

April 14, 2025

City of Eureka  
Attn: Brittany Powell, Project Manager  
531 K Street  
Eureka, CA 95501  
Email: [bpowell@eurekaca.gov](mailto:bpowell@eurekaca.gov)

Re: Bid Protest – Elk River Wastewater Treatment Plant Wet Weather Improvements  
Project, Bid No. 2025-5  
On Behalf of Wahlund Construction, Inc.

Dear Ms. Powell,

Wahlund Construction, Inc. (“Wahlund”) has retained this firm to submit this formal bid protest concerning the Elk River Wastewater Treatment Plant Wet Weather improvements Project, Bid No. 2025-5 (“Project”). This protest is timely filed per Section 10 of the Instructions to Bidders, requiring submission in writing to the City at 531 K Street, Eureka, CA, or via email to [bpowell@eurekaca.gov](mailto:bpowell@eurekaca.gov) before 5:00 p.m. on April 14, 2025, the second working day following the bid opening on April 10, 2025. Wahlund respectfully requests that the City reject the bid submitted by McCullough Construction, Inc. (“McCullough”).

On April 10, 2025, McCullough submitted a bid for \$16,885,548.87. Wahlund submitted its bid for the Project in the total amount of \$17,299,600.00. Mercer-Fraser Construction submitted a bid for \$ 18,475,125.00. These three bids were the only bids submitted. The problem with McCullough’s bid centers on its unit price listed for Bid Item 28.

Bid Item 28 is the central component of the work, comprising over 30% of the overall contract work. Bid Item 28 includes dredging sludge from the equalization basin (EQ), dewatering the sludge, and hauling and disposing of that material, and other work contained within Specification Section 31-23-20.

McCullough used a unit price of \$362.18 per dry ton for Bid Item 28—a total of \$1,403,447.50 for the anticipated 3,875 dry tons of material. By contrast, Wahlund used a unit price of \$1,655 per dry ton for 3,875 dry tons. Mercer-Fraser Construction submitted a unit price of \$1,575 per dry ton for Bid Item 28. Thus, McCullough’s per-unit price was more than \$1,200 per ton less than either of the other bidders. Both

Wahlund and Mercer-Fraser listed Synagro as their subcontractor to perform the work. McCullough did not identify a subcontractor for the Bid Item 28 work.

As explained more fully below, McCullough's objectively erroneous Bid Item 28 unit price requires that the City reject McCullough's bid because the error creates a "string on the bid," and because the bid did not comply with the Instructions to Bidders Section 1.1 requirement to include "all costs to perform the Work" in each of "the bid price(s)." Further, McCullough's bid is non-responsive because it is unbalanced so as to give McCullough an unfair advantage in the bidding process. Finally, the underbid on Bid Item 28 reflects that McCullough has not planned to perform all components of the Bid Item 28 scope of work as set forth in Specification section 31-23-20. Under any of these scenarios, the City must deny McCullough's bid as non-responsive.

Further, McCullough's bid reveals that McCullough does not have the expertise to perform the Bid Item 28 work, and has not identified a subcontractor to perform that work. Indeed, if McCullough intended to use the price it listed for Bid Item 28, then it does not have a clear understanding of the work required. Accordingly, McCullough is also non-responsible to perform this Project.

### **I. Compliance with Bid Protest Requirements**

This protest complies with Section 10 of the Instructions to Bidders. Wahlund, a bidder on April 10, 2025, is eligible per Section 10.1. The protest is submitted in writing to Brittany Powell at [bpowell@eurekaca.gov](mailto:bpowell@eurekaca.gov) and 531 K Street, Eureka, CA, before 5:00 p.m. on April 14, 2025. Per Section 10.3, Wahlund will transmit this protest to McCullough Construction, Inc. by email or hand delivery, before the Bid Protest Deadline. The information required by Section 10.2 is:

Protestor's Name: Wahlund Construction, Inc.  
Physical Address: 690 Indianola Rd. Eureka, CA 95503  
Mailing Address: PO Box 6486 Eureka, CA 95502  
Email address: [ryan@wahlcon.com](mailto:ryan@wahlcon.com)  
Telephone Number: (707)268-0150

### **II. Summary of Pertinent Applicable Law**

The Public Contract Code aims to "provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices" and to "eliminate favoritism, fraud, and corruption in the awarding of public contracts." (Pub. Contract Code § 100.) Deviations from bidding standards, even without corruption, justify setting aside awards to protect the process's integrity, regardless of potential cost savings. (*Konica Bus. Machs. U.S.A. v. Regents of Univ. of Cal.* (1988) 206 Cal.App.3d 449, 456.) "This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money." (Id., 456.)

