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May 27, 2022

VIA EMAIL ONLY

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Omar Sandoval, Director
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VIA GSO OVERNIGHT EXPRESS MAIL

Ms. Teresa Pomery, CMC
Clerk, City of Garden Grove
11222 Acacia Parkway
Garden Grove, CA 92840

Re: *Initial Response to Notice of Appeal of R.J. Noble Co.*

Project:	Various Streets Rehabilitation 2022
Client:	All American Asphalt
Lowest Bidder:	All American Asphalt
Bid Date:	May 11, 2022

Dear Mr. Sandoval and Ms. Pomery:

As represented in my telephone conversation with Mr. Sandoval of May 24, 2022, please be advised that The Mouzis Law Firm, APC serves as legal counsel for All American Asphalt (hereinafter "AAA") in connection with its response to the Notice of Appeal submitted on May 19, 2022 by R.J. Noble Co. (hereinafter "Noble") involving bids submitted on the public work of improvement commonly referred to as the "Various Streets Rehabilitation 2022" project (hereinafter the "Project").

It is our understanding that the formal Award of the contract for the Project was previously on the Agenda for the City Council meeting of May 24, 2022 for the City of Garden Grove (hereinafter the "City"). AAA requested that the Agenda item be continued to another date so that AAA could provide a formal response to the Notice of Appeal of Noble. The City

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graciously granted the requested extension, and the item is now on the Agenda for the City Council meeting of June 14, 2022, as confirmed by Mr. Sandoval telephonically and in my email of May 24, 2022.

Please allow this correspondence to serve as AAA's Initial Response to the Notice of Appeal of Noble.

NOTICE OF INVITING BIDS/BID PACKAGE

On or about April 12, 2022, the City of Garden Grove (hereinafter the "City") issued a Notice of Inviting Sealed Bids for the Project, with publication dates of April 15, 2022 and April 22, 2022 and a bid submission date and time of May 11, 2022 at 11:00 a.m.

The Notice of Inviting Bids incorporated Specification No. 770 for the Project. The Notice of Inviting Bids and Specification No. 770 both note that the Garden Grove City Hall is temporarily closed for construction and that bidders are to proceed to the back door of City Hall to deliver their bid proposals. Also, Specification No. 770 authorizes the City to waive any informality or irregularity in the bids received. (Spec. 770, §1B., subsection 6.)

The Bid Schedule did not call for a lump sum bid. Indeed, the Notice of Inviting Bids did not call for one proposal to be submitted to the City, but six separate proposals with six different schedules calling for separate unit price entries corresponding with various line items, depending on the segment of street rehabilitation work involved.

The six segments and corresponding line items are as follows:

1. Newland Street Rehabilitation From Trask Avenue to Garden Grove Blvd; Project No. CP – 1322000, Drawing No. A-1942; Line Item Numbers 1-27.
2. Mays Avenue Rehabilitation From Yockey Street to Magnolia Street, Project No. CP – 1323000, Drawing No. A-1941; Line Item Numbers 1-23.
- 3A. Hazard Avenue rehabilitation From Bushard Street to Ward Street, Project No. CP – 1296000, Drawing No. 1922; Line Item Numbers 1-24.
- 3B. McFadden Avenue Rehabilitation From Ward Street to 600' East Project No. CP – 1296000, Drawing No. 1922; Line Item Numbers 1-16.
4. Chapman Avenue Rehabilitation From Nelson Street to Ninth Street, Project No. CP – 132100, Drawing No. A-1940; Line Item Numbers 1-23.
5. Lampson Avenue Rehabilitation Harbor Boulevard to Haster Street, Project No. CP – 1297022, Drawing No. A-1936; Line Item Numbers 1-18.

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In connection with the preparation of the bid form, Specification No. 770 specifically states as follows:

“The bidder shall state in words and figures, the unit prices or the specific sums, as the case may be, for which he/she proposes to perform the work as required by the specifications. In case words and figures do not agree, the words shall govern and the figures shall be disregarded. **If the unit price and the total amount for any item are not in agreement, the unit price alone shall be considered as representing the bidder’s intention and the totals will be corrected to conform.**” (Spec. 770, §A., subsection 1-Information for Bidders; emphasis added.)

