

KAMINE LAW PC

Construction Attorneys

523 WEST 6TH STREET, SUITE 1128

LOS ANGELES, CALIFORNIA 90014

(213) 972-0119 FAX (213) 972-0005

www.KamineConstructionLaw.com

December 28, 2023

BY EMAIL

LJIN@CI.GARDEN-GROVE.CA.US

City of Garden Grove
Garden Grove Sanitary District
Department of Public Works
13802 Newhope Street
Garden Grove, CA 92843

ATTN: Liyan Jin, P.E., Associate Engineer

Re: Specification No. 783 - Project No. C 1329000
Sewer System Rehabilitation Plan Phase 1
Sewer Main Replacement Project No. 4

Response by RAMONA to
Bid Protest by EVERLEVEL to Award of Specification 783

Gentlemen:

We represent RAMONA on the contract referred to above. This letter is intended to be:

- (1) A protest against any award of that contract to any bidder other than Ramona.
- (2) A request under Gov. Code § 54954.1 for mailed notice of all meetings of the awarding authority at which any issues pertaining to the award of that contract are on the agenda for the meeting. If there is any fee for this service, please telephone that information to us immediately, so we can promptly pay the fee.
- (3) A request to be informed (by telephone or fax) as soon as any staff reports or recommendations concerning any issues pertaining to the award of that contract are available to the public, so we can immediately inspect those reports or recommendations.
- (4) A request to address the awarding authority before or during consideration of any issues pertaining to the award of that contract, which opportunity is guaranteed by Gov. Code § 54954.3(a).

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If this letter is not sufficient to accomplish any of these four purposes, please let us know immediately what else is required, so we can comply. If we do not hear from you, we will proceed on the basis that this letter is sufficient.

Grounds for Bid Protest

An award of the contract to any bidder besides RAMONA would violate the competitive bidding laws, standards and practices applicable to California public works contracts, for the following reasons:

EVERLEVEL challenges the award of the referenced contract to RAMONA on the grounds that that RAMONA's bid is non-responsive to the invitation to bid. EVERLEVEL claims that RAMONA failed to provide a mandatory Jurat Certificate for the Non-Collusion Affidavit.

EVERLEVEL's allegation is baseless for the following reasons:

1. EVERLEVEL has misconstrued Section 4 of the bid documents which provides:

AFFIDAVID TO ACCOMPANY PROPOSAL
USE THIS FORM WHEN BIDDER IS A CORPORATION

The corporation who makes the accompanying proposal, having first been duly sworn, deposes and says: That such proposal is genuine and not sham or collusive, not made in the interest of or in behalf of any person not herein named, and the bidder has not directly or indirectly induced or solicited any other bidder to put in a sham bid, or any other person, firm or corporation to refrain from bidding, and that the bidder has not in any manner sought by collusion to secure itself for an advantage over any other bidder.

The foregoing paragraph is not a non-collusion affidavit, nor did the Garden Grove Sanitary District intend that it should be construed as such. Section 1-Notice to Contractors/Section A- Information For Bidders, Paragraph 13-Non-Collusion Affidavit provides:

The DISTRICT reserves the right, before any award of the contract is made, to require any bidder to whom it may make an award of the principal contract to execute a Non-Collusion Affidavit.

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The form of the Non-Collusion Affidavit pursuant to Public Contract Code §7106 does not require a jurat, nor an acknowledgement, only a declaration under penalty of perjury. Thus to the extent that the Affidavit to Accompany Proposal is a Non-Collusion Affidavit, no jurat is required by the Public Contract Code. Since the bid documents require that the bidder execute a non-collusion affidavit prior to award and Public Contract Code §7106 specifically mandates the form of the affidavit, it is clear that Section 4 was not intended to be a non-collusion affidavit. RAMONA has complied with the requirements of the bid documents.

Moreover, nothing in the Bid documents instructs the bidder on the type of confirmation for the form on page 24, notwithstanding the assertion by EVERLEVEL that Section 4 of the Instructions to Bidders specifies the type of notarization, whether Jurat or Acknowledgement. EVERLEVEL is inserting requirements not mandated by the Bid documents. RAMONA complied with the Bid documents with an Acknowledgement. In so doing, the Bid of RAMONA was completely responsive to the Invitation to Bid.

Furthermore, EVERLEVEL' s demand that RAMONA provide a jurat in lieu of an acknowledgement is inconsistent with Public Contract Code §7106 which in mandating the form of the non-collusion affidavit has no jurat requirement nor affidavit requirement. Here affidavit is superfluous at best. Since the jurat is not mandated, the lack of jurat is not a defect in RAMONA'S Bid and should be ignored.

2. One bases for a test of whether a bid is responsive to the request for invitation for bids is whether a bidder has the ability to disavow a bid without forfeiture of a bid bond based upon the irregularity, giving that bidder an unfair competitive advantage not enjoyed by other bidders.

In *Valley Crest Landscape, Inc. v. City Council* (1996) 41 CA 4th 1432, 1442-1443. The *Valley Crest* court found that waiving a mistake concerning the percentage of subcontracting, violated the invitation to bid. Such a material deviation was an irregularity that provided an unfair advantage because the low bidder could have claimed a mistake and withdrawn its bid without consequence. The fact that the low bidder did not seek such relief was not dispositive; "[t]he key point is that such relief was available." (*ibid.*) In voiding the award to the low bidder, the court held that the mistake made the low bidder non-responsive and that the city could not waive the mistake as an irregularity. Allowing the city to waive such an irregularity would have given the low bidder an unfair advantage and benefit..


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The purported irregularity raised by EVERLEVEL, is, at best, just that, an irregularity, not an unfair competitive advantage. [*MCM Construction, Inc. v. City and County of San Francisco* (1988) 66 Cal.App.4th 359, 375]. RAMONA did not garner an unfair competitive advantage because its bid bond would not be forfeited [*Ghilotti Construction Company v. City of Richmond* (1996) 45 CA4th 897, 912, *Jtn.* 6]. Thus, to the extent that the lack of a jurat is an irregularity in the RAMONA Bid, it is clearly a waivable defect.¹

For the foregoing reasons, EVERLEVEL's bid protest should be summarily rejected and the contract awarded to RAMONA.

If you need any further information, please contact me.

Very truly yours,
KAMINE LAW, PC



MARCIA HABER KAMINE

¹ EVERLEVEL's reference to an action taken by the City of Santa Ana is completely irrelevant because not all the facts surrounding the decision are known,