As a general law city, Eureka must award public works contracts exceeding \$5,000 to the responsible bidder that submits the lowest responsive bid. (See Pub. Contract Code § 20162.) A responsive bid conforms to bidding instructions (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1438), and non-conforming bids must be rejected. (*Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904.) A bid that contains material errors must likewise be rejected where the error would make relief under Public Contract Code section 5103 available to the bidder. (Pub. Cont. Code §5103.) “The fact that (the bidder) does not seek such relief is of no moment. The key point is that such relief was available.” (*Valley Crest*, 41 Cal.App.4th at 1442; *MCM Constr., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 377; *DeSilva Gates Constr., LP v. Dep’t of Transp.* (2015) 242 Cal.App.4th 1409, 1422.)

A responsible bidder can perform the contract as promised. (*City of Inglewood-L.A. Cty. Civic Ctr. Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867; *Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1450.)

### **III. Grounds for Protest**

#### **A. Because McCullough’s bid failed to comply with the bid requirements, it is non-responsive, and must be rejected.**

McCullough’s bid fails to conform to the bid documents, rendering it non-responsive. Here, the Instructions to Bidders (“ITB”) was clear that “bid price(s) must include all costs to perform the Work as specified, including all labor, material, supplies, and equipment and all other direct or indirect costs such as applicable taxes, insurance and overhead.” The Bid Schedule reinforced this requirement, stating: “The lump sum or unit cost for each item must be inclusive of all costs, whether direct or indirect, including profit and overhead.” Whether by mistake, intent, or design, McCullough’s bid failed to comply with the ITB, and thus must be rejected.

#### **1. Because McCullough’s bid contains an apparent material error, it must be rejected as nonresponsive.**

Public Contracts Code section 5103 permits a bidder to withdraw its bid and avoid forfeiting the bid bond if it identifies a material error in its bid. Courts hold that an error giving the mere availability of relief under section 5103—regardless of intent to withdraw or whether the bidder actually seeks to withdraw its bid—undermines competitive fairness mandated by Public Contract Code § 20162. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442 [“The fact that (the bidder) does not seek such relief is of no moment. The key point is that such relief was available.”]; *MCM Constr., Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 377; *DeSilva Gates Constr., LP v. Dep’t of Transp.* (2015) 242 Cal.App.4th 1409, 1422.) Any other result would allow a bidder to include an error in its bid, wait to see how other bidders’ prices compared to its own, and then use the error to

withdraw its bid. This ability to “wait and see” would give a bidder an unfair advantage over other bidders.

McCullough’s bid omitted substantial cost items from Bid Item 28—specifically, McCullough’s price for Bid Item 28 at most covers only a fraction of the hard costs for that bid item. Notably, on April 11, 2025, at 2:39 P.M., John Pugliaresi of Synagro WWT, Inc.—the subcontractor identified by both Wahlund and Mercer-Fraser and a recognized expert in the industry—sent an email to the City. (Email attached as **Exhibit A.**) Synagro’s email confirms that McCullough’s Bid Item 28 price cannot possibly include all required costs.

According to Mr. Pugliaresi, transportation and disposal cost of the biosolids alone is between \$420 to \$560 per dry ton. Additional expenses, including labor, equipment to dredge the wet material, dewatering, the cost of the polymer required to conduct the dewatering, and fuel and operating expenses range between \$500 and \$800 per dry ton. In this instance, Mr. Pugliaresi points out that the polymer necessary for dewatering alone is \$150 per dry ton. This is before any provision for other operation expense, overhead, or profit—all of which are required to be included under the ITB. Pugliaresi concluded: “Clearly the cost proposed for this line item is approximately 1/3 the cost (not the price) excluding any overhead.”

Here, McCullough’s Bid Item 28 price of \$362.18 per dry ton is approximately \$5 million below prices submitted by both other bidders to perform the work. The magnitude of the McCullough’s error is material, and enables McCullough to seek section 5103 relief—an option unavailable to Wahlund. Accordingly, the apparent error is a “string” on McCullough’s bid requiring that bid to be rejected. As made clear in *Valley Crest* and its progeny cases, the City has no discretion to waive such an error.

Wahlund anticipates that McCullough may claim that its Bid Item 28 amount was not an error. If it does so, the City should require McCullough to provide detailed documentation confirming all of the required cost items are included.