The bid package also includes a proposed Construction Agreement, which specifies that the City will pay the Contractor full consideration for the faithful performance of the Contract, subject to any additions or deductions as provided in approved change orders, in a sum certain **as itemized in the bid proposal.** (Proposed Construction Agreement, §5.11; emphasis added.) By its clear and unambiguous language, the proposed Construction Agreement contemplates payment by the City for the cost of each of the line items of work specified in the six proposals submitted by the bidder who is awarded the Contract. The Contract is a unit price contract.

BIDS

As per Specification No. 770, the unit prices govern the amount bid by a contractor and reflect the bidder’s intention as to the amount of the bid. All of the unit prices per line item for each segment were posted by AAA next to the line item, with a total for all six segments bid by AAA of **\$4,789,300.00.**

No mistake was made by AAA in the amount of each line item specified for each of the six proposals nor in the total amount reflected for each segment bid on the Summary of Bid Proposal. The total of the unit prices for each segment bid and the total of each segment reflected on the Summary of Bid Proposal confirm that AAA was the low bidder at **\$4,789,930.00.** Noble was the next lowest bidder at **\$4,971,340.00,** a difference of **\$182,040.00,** a difference of approximately 3.67%.

On the Summary of Bid Proposal, however, an inadvertent variance exists wherein the total of the unit pricing for each segment was incorrectly recorded in figures and words as \$478,930 as opposed to \$4,789,930. A representative of the City then transferred the number without apparently checking the total amount of the line items to the City’s summary of bids, wherein the total figure of the bid is also reflected as \$478,930.00.

As discussed more fully herein, the City, in conformity with its own Specification and consistent with the law, could have confirmed that the total amount reflected in AAA’s bid summary matched the total of the line items, as the amounts reflected in the line items for the six proposals govern. Regardless, the City can still correct the total amount to conform to the

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amount of the unit pricing for each of the six segments, as the unit pricing is to be considered the bidder's intention as to pricing for the Project. (Spec. 770, §A., subsection 1-Information for Bidders.)

NOBLE'S NOTICE OF APPEAL

Noble's Notice of Appeal identifies three separate grounds for the appeal based on four claimed deviations in AAA's bid from the call for bids. The four factual deviations are as follows:

1. AAA's bid was not submitted in a sealed envelope;
2. AAA's bid was submitted at 11:02 a.m., two minutes after the deadline;
3. AAA's bid was submitted at the wrong location; and
4. AAA's bid contains a "mistake" on pricing and, having failed to invoke the administrative procedures to correct a mistake set forth in *Public Contract Code*, section 5101, *et seq.*, AAA's bid is "nonresponsive" on price.

Noble's position is not well taken and is not supported by the law or the language of the bid package of the City. Moreover, the declarations submitted by Noble in support of the Notice of Appeal lack the requisite foundation and would likely be excluded in a court of law.

LEGAL STANDARDS

A. Competitive Bidding

Generally, public entities and owners subject to the competitive bidding statutes are required to put significant contracts out for competitive bidding and to award the contract to the lowest responsible bidder. (*Public Contract Code*, §20162, *et seq.*)¹ The purpose of requiring owners of public works of improvement to open the contracts process to public bidding is **to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous marketplace competition.** (§100; *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 369.) In other words, the **bidding procedure is a safeguard for the protection of the public.** Its purposes are to guard against **favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; to obtain the best economic result for the public and to stimulate advantageous market-place competition.** (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 88; *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 456; *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173.) Indeed, the Legislature's Statutory Note to §1103 states as follows:

¹ Unless otherwise indicated, all statutory references are to the California Public Contracts Code.

“The Legislature hereby finds and declares that the establishment by public agencies of a uniform system to evaluate the ability, competency, and integrity of bidders on public works projects is in the public interest, will result in the construction of public works projects of the highest quality for the lowest costs, and is in furtherance of the objectives stated in Section 100 of the Public Contract Code.”

In this case, the City is a public agency, who must award the contract to the lowest responsible bidder. (§20111, *et seq.*).

B. “Responsible Bidder” vs. “Responsive Bid”

(1) “Responsible Bidder”

Public owners are required by law to award construction contracts (with certain exceptions) to the “lowest responsible bidder.” (§20111.) A public owner does have discretion, however, to determine whether a low bidder is “responsible,” but that determination is not without limits. The law specifies that a **“responsible” bidder is one who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.** (§1103; *City of Inglewood v. Superior Court* (Argo Construction) (1972) 7 Cal.3d 861, 867; *Eel River Disposal and Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 220-221; *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1450-1459; *Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d 1362, 1368-1369; *Taylor Bus. Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341-1343.)

