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MCNEIL, SILVEIRA, RICE & WILEY

AN ASSOCIATION INCLUDING PROFESSIONAL CORPORATIONS

55 PROFESSIONAL CENTER PARKWAY, SUITE A

SAN RAFAEL, CALIFORNIA 94903

T-(415) 472-3434 F-(415) 472-1298

WWW.MSRWLAW.COM

RONALD A. SILVEIRA
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PATRICK J. McNEIL
A PROFESSIONAL CORPORATION

MARK J. RICE
A PROFESSIONAL CORPORATION

NEIL W. WILEY

September 21, 2017

Via Email and U.S. Mail

City Attorney City of San Pablo
Lynn Tracy Nerland, Esq.
Lynnn@sanpablo.gov
13831 San Pablo Ave., Bldg. #2
San Pablo, CA 94806

Barbara Hawkins, City Engineer
Ronalyn Nonato, Assistant City Engineer
City of San Pablo Department of Public Works
barbarah@sanpablo.gov
ronalynn@sanpabloca.gov
13831 San Pablo Avenue, Bldg. #3
San Pablo, California 94806

Re: Randy Lane Drainage Improvement Project (RLN-DRN)
Bid Protest

Dear Ms. Nerland, Ms. Hawkins, and Mr. Nonato,

As advised in my email of yesterday, we are legal counsel to Maggiora & Ghilotti ("MG"), the low bidder on the Randy Lane Drainage Improvement Project. I am writing on behalf of MG as to why Trinet's bid protest of MG's low bid should be rejected, and why MG's low bid be accepted as responsive from a responsible bidder specifically:

1. Any variance is immaterial and waivable by the City. There is no possible bid advantage to any bidder by the timing of submission of an additional insured certificate. MG immediately submitted its insurance certificate naming the Contra Costa agencies as additional insured, once this was discovered, and it is now in the City's hands. The sole purpose of the requirement in Addendum 4 to have the certificate in the bid envelope, was not to evaluate bids but to be able to have a quick turn around and meet the Contra Costa Flood Control District permit requirements, so the project could proceed with a permit. You have advised that the permit has yet to be applied for. Therefore the small delay caused no impact on the permitting process.

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2. The primary Court case involving this issue is well known, *Menefee v. County of Fresno* (1985) 163 CA 3rd 1175. The test is whether the irregularity would give a bidder an unfair advantage and allow it to withdraw from its bid without risk to its bid bond. See *Valley Crest Landscape, Inc. v. City Council* (1996) 41 CA 4th 1432, at 1441-2, "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 the bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential. [Citations.]' " (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 454 [253 Cal.Rptr. 591], quoting 47 Ops.Cal.Atty.Gen. 129, 130-131 (1966), italics in *Konica*.) ...The *Menefee* court read *Williams* to explain that the real issue in determining the validity of a bid is whether the bidder would be liable on its bond if it attempted to back out after the bid was accepted. (*Menefee, supra*, at pp. 1178-1179.) Waiver of an irregularity in a bid should only be allowed if it would not give that bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond. (*Id.* at pp. 1180-1181.) "Thus, we should ask—what would have happened if Brewer-Kalar had refused to enter into a contract and sought to recover its bid bond? If they could use the absence of an executing signature on their bid to avoid a contract, then they had an unfair advantage - the opportunity to back out - not given to other bidders who signed their bids properly." (*Id.* at p. 1181.)

3. In this case, I have pointed out to you § 2.4 of the signed bid bond by MG and its surety. Section 2.4 obligates the bid bond surety to forfeit the bond if, within ten days after staff transmits the proposed contract for signature, MG does not deliver to the City the insurance certificates required by the Contract Documents MG has delivered the required Certificate, before award. So, MG and its bid bound surety is fully bound and cannot escape liability under the bid bond on account of failure to include the additional insured certificate at the time of the bid, but shortly thereafter and before award. MG is locked in and has met § 2.4. Therefore, the minor immaterial variance gives no advantage and is waivable by the City. This is because MG and its surety are on the hook by the express promise at § 2.4 in the bid bond to submit the same form. MG bid submitted is in compliance with § 2.4 and the contract documents.

4. This is set forth on the bid bond form, as follows, at § 2.4, which is part of the required California insurance bid package:

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2. **Submittals.** Within ten days after City staff transmits the Contract to Bidder, as the apparent low bidder, for execution, Bidder must submit to City the following:
 - 2.1 **Contract.** The executed Contract, using the form transmitted by City;
 - 2.2 **Payment Bond.** A payment bond for 100% of the maximum Contract Price, executed by a surety licensed to do business in the State of California using the Payment Bond form included with the Contract Documents;
 - 2.3 **Performance Bond.** A performance bond for 100% of the maximum Contract Price, executed by a surety licensed to do business in the State of California using the Performance Bond form included with the Contract Documents; and
 - 2.4 **Insurance.** The insurance certificate(s) and endorsement(s) required by the Contract Documents, and any other documents required under the Instructions to Bidders.

5. While the bid's Addendum 4 required the Additional Insured certificate to be included in the bid envelope, it was not to compare certificates for price or responsiveness. It was used as a way to accelerate getting the certificate over to Contra Costa Flood Control District as part of a permit application by the City of Pinole for its project. The fact Addendum 4 is contradicted by the bid bond form's § 2.4 (granting ten days for submittal, after the City staff transmits the contract) also suggests that Addendum 4's request was not for project performance but only to accelerated permitting by the City. That permit application has yet to occur. The City has both bidders' certificates. Therefore, no prejudice has occurred. The City could not submit a low bidder's certificate to Contra Costa until award, realistically. The award does not take place until after a hearing (and review of any bid protest). So, in effect, the City's request also does not result in time savings either (though intended to). That is to say, the Certificate can only be submitted to Contra Costa after knowing the contract awardee, i.e., after award.

6. Given the above, and the ambiguity created by the difference between the bid bond ten day allowance under § 2.4 after contract submittal and Addendum 4, the fact this is plainly immaterial, with no prejudice, and cannot allow MG to escape bid bond liability, its bid should be accepted and the protest rejected.

Maggioria & Ghilotti Has An Excellent Track Record With The City Of San Pablo

To date M&G has successfully completed two projects for the City of San Pablo.

They are:

- 1) Wildcat Creek Restoration Project during 2014/2015 for a total cost of \$1,838,800, and
- 2) Wildcat Creek Daylighting and Davis Park Project for a total cost of \$1,838,800.

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These projects and track record demonstrate MG is a responsible bidder and has met and exceeded the City's expectations. The minor immaterial bid item here should not result in rejection, and by law, is waivable. The time afforded by § 2.4's 10-day rule still remains. A bidder relying on that section is equally responsive to the call of the bid given the bid ambiguity. No delay in permitting has occurred. Therefore the goal of accelerated permitting has been met and not impacted. MG should not be penalized when its bid is low and responsive in all material terms.

Very truly yours,



Mark J. Rice

MCNEIL, SILVEIRA, RICE & WILEY
Attorneys for Maggiora-Ghilotti

cc: Mr. Gary Ghilotti, Maggiora-Ghilotti
Ms. Nora Hickey, Trinet