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February 1, 2019

VIA CERTIFIED MAIL AND ELECTRONIC MAIL

City of Rialto
Attn: Robert Eisenbeisz, PE
Director of Public Works
150 S. Palm Avenue
Rialto, CA 92376

Re: Construction of Frisbee Park Expansion
City Project No.: CB 150304
Our Client: RAL Investment Corp. d/b/a Silverstrand Construction

Dear Mr. Eisenbeisz:

As you are aware, this firm represents RAL Investment Corp. d/b/a Silverstrand Construction ("Silverstrand") in connection with the public bidding procedures administered by the City of Rialto (the "City"), as owner, concerning the public works construction project commonly known as the "Construction of Frisbee Park Expansion, City Project No. CB 150304 (the "Project").

We are in receipt of and thank you for a copy of the January 22, 2019, correspondence (the "Final Response Letter") of RC Graves Construction ("RC"). Therein, RC again attempts to "explain away" the multiple bid irregularities highlighted in Silverstrand's December 27, 2018, bid protest letter (the "Bid Protest Letter").

The purpose of this letter is to a) briefly refute RC's arguments as to the purported responsiveness of its bid, and b) renew Silverstrand's demand that the Project be awarded to Silverstrand as the lowest responsive/responsible bidder.

I. RC's Final Response Letter still does nothing to refute, negate, or explain RC's plain violation of the maximum fifty percent (50%) subcontracting threshold established by the Bid Specifications.

Although RC apparently finally acknowledges in its Final Response Letter that the fifty percent (50%) *maximum* subcontracting threshold of the Bid Specifications is a separate and distinct requirement from the fifty percent (50%) *minimum* self-performance requirements of the Bid Specifications, nothing in RC's Final Response Letter explains (or even attempts to explain) how RC's listing of subcontractors whose aggregate work

percentages total **62.45%** can possibly comply with the “Special Notes” section of the “Information Required of Bidder – List of Subcontractors” form, which states in no uncertain terms that “[in] the event a Bidder lists subcontractors who will perform Work under this Bid in excess of 50% of the Work identified in this Bid, **the Bid shall be considered non-responsive.**” Emphasis added.

At no point of the written colloquy concerning RC’s bid has RC offered any explanation whatsoever as to this obvious violation of the express, plain requirements of the Bid Specifications -- terms which appear *on the same page of the same form* on which RC nevertheless used to violate such requirements.

California law is clear as to the effect of such violation: RC’s bid must be rejected as non-responsive. See Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432, 1443 (1996) (“[The bid specifications] made listing the subcontractor percentages a material element of the bid. . . . North Bay’s bid provided for more than 50 percent of the work to be done by subcontractors; therefore, it was nonresponsive.”); Murray Co. v. Occupational Safety & Health Appeals Bd., 180 Cal. App. 4th 43 (2009) (holding that use of word “shall” implies a mandatory requirement that carries with it no discretion); Pozar v. Dep’t of Transp., 145 Cal. App. 3d 269, 271 (1983) (holding that public entity had no choice but to follow its own rules” set forth in bid specifications concerning interpretation of bid)).

No amount of elaborate protestations by RC as to why its alleged efforts to comply with the fifty percent (50%) *minimum* self-performance requirements of the Bid Specifications excuse or negate RC’s plain violation of the fifty percent (50%) *maximum* subcontracting threshold of the Bid Specifications. RC cannot escape the plain words of the Bid Specifications -- or the holdings of the above-cited California courts on the exact same questions of law at issue here.

Thus, RC’s bid must be rejected, and the contract for the Project must be awarded to Silverstrand as the lowest responsive, responsible bidder.

II. RC’s Final Response Letter still fails to offer a coherent explanation for the apparent misrepresentations in its bid as to subcontract amounts.

In its Final Response Letter, in responding to an apparent January 16, 2019, email correspondence from the City, RC states the purpose of its letter as “elaborate[ing] on why the percentages listed on the Subcontractor listing don’t match the bid schedule.” This is not (and never has been) the focus of Silverstrand’s bid protest concerning the subcontract amounts which RC intends to allocate to its subcontractors. Rather, the question raised by RC’s bid is why the subcontract amounts referenced in RC’s bid do not match up with the actual, written subcontract proposals received by Silverstrand *by the same subcontractors for the same work*.

In applying RC's listed subcontractor percentages to RC's stated Total Base Bid of \$15,081,000.00, the City should be able to calculate, to the penny, the amount of each subcontract into which RC intends to enter for the Project. In both its initial Response Letter and its Final Response Letter, RC refuses to address the fundamental question of how its stated subcontract amounts correspond to the bids submitted by its subcontractors, opting instead to make statements like "there are a number of things that go into each line item on the bid schedule" and "many factors go in to a bidding contractor's bid price calculations and subcontractor values." However, even accepting for the sake of argument that such nebulous "other factors" may have gone into RC's calculation of particular subcontract amounts, RC has wholly failed to enunciate a rational, coherent explanation for how such "other factors" resulted in the wild divergences between the prices for which RC's subcontractors have offered to do the work on the Project and the ultimate subcontract amounts indicated in RC's bid.

Further, although contract discussions with subcontractors typically involve a prime contractor's attempts to negotiate *down* a subcontractor's price, as evidenced by the table set forth in Silverstrand's initial Bid Protest Letter, many of the subcontract percentages listed by RC in its bid actually correspond to substantial *increases* over and above the amounts of the bids submitted by such subcontractors -- including, but not limited to, increases in the amounts of a) \$547,108.00 for Ace Electric; b) \$318,583.00 for Ortco, Inc.; and c) \$224,113.00 for Team West Contracting. Again, no amount of "other factors" could possibly explain these divergences.

In reality, the most plausible explanation for the obvious irregularities in RC's bid is the simplest -- RC made a mistake in calculating and/or writing in the percentages (and, by extension, the associated subcontract amounts) for the subcontractors listed in such bid. Having apparently not realized such errors prior to submitting its bid, and having missed the deadline for attempting to withdraw its bid pursuant to Cal. Pub. Contract Code § 5103, RC finds itself in the unenviable position of having to defend a patently faulty bid by framing such errors as deliberate choices. However, as set forth above, this defense does not withstand even basic scrutiny.

Thus, because the incompatibility between RC's listed subcontractor percentages and the actual bids submitted by such subcontractors for the Project, *at a minimum*, renders RC's bid non-responsive with regard to the subcontractor listing requirements of the Bid Specifications, RC's bid must be rejected and the Project must be awarded to Silverstrand.

III. Conclusion.

In light of the foregoing, Silverstrand hereby reiterates, for a third time, its demand that the City reject the putative "low bid" of RC and award the Project to Silverstrand, as the lowest responsive and responsible bidder. Silverstrand further continues to request that Silverstrand be afforded notice of any proceeding of the City and/or the City Council at which the instant bid protest letter may be discussed, and that Silverstrand further be afforded the right to address the City and/or the City Council at any such proceeding. Silverstrand reserves all rights.

Robert Eisenbeisz, PE
City of Rialto
February 1, 2019
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Thank you for your professional courtesy and prompt attention to this matter.
Should you have any questions or comments, please let me know.

Very truly yours,

SULLIVAN HILL REZ & ENGEL
A Professional Law Corporation

By: 
Shailendra U. Kulkarni

SUK/suk

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