No issue exists as to whether both AAA and Noble have the requisite quality, fitness, capacity and experience to perform a public works contract. They are both “responsible” bidders. Instead, the central issue is if AAA’s bid is responsive to the call for bids.

(2) “Responsive Bid”

A public owner must also determine whether a bid is responsive to the call for bids, *i.e.*, whether the bid “promises to do what the bidding instructions demand.” (*D. H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 764, citing *Taylor Bus. Services, Inc. v. San Diego Board of Education* (1987) 195 Cal.App.3d 1331, 1341.) In the usual case, the determination that a bid is nonresponsive is not based on disputed facts, does not involve the exercise of agency discretion, and does not require a hearing for the excluded bidder. (*Taylor Bus. Services, Inc.*, *supra*, 195 Cal.App.3d at pp. 1342-1343; see *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1453 [“usually the question of responsiveness can be determined simply by looking exclusively at the face of the bid”].)

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(a) **Inconsequential Deviations or Variations from Bid Documents**

It is well settled that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted **if the variance could not have affected the amount of the bid or have given the bidder an advantage or benefit not allowed other bidders** or, in other words, if the variance is inconsequential. (*Valley Crest, supra*, at p. 1441; *Konica Business Machines, supra*, at p. 454, quoting 47 Ops. Cal. Atty. Gen. 129)

In *Ghilotti Construction Company v. City of Richmond* (1996) 45 Cal. App.4th 897, 900, California's First Appellate District stated as follows:

“ . . . we hold that a public entity may waive inconsequential deviations from contract specifications in a public contract bid. To be considered inconsequential, **a deviation must neither give the bidder an unfair competitive advantage** nor otherwise defeat the goals of insuring economy and preventing corruption in the public contracting process.” (Emphasis added.)

(See also *MCM Construction, Inc., supra*; *Menefee v. County of Fresno* (1985) 163 Cal. App.3d 1175.)

AAA'S RESPONSE TO NOBLE'S NOTICE OF APPEAL

Noble's Claim that AAA Did Not Comply with the City's Procedures in Physically Delivering the Bid to the City

Noble claims that AAA failed to comply with the procedures set forth in call for bids in three ways: (1) AAA's bid was not submitted in a sealed envelope; (2) AAA's bid was submitted at 11:02 a.m.; and (3) AAA's bid was submitted at the wrong location. These claims do not challenge the substance of AAA's bid, but the physical manner in which the bid was submitted.

AAA complied with the bid package in the actual personal delivery of its bid. Indeed, the information provided not only by AAA but also by the City Clerk to Mr. Sandoval confirm that AAA was in full compliance with the procedures set forth in the bid package and directions provided to bidders on site.

On May 23, 2022, Michael S. Farkas, Corporate Secretary of AAA, directed correspondence to Ms. Teresa Pomery of the City which reflects that AAA's runner arrived at the City at 9:20 a.m. and proceeded to 11222 Acacia Parkway, the address specified in the Notice of Inviting Bids for the physical submission of bids. Upon arriving at that address, however, she discovered a sign stating that the lobby was closed but to proceed to 12860 Acacia Parkway. At that location, she made contact with an individual, who advised her to contact the City Clerk by telephone when the bid was ready to be submitted. Prior to 11:00 a.m., AAA's runner contacted the City Clerk. A staff member of the City was already outside, who time

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stamped and dated the sealed envelope prior to AAA's runner leaving the site. The bid was accepted by the City.

This same factual scenario was confirmed by the City as being accurate in Mr. Sandoval's email of May 20, 2022, which Navin B. Maru, Associate Engineer of the City, then sent to Jim McGee of AAA.

The clear weight and reliability of the evidence reflects that AAA complied with all directions for the submission of bids set forth in the call for bids and the modifications thereto on site that morning. Had AAA not complied with procedures in the bid package and on site for the submission of the bid, the City would not have accepted the bid.

