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January 23, 2019

City of Rialto

Public Works Department
335 W. Rialto Ave.
Rialto, CA 92376

Re: Frisbie Park Expansion, City Project No. 150304
Bid Protest

Dear Sir or Madam:

I am writing in furtherance of the bid protest that I submitted on behalf of Horizons Construction Co., Int'l, Inc. ("Horizons") regarding the Frisbie Park Expansion Project, City Project No. 150304 ("the Project").

I am in receipt of letter from Matthew J. Kraus of Lester & Cantrell, LLP dated January 9, 2019, written on behalf of RC Construction Services, Inc. ("RC") Mr. Kraus's letter purports to be a response to the protests by both Horizons and Silverstrand. Preliminarily, I note that I have recently received the January 8, 2019 letter from Sullivan Hill regarding the portion of the bid protest submitted by Horizons that protested any award to Silverstrand. Horizons will separately respond to that letter and do so by January 28, 2019, as requested. I have not seen Silverstrand's protest of RC's bid.¹

The bidding instructions require that each bidder perform 50% of the work with its own forces. The subcontractor listing for RC shows that it intends to perform more than 50% of the work with its own forces.

The bidding instructions expressly state:

The Prime Contractor shall perform not less than 50% of the Work identified in this Bid. 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.**

Bid Form, page 11, emphasis added.

¹ Horizons respectfully reiterates its request for the communications between the bidders and the City.

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Preliminarily, I note that the requirement is expressly not waivable by the City because of the use of the word “shall” instead of “may.”

To further clarify this point, the bidding instructions advise bidders to calculate the subcontracted work percentage, and at the very portion of the bidding documents that call for the bidder to insert the number, the instructions warn that the number cannot exceed 50%.

RC blatantly ignored the bidding instructions in filling out the bid by listing bids that exceeds 50. Adding up the subcontractor bid percentages listed by RC, the total subcontracted work comes to 62.45%.

The public agency’s determination of questions regarding bid responsiveness is determined on the face of the documents submitted before the bid date. Taylor Bus Service, Inc. v. San Diego Board of Education, 195 Cal. App. 3d 1331, 1342 (1987). It is abundantly clear from the face of the bid that RC violated the bidding instructions by having listing subcontractors to perform in excess of 50% of the work.

RC tries to justify its mistake by now claiming that some unspecified portion of certain trades are “specialty work” which should not count. RC is wrong for several reasons.

First, RC relies on the instructions on Section 2-3.2 of the Greenbook. That section provides different instructions than the bidding instructions given by the City on this Project. The two provisions are in conflict. The difference is highlighted below.

Special Provisions for the Project	Greenbook Section 2-3.2
The Prime Contractor shall perform not less than 50% of the Work identified in this Bid. 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.	The Contractor shall perform, with its own organization, Contract work amount to at least 50 percent of the Contract Price <i>except that any designated “Specialty Items” may be performed by subcontract ...</i>

The italicized language from the Greenbook is different from the express language in the subcontractor listing portion of the bid form that is part of the special provisions. The conflict is resolved in favor of the special provisions because the special provisions, in the introduction on page 2, very clearly state:

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In the case of any conflict between the ... Greenbook and these Special Provisions, the Special Provisions shall take precedence.

This is standard language in that the special provisions are specially tailored to the specific needs of the Project. The bidders were required to follow the specific bidding instructions that are part of the Special Provisions of this Project.

While other language in other portions of the special provisions references specialty items, nowhere in the bidding documents does it state that a bidder may rely on a secret and undisclosed calculation to determine the self-performed percentage. RC's response is flawed because it requires that the City go beyond the four corners of the bid and to trust RC's characterizations. RC now claims that portions of the skate bar, site utilities, shelters and equipment and play surface and electrical line items include "specialty work." But it is impossible to determine what portion of those items is specialty work. For example, the "electrical" work is listed as 16.8% of the total contract. What percentage of RC's electrical number is for supposed "specialty work?" It is impossible to tell.

The purpose of having competitive bidding and open bids is to create transparency in the process and to eliminate even the appearance of impropriety, fraud or corruption in public bidding. Cal. Pub. Contracts Code § 100; Konica Business Machines U.S.A., Inc. v. Regents of University of California, 206 Cal. App. 3d 449 (1988). As the Konica court explained:

Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. 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. The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.

Internal Citations omitted.

Horizons recognizes that RC has provided an after-the-fact calculation (in its Exhibit D) which purports to show the portions of specialty items in the listing. However, that document was

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not provided at bid time, not part of the bid, and should be disregarded.

Permitting a prospective bidder to justify a bid that is non-responsive on its face with secrete calculations not discernable from documents submitted with the bid, and submitted only after the fact, would defeat the purposes of transparency, and scuttle the level playing field created by the bidding laws.

If RC's interpretation were adopted, RC would be able to exceed the subcontractor requirements of the bidding requirements, and always claim that some amount of its listing was for certain undisclosed specialty items. The City and other bidders would have no way of verifying this assertion.

Moreover, RC is exempt from workers compensation insurance because it has no employees, accordingly it cannot perform the requirement that it perform 50% of the work with its own forces. In response, RC claims that it has the ability to obtain workers compensation, and that it is a joint venture of two local contractors that each contain workers compensation insurance. The response raises more questions about the responsiveness of RC's bid than it answers. Assuming that is true, the joint venture appears to have obtained a contractors' license on May 2, 2013 (according to the CSLB). This conflicts with the representation on section 7 of the Bidder's General Information (page 20 of the bidding documents) that states that the bidder has 23 years' experience.

The bid of RC is nonresponsive. Horizons continues to protest any award to either RC Graves Construction or Silverstrand Construction on the ground that both bids are nonresponsive for the reasons stated herein and in my prior letter.

Thank you.

Very truly yours,

RAISIN & KAVCIOGLU

By 
Armenak Kavcioglu

cc: Horizons Construction Co., Int'l