**2. McCullough’s bid is non-responsive because it failed to comply with Section 1.1 by failing to identify all costs for Bid Item 28.**

As noted above, Section 1.1 of the ITB mandates that bid prices include “all costs to perform the Work as specified,” and the Bid Schedule reconfirms this requirement. As noted above, it is not possible for McCullough’s bid to include all of the cost items as required by Section 1.1—if it did, it would be much closer to the numbers provided by the two other bidders. Such material deviations render the bid non-responsive and require it to be rejected. (See e.g., *Valley Crest Landscape*, 41 Cal.App.4th 1432, 1442.) See also Section III.A.3 for performance implications.

Further, McCullough’s failure is material, and therefore cannot be waived as an “immaterial deviation.” Any argument that the error in this case can be waived is belied by the importance of Bid Item 28. A public entity may waive a bid deviation only “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.” *Valley Crest Landscape, Inc. v. City Council* 41 Cal.App.4th at 1440–1441. The City does not have discretion to waive “material” deviations in the bid. Here, Bid Item 28 amounts to approximately 30% of the overall contract value, and is the primary focus of the entire project. Such an extreme discrepancy in price for this critical work cannot be considered “immaterial.” This is especially true given that the discrepancy makes McCullough’s bid unbalanced as discussed more fully below.

Figure 1, below, underscores the importance of McCullough’s Bid Item 28 price. If the submitted bids are adjusted for what the actual units on Bid Item 28 are likely to be, Wahlund’s bid is **lower** than McCullough’s by **over \$2 million**. The below chart (Fig. 1) demonstrates what happens to the bid numbers if the number of Bid Item 28 dry tons is half of the anticipated 3,875.

	McCullough	Wahlund	Mercer Fraser
Base bid	\$ 16,885,000	\$ 17,299,000	\$ 18,475,000
Value of sludge removal	\$ (1,400,000)	\$ (6,400,000)	\$ (6,100,000)
Base bid excluding sludge removal	\$ 15,485,000	\$ 10,899,000	\$ 12,375,000
Add 50% of sludge removal cost	\$ 700,000	\$ 3,200,000	\$ 3,050,000
Likely outcome on base bid	\$ 16,185,000	\$ 14,099,000	\$ 15,425,000

(Figure 1)

But even if the actual Bid Item 28 quantity ended up at as much as 3,400 tons, Wahlund’s price would still be lower than McCullough’s price. As noted in Synagro’s proposed RFI submitted to the City on April 3, 2025, Synagro estimated 1,800 dry-tons—even less than the 1,937.5 tons (1/2 of the 3,875 tons) Fig. 1 assumes. (See **Exhibit B.**)

Fig. 1 underscores three critical issues: (1) that McCullough’s decision or error in including all Bid Item 28 costs is highly material; (2) the chart tangibly illustrates the unfair advantage McCullough obtained by understating its Bid Item 28 unit price; (3) that McCullough’s bid is materially unbalanced because without the artificially low Bid Item 28 unit price, McCullough’s bid is nearly \$5 million **higher** than Wahlund’s bid.

### **3. McCullough’s unbalanced bid likely indicates a deliberate strategy and should be rejected accordingly.**

Alternatively, McCullough’s low price may reflect a deliberate strategy. Unbalanced bids are a well-known issue in public bidding that creates an unfair advantage for one

bidder over others.<sup>1</sup> Fairness is the linchpin of California public bidding. (See e.g., Pub. Cont. Code §100, *Konica*, at 1456.) McCullough’s understated bid amount for Bid Item 28 has all of the earmarks of an intentionally unbalanced bid.

Synagro’s April 3, 2025, proposed RFI notified the City that Bid Item 28’s tonnage would likely be lower than 3,875 dry tons anticipated in the bid documents. (See Exhibit B.) Indeed, the estimated amount of biosolid dry tons is 1800—less than half of the bid’s estimate. As a result, McCullough may have reduced its unit price on Bid Item 28 to reduce the amount of the overall contract reduction that is anticipated to occur when the dry tonnage is less than 3,875. By reducing its unit-cost price on a line item it knew would have significantly fewer units and bumping the price for other line items, McCullough would be able to bid a lower overall amount knowing that a significant amount of the shortfall would be avoided when the reduced total units were determined. Where the other bidders would face an overall contract price reduction measured in \$1,500 to \$1,600 per dry ton, McCullough’s overall contract price would suffer by only \$362 per dry ton. Knowing this, McCullough would be able to present a lower overall price while simultaneously escaping the anticipated reduction in total value for Bid Item 28 when true unit amounts were determined. (See also Fig. 1.) Such unbalanced pricing deviates from Section 1.1’s costing requirement, skews bid evaluation and gives McCullough an unfair advantage not permitted by the Public Contract Code.

