advantage over another contractor by not including this information for the 5 specialty items.

No specialty subcontractor is harmed by Brough's alleged clerical error because Brough listed the cost of each of the 5 specialty line items. Brough will of course pay the specialty subcontractors in full even though Brough followed the revision to the fifth paragraph of Section 5-1.13A and did not include the percentage of the total base bid amount for each of the 5

specialty line items.

Furthermore, Brough did not gain an advantage (materially or immaterially) over other bidders by not including the percentage of the total base bid amount for the 5 specialty items.

The factual consideration of whether a bidder receives an advantage from a waiver of strict compliance is evaluated in light of the public interest, not from the perspective of disappointed bidder. *Judson Pacific–Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 383, “It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal... 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.”

In sum, the City should reject Urban’s untimely bid protest letter and proceed to award the Project to Brough because Brough followed the requirements listed in the Addendum No. 2 for Specification No. 2000054, Section 2-1.33A. The issues aired by Urban are not true and are therefore not a sufficient reason for the City to reject Brough’s bid.

IV. CONCLUSION

Thus, for the above reasons, the City should award the contract to Brough as the lowest responsive and responsible bidder.

In addition, Brough requests the following:

1. That this letter serves as a protest against the award of the above contract to anyone other than Brough.
2. Mailed notice of all meetings of the awarding authority at which any issues pertaining to the award to the contract are on the agenda for meeting pursuant to *Gov. Code* § 54954.1
3. That Brough be informed by telephone or fax or email as soon as any staff reports or recommendations concerning any issues pertaining to the award of the contract are available to the public, so that we can immediately inspect those reports or recommendations.
4. The ability to address the awarding authority before or during consideration of any issues pertaining to the award of the contract pursuant to *Gov. Code* § 54954.3(a).

Thank you for your prompt attention to this matter. If you have any questions, please direct them, as well as any communication with this office, to the undersigned.

Sincerely,

A handwritten signature in black ink that reads "Sumner W. Schwartz". The signature is written in a cursive, flowing style.

Sumner W. Schwartz, Esq.
for Feldman & Associates, Inc.

cc: Mark Feldman, Esq.
Brough Construction, Inc.
Lanak & Hanna, P.C. Charles K. Stec, Esq. ckstec@lanak-hanna.com

Enclosed: A Notice to Bidders; and,
B Addendum #2.