In response, however, Noble submitted two virtually identical and repetitive declarations to support the claimed deviations, one from Steve Mendoza (Noble's Chief Estimator) and the other from Brandon Spiers (an Estimator with Noble). In effect, they both state that they submitted Noble's bid before 11:00 a.m. on May 11, 2022, and then waited at some undisclosed location in the parking lot, at which time they claim "the AAA runner" delivered an unsealed package to "another woman," whose identity was never obtained, and that this other woman entered the premises at 11:02 a.m. No evidence is provided as to each of these individual's location in the parking lot, the distance from their location to where they purportedly saw the delivery of AAA's bid, and how they determined that the envelope was unsealed at the precise time it was handed to some unidentified woman at the City.

As referenced above, AAA complied with the bid package in the actual personal delivery of its bid. Indeed, the information provided not only by AAA but also by the City Clerk to Mr. Sandoval rebut Noble's rendition of the facts. Again, had AAA not complied with the procedures for submission of the bid timely, the City would not have stamped the document as accepted. AAA was in full compliance.

Noble's Claim Involving AAA's Pricing

Noble claims that, notwithstanding the bid Specification that unit prices govern and that the City can change amounts reflected as total sums to conform with the amount of unit prices, AAA's entry of \$478,930.00 render's AAA's bid non-responsive, such that an award of the contract should be made to Noble as opposed to AAA for the increased amount of Noble's bid. Two related grounds appear to be proffered by Noble to support this position: (1) AAA did not avail itself of the administrative procedures set forth in sections 5101, *et seq.* to correct a "mistake" in their bid; and (2) the error in arriving at a total of the line item figures in writing and by words is not an inconsequential or immaterial deviation which can be waived by the City.

On both grounds, Noble's position is not well-taken.

A. Claim that AAA's Price was a "Mistake" in Need of Correction Through the Administrative Process

1. Public Contract Code, Section 5101, et seq. Does Not Apply and the Administrative Process Set Forth Therein Was Never Triggered

A bidder shall not be relieved of a bid unless by consent of an awarding authority *nor shall any change be made in the bid because of mistake.* (§5101; emphasis added.) Instead, the bidder may bring an action against the public entity *for the recovery of an amount forfeited by the mistake* in the bid. (§5101; emphasis added.)

Prior to bringing such an action, however, an administrative procedure is to be exhausted. (§5103.) Prior to filing a legal action, the bidder must establish that a mistake was made; that notice of a mistake contemplated by section 5101 was provided within five working days of the discovery of a mistake; that the mistake made the bid *materially different* than the bidder intended; and that the mistake was not made due to an error in judgment or to carelessness in inspecting the site or in reading the plans and specifications, but merely in filling out the bid documents. (§5103.)

Neither section 5101 nor section 5103 apply to the instant dispute.

By the language of section 5101, AAA would not be seeking an amount forfeited by any mistake in the completion of the bid documents. Indeed, the City exhibited tremendous foresight by realizing that a variance may exist between unit price line items and a total amount reflected for line items, thereby indicating that unit prices would govern, and that an incorrect total of unit pricing could be corrected by the City to conform to the amount of the unit prices. (Spec. 770, §A., subsection 1-Information for Bidders.) Here, AAA would not be seeking any correction to the unit prices, as AAA is bound to the unit prices. The change would only be to one entry, from \$478,930 to \$4,789,930, the amount intended to be the total bid price based on unit pricing for the six separate proposals, and the corresponding word description. Such a procedure is mandated by Specification 770 and would not violate section 5101(a).

As such, any notice provided under section 5103 would not reflect that the mistake involved pricing that was "materially different" from the amounts submitted in the proposals. The total figure does not govern. The unit pricing does. The change to the total figure would simply conform the amount reflected on that line of the Summary of Bids to the existing total of unit pricing.

Therefore, since the City was empowered and indeed obligated to correct the inadvertent variance between the unit pricing and the total amount reflected, and since there would be no material difference set forth in any administrative procedure initiated by AAA, the bid submitted by AAA is responsive to the call for bids. Section 5101 and 5103 do not apply to render AAA's

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bid non-responsive. At most, the inadvertent variance between the unit pricing and the total reflected of unit pricing constitutes an immaterial or inconsequential deviation which can and should be waived by the City.

2. No Material or Consequential Deviations Exist in the Price of AAA's Bid

Again, the legal standard is whether the variance provided AAA with an unfair competitive advantage not afforded other bidders. AAA did not receive any such advantage. The unit prices have not changed. Correcting the amount reflected as the total of the unit prices as per Specification 770 would not provide AAA with a competitive advantage. AAA is bound by those prices in bidding the job. The amount of \$4,789,930, the total of the unit pricing, would constitute the Contract amount. (See *Konica, supra* at p. 454.)