#### **4. McCullough’s underbid suggests its bid did not call for performing the Project as required by the specifications.**

McCullough’s underbid on Bid Item 28 also suggests that it cannot meet (and perhaps has not considered) Section 31-23-20’s standards, including equipment and storage of sludge (3.1.B, 3.1.D), timing of sludge removal from the project (3.1E), 40 CFR compliance, including multiple 40 CFR sections specified (1.3.A), pathogen control (1.3.C), records for handling and facilities and equipment (1.3B), daily sampling (1.4.C, 1.4.D), ground-water management planning for surface disposal (1.3D), and testing if a landfill is used (1.3E). Synagro’s analysis confirms the realistic *cost* to perform the work far exceeds McCullough’s bid. This failure to promise performance is a material defect, rendering

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<sup>1</sup> Under the Federal Acquisition Regulations (“FAR”), section 52.214-19, the government “may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and there is reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid . . .”

As the Federal Highway Administration has stated in its publication on unbalanced bids: “Another reason [bidders submit unbalanced bids] is to maximize profits. The bidder does this by overpricing bid items he/she believes will be used in greater quantities than estimated in the proposal *and underpricing items he/she thinks will be used in significantly lesser quantities.*”

(<https://www.fhwa.dot.gov/programadmin/contracts/051688.cfm>).



the bid non-responsive. (*D.H. Williams Constr.*, 146 Cal.App.4th at 764; *MCM Constr.*, 66 Cal.App.4th at 369.) If McCullough intended to self-perform without a subcontractor<sup>2</sup> as its failure to identify a subcontractor suggests, then the City should rightly have concerns about McCullough's expertise to perform this work. McCullough of significant portions of the work required by the specifications render McCullough's bid non-responsive.

**B. Even If its bid was responsive, McCullough is not responsible because it does not have adequate experience and expertise to perform the Bid Item 28 work.**

Even if deemed responsive, McCullough lacks the qualifications to perform Bid Item 28, for these reasons:

- 1. Lack of Specialized Experience:** Bid Item 28 requires expertise in biosolids management per Section 31-23-20 (e.g., 40 CFR compliance, pathogen control). McCullough has no demonstrated experience, unlike Synagro. If McCullough's underbid was not the result of a mistake or omission of cost items, then it reflects a woefully inadequate understanding of what is required by the specifications.
- 2. No Qualified Subcontractor:** McCullough cannot save its bid by claiming that it intended to use a subcontractor because McCullough did not list a subcontractor to perform this work in its bid.

McCullough's non-responsibility disqualifies it under § 20162, threatening Project success. (*MCM Constr.*, 66 Cal.App.4th at 369.)

#### **IV. Relief Requested**

Wahlund requests that the City reject McCullough's bid and award to Wahlund as the responsible bidder with the next-lowest responsive bid.

At the barest minimum, the City should require McCullough to provide clear and compelling evidence reflecting its Bid Item 28 bid demonstrating its cost and overhead/profit calculations for Bid Item 28 so that the City may determine whether McCullough made an error in its pricing and whether McCullough complied with the ITB. The City should require that McCullough provide this information before—and as a condition of—any award to McCullough.

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<sup>2</sup> If McCullough intended to use a subcontractor but did not list that subcontractor, then the bid violates Section 9 of the Notice Inviting Bids and Public Contract Code § 4104, requiring listing for work exceeding 0.5% of the bid price. Section 31-23-20 demands expertise for biosolids management, unlike McCullough's general construction skills. Notably both Wahlund and Mercer-Fraser listed Synagro, an industry expert, highlighting the standard.

If I can provide any additional information or you wish to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

REYNOLDS TILBURY WOODWARD LLP



Treven I. Tilbury

Attachments

cc: Chelsey Rios; [chelseyrrios@mcculloughconstructioninc.com](mailto:chelseyrrios@mcculloughconstructioninc.com)  
Cliff Poulton; [cliffpoulton@mcculloughconstructioninc.com](mailto:cliffpoulton@mcculloughconstructioninc.com)  
McCullough Construction Admin; [admin@mcculloughconstructioninc.com](mailto:admin@mcculloughconstructioninc.com)



EXHIBIT A

From: John Pugliaresi <JPugliaresi@SYNAGRO.com>  
Sent: Friday, April 11, 2025 2:39 PM  
To: [bpowell@eurekaca.gov](mailto:bpowell@eurekaca.gov) <[bpowell@eurekaca.gov](mailto:bpowell@eurekaca.gov)>  
Cc: Kelly Allen <[kallen@eurekaca.gov](mailto:kallen@eurekaca.gov)>  
Subject: Wet Weather improvements bid detail

Dear Ms. Powell:

I reviewed the line item detail on the bid results and noticed that there is quite a discrepancy between the low bid and the other two bids as it relates to sludge removal.

