

Via email only to ttilbury@rtwlawllp.com

April 23, 2025

Mr. Treven I. Tilbury
Reynolds Tilbury Woodward, LLP
11601 Blocker Drive, Suite 105
Auburn, CA 95603

Re: Elk River Wastewater Treatment Plant Wet Weather Improvements Project
City of Eureka Bid No. 2025-5
Response to Bid Protest

Dear Mr. Tilbury:

This letter is submitted on behalf of my client, the City of Eureka (“City”), in response to the bid protest dated April 14, 2025 that you submitted on behalf of your client, Wahlund Construction, Inc. (“Wahlund”), the second low bidder for the above-referenced City project (“Project”).

A. INTRODUCTION

Wahlund’s protest argues that the low bid submitted by Mc Cullough Construction, Inc. (“McCullough”) is nonresponsive and that McCullough should be disqualified as nonresponsible. McCullough’s legal counsel, Randall C. Nelson, submitted a letter in response to the protest on behalf of McCullough, and disputed Wahlund’s contentions in this regard.

Based upon review of the salient facts and applicable law, the City has determined that McCullough is the lowest responsible bidder and that it has submitted a responsive bid, as further detailed herein.

B. LEGAL BACKGROUND

California state court published decisions on bidding issues, including issues of responsiveness and responsibility, provide a robust body of case law which provides the necessary source and context for the City's determination that Wahlund's protest lacks merit under California law.

1. Responsiveness

Under well-established California law, a bid is responsive "if it promises to do what the bidding instructions require." (*Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1187.)

Generally, responsiveness is determined based solely on the face of the bid itself, without regard to the bidder. "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." (*Taylor Bus Service v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1342 ("*Taylor Bus*").)

2. Responsibility

The common law definition of "responsible bidder" is codified in Public Contract Code section 1103, which states:

"Responsible bidder," as used in this part, means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.

Rejection of a bidder on grounds that it is not responsible requires *evidence* and the bidder must be afforded an evidentiary due process hearing before it can be disqualified. In *City of Inglewood v. Superior Court* (1972) 7 Cal.3d 861, 867 ("*Inglewood*"), the California Supreme Court articulated the well-established requirements under California law for rejecting a low bidder that has submitted a responsive bid:

"We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any **evidence** reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract." (*Inglewood, supra*, 7 Cal.3d at 871; emphasis added.)

Note the emphasis on “evidence” of whether a contractor is a responsible bidder. This informs the following analysis of Wahlund’s protest, McCullough’s response, and the City’s independent evaluation of the responsiveness of McCullough’s bid and of whether McCullough is a responsible bidder.

C. ANALYSIS

1. The City has determined that McCullough’s low bid is responsive.

Wahlund’s protest alleges that McCullough’s bid is nonresponsive based on Wahlund’s speculation that McCullough’s pricing for Bid Item 28 does not include all costs to perform the scope of work for Bid Item 28. The City disagrees.

The City has carefully reviewed McCullough’s bid, and while McCullough’s unit pricing for Bid Item 28 is substantially lower than the pricing provided by the other two bidders for that bid item, a difference in pricing—even a substantial one—does not render a bid nonresponsive. Bids by their very nature vary in amount. Otherwise, public bidding would be pointless.

Moreover, a bid cannot be deemed nonresponsive based solely upon speculation or conjecture as to the bidder’s intent or future acts. As noted above, determinations of responsiveness are generally limited to the face of the bid. See also, *Great West Contractors, Inc. v. Irvine USD* (2010) 187 Cal.App.4th 1425, 1453.

McCullough’s bid is responsive because it has complied with the bidding instructions, which included providing a unit price for Bid Item 28. If awarded the contract for the Project, McCullough will be bound by that price, even if it underbid that scope of work.

McCullough’s response to the bid protest expressly affirms that its bid price for Bid Item 28 includes all costs to perform the work, and further asserts “McCullough did not make an error on Bid Item 28,” a scope which it intends to self-perform.

The protest also alleges—again based solely on speculation—that McCullough’s bid is “unbalanced,” but does not identify any bid instructions that are relevant to this allegation. Wahlund’s protest cites to the Federal Acquisition Regulations (“FAR”) in this regard, but the referenced FAR provision does not apply here since this contract is being awarded by a California charter city, not the federal government or a federal agency.

Based on its review of McCullough’s bid, the City is satisfied that the low bid submitted by McCullough is fully responsive; it promises to do what the bidding instructions require.

2. The City has determined that McCullough is a responsible bidder.

Wahlund also alleges that McCullough is not a responsible bidder because it “does not have the expertise to perform the Bid Item 28 work.” Again, this allegation appears to be based on speculation and conjecture. The allegation is not supported by credible evidence, which is required for any determination that a bidder is not responsible.

Moreover, McCullough disputes the allegation with specific details concerning its relevant experience and objective qualifications:

“McCullough is well qualified and fully licensed to do this work. It has over 50 years of experience working on waste treatment, including the handling and transportation of waste.”

The City has independently confirmed that McCullough possesses the Class “A” California contractor’s license required for the Project, state license number 715577, which is currently in good standing. In addition, the California State Licensing Board website indicates that in addition to its multiple license classifications (“A”, “C27”, and “C-61/D49”), McCullough is also certified for Hazardous Substances Removal pursuant to Business and Professions Code section 7058.7.

McCullough’s response to the bid protest further explains that it will be able to self-perform the Bid Item 28 work more cost-effectively than the other two bidders because it is not relying on pricing provided by the out-of-state subcontractor listed by the other two bidders and will instead be able to use its own equipment, trucks, and local employees, thereby providing cost savings to the City.

The City has undertaken its customary due diligence to determine whether the low bidder is a responsible bidder. Based on its investigation, the City is satisfied that McCullough is a responsible bidder as defined in Public Contract Code section 1103, above.

The City has *not* encountered any evidence that support Wahlund’s allegations that McCullough will not be able to perform this scope of work as specified in the plans and specifications for the Project. Moreover, the self-interested and speculative allegations contained in Wahlund’s bid protest do not constitute credible *evidence* that McCullough is not a responsible bidder.

Whether or not Wahlund and its subcontractor collectively have more experience with respect to the Bid Item 28 scope of work is irrelevant. Because McCullough is qualified to perform the work, including the required license, its experience relative to other bidders cannot be

considered. See, *Inglewood, supra*, 7 Cal.3d at 867, holding that “a relative superiority concept” cannot be applied to public bidding statutes requiring award to the lowest responsible bidder.

D. CONCLUSION

For the reasons stated above, the City has concluded that Wahlund’s bid protest lacks merit because it does not provide legal grounds nor evidence for rejecting McCullough’s low bid as nonresponsive or for disqualifying McCullough as nonresponsible. The City appreciates Wahlund’s interest in the Project and welcomes its participation in future public works bids for the City.

Sincerely,

LAW OFFICE OF CLARE M. GIBSON



Clare M. Gibson

c: (via email only)
Jesse Willor, City Engineer
Brittany Powell, Project Manager
Randall C. Nelson, Carr|Kennedy