Against this standard, a plethora of case law provides guidance in determining “immaterial” and “inconsequential” deviations from the call for bids.

In *Menefee, supra*, the court held that the failure to sign the bid did not constitute an unfair advantage to the low bidder and could be waived. (163 Cal. App. 3d at p. 1181.) Thus, section 5103 did not apply. (*Id.* at p. 1181.). Conversely, in *Valley Crest, supra*, the court concluded that the initial disclosure by the low bidding contractor of the percent of work to be performed by subcontractors (83 percent contrary to the bid specifications capping the percent of subcontractor work at 50%), and then after initial bid submission, permitting the bidding contractor to change the percentages to 44.65 percent, constituted an unfair competitive advantage thus rendering the bid non-responsive. In *Ghilotti, supra*, the low bidding contractor's failure to comply with the bid specifications involving the percent of subcontractor work was deemed inconsequential and immaterial, as it did not change the dollar amount of the lowest bid. In *MCM Construction, supra*, the court concluded that MCM's failure to list the dollar amount of subcontractor work pursuant to the City of San Francisco Administrative Code was a material deviation from the call for bids, as it affected the price of the bid and issues involving the forfeiture of the bid bond. More recently, in *DeSilva Gates Construction LP v. Department of Transportation* (2015) 242 Cal. App.4th 1409, the court concluded that the bid of the low bidder was responsive even though a difference existed between the subcontractors listed in the original bid and those in a 24-hour contractor list required for submission, again because it did not impact price.

Consistent with Specification No. 770, correcting one line of AAA's bid to reflect the accurate total of unit prices without any impact on the total unit price of the bid does not render AAA's bid non-responsive. The correction is called for in the Specification, would not violate sections 5101 and 5103, and constitutes the correction of an “immaterial” and “inconsequential” variance in the Summary of Bids.²

² It should be noted that any attempt by the City to hold AAA to a bid price of \$478,930.00, contrary to Specification No. 770 when such a price does not govern AAA's bid amount, would be unconscionable and contrary to law. (See *M.F. Kemper v. City of Los Angeles* (1951) 37 Cal.2d 696.)

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CONCLUSION

In closing, the City does have broad discretion to reject all bids and re-bid the Project. However, such a step should only be taken when compelling reasons exist. As stated more than 75 years ago in *Massman Const. Co. v. U.S.* (1945) 102 Ct. Cl. 699; 60 F.Supp. 635, *cert. den.* 325 S.Ct. 86:

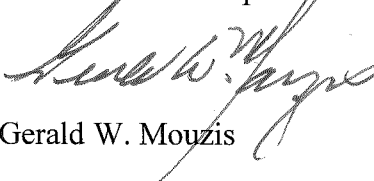
“To have a set of bids discarded after they are opened and each bidder has learned his competitor’s price is a serious matter, and it should not be permitted for cogent reasons.”

Instead of rejecting all bids and re-bidding the Project, the City is required to make the formal Award of the Contract to AAA as the lowest responsible bidder. Substantial evidence exists that AAA complied with the call for bids. As per the bid Specification, the City is required to correct the amount reflected as AAA’s total amount for all six segments in the Summary of Bids to conform with the unit prices reflected for all six proposals submitted by AAA, which total **\$4,789,930.00**. An award of the Contract to AAA would not be arbitrary and capricious and would not be entirely lacking in evidentiary support. To the contrary, it would reflect a stewardship of public funds by awarding the Project to AAA in an amount \$182,040.00 less than Noble’s bid, consistent with the policy behind competitive, *i.e.*, to prevent the waste of public funds, to obtain the best economic result for the public and to stimulate advantageous market-place competition. (*Miller v. McKinnon, supra; Konica Business Machines, supra; Domar Electric, supra.*)

Thank you again for affording AAA additional time to submit this formal Response to the Notice of Appeal of Noble. We look forward to the City’s Award of the Contract on June 14, 2022 to AAA as the lowest responsible bidder on the Project.

Very truly yours,

THE MOUZIS LAW FIRM
A Professional Corporation



Gerald W. Mouzis

GWM/cf