The low bid has a unit price of \$362.18 whereas the other two bidders have unit prices more reflective of actual costs (\$1,578-\$1,655 per dry ton).

It is possible that there is confusion between a dry ton and a wet ton. As the estimate is roughly 25 ton 33% solids when mechanically dewatering the material, the expectation is between 3 and 4 wet tons for every dry ton produced. This is consistent with the results the city is getting for its current dewatering operations.

The minimum transportation and disposal cost per wet ton is approximately \$140 per wet ton. This would put the per dry ton cost for transportation and disposal alone at \$420 to \$560 per dry ton. This excludes any costs for labor and equipment to dredge and dewater the sludge. These costs typically range between \$500 to \$800 per dry ton depending on dewatering efficiency, cost of polymer (which in this case is \$150 per dry ton alone), fuel and other operating expenses.

Synagro did submit a Request for Information (RFI) on April 3, 2025 which identified that its survey indicated substantially less volume than contained in the bid specs. As it was not addressed, we clearly communicated it with all three of the proposers. We also pointed out that we would not request an adjustment of the unit price due to discrepancy between actual and bid volumes as our unit costs were based on expected volumes.

Furthermore, the analysis below indicates how McCullough, the low bidder, potentially bid a price that is substantially below cost in order to shift price to other items knowing the reduction in volume would result in a windfall when compared to the other likely outcomes.

[cid:cd395361-75e8-4fd3-a9d4-15f59409686b]

Clearly the cost proposed for this line item is approximately 1/3 the cost (not the price) excluding any overhead.

We would recommend that in light of the discrepancy for this particular line item and fact that they did not list a qualified subcontractor, the City request McCullough to provide sufficient detail on their expected means and methods for accomplishing this task, including equipment to be used, experience of personnel, expected throughput, percent solids and destination for lawful disposal or reuse of the material.

Thank you  
John Pugliaresi  
Synagro WWT, Inc.

John Pugliaresi  
Senior Area Sales Manager  
3110 Gold Canal Drive Suite E, Rancho Cordova, CA, 95670  
Phone: +1 650-219-6380  
[JPugliaresi@SYNAGRO.com](mailto:JPugliaresi@SYNAGRO.com) |  
Synagro<[www.synagro.com](http://www.synagro.com)> | YouTube<<https://www.youtube.com/@synagrotechnologiesinc.3851>> |  
LinkedIn<[https://www.linkedin.com/company/synagro?trk=vsrp\\_companies\\_res\\_name&trkInfo=VSRPsearchId%3A157349671453751845747%2CVSRPtargetId%3A95690%2CVSRPcmpt%3Aprimary](https://www.linkedin.com/company/synagro?trk=vsrp_companies_res_name&trkInfo=VSRPsearchId%3A157349671453751845747%2CVSRPtargetId%3A95690%2CVSRPcmpt%3Aprimary)>  
[\[https://www.synagro.com/wp-content/uploads/2018/03/Synagro\\_logo\\_with\\_tagline-300x102.jpg\]](https://www.synagro.com/wp-content/uploads/2018/03/Synagro_logo_with_tagline-300x102.jpg)

[\[https://www.synagro.com/wp-content/uploads/2022/01/Top-Workplaces-Badge-11022021-RRR.png\]](https://www.synagro.com/wp-content/uploads/2022/01/Top-Workplaces-Badge-11022021-RRR.png)

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		McCullough		Wahlund		Mercer Fraser
Base bid		\$ 16,885,000		\$ 17,299,000		\$ 18,475,000
Value of sludge removal		\$ (1,400,000)		\$ (6,400,000)		\$ (6,100,000)
Base bid excluding sludge removal		\$ 15,485,000		\$ 10,899,000		\$ 12,375,000
Add 50% of sludge removal cost		\$ 700,000		\$ 3,200,000		\$ 3,050,000
Likely outcome on base bid		\$ 16,185,000		\$ 14,099,000		\$ 15,425,000

## EXHIBIT B

**From:** [Emil Kneis](#)  
**To:** [bpowell@eureka.ca.gov](mailto:bpowell@eureka.ca.gov)  
**Subject:** Question RE: Bid For Eureka CA Wet Weather Improvement Project  
**Date:** Thursday, April 3, 2025 5:56:00 PM

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Dear Ms. Powell

Synagro- WWT, Inc would like to submit the following question regarding the above referenced project.

Your response is greatly appreciated.

Thank You

Emil Kneis

1. **Synagro, as part of its due diligence, has estimated that the dry tons in place are approximately 1,500 to 1,800 dry tons. Can you please provide documentation of the 3,875 dry ton estimate?**