

LAW OFFICES

TENNANT & INGRAM

2101 W Street
Sacramento, CA 95818
(916) 244-3400
Fax (916) 244-3440

DAVID M. INGRAM

Retired:
DAVID H. TENNANT

September 24, 2018

VIA EMAIL (Clerk/BOS@co.fresno.ca.us)

Clerk, Board of Supervisors
County of Fresno
2281 Tulare Street, Room 301
Fresno, CA 93721-2198

Re: Conditional Aware of Contract No. 18-07-C
Our Client: Nor-Cal Pump & Well Drilling, Inc.
Our File: 4557

Dear Clerk:

Our office has been retained by Nor-Cal Pump & Well Drilling, Inc. regarding the above-noted matter. We kindly request that you immediately disseminate this letter to all County Supervisors and other individuals of interest.

The purpose of this letter is to challenge the recommended action expressed by Director Steven M. White to *“waive as a minor irregularity an error on the California Public Contract Code, Section 10285.1 Statement Form submitted with the bid from Zim Industries, Inc., for Contract 18-07-C, Fresno County Westside Groundwater Project.”*

Alternatively, Nor-Cal Pump & Well Drilling, Inc. hereby respectfully requests that the Board of Supervisors reject all bids and re-advertise the project. This request is made on the following grounds:

- 1) The bid from Zim Industries, Inc. was irregular and, therefore, non-responsive under applicable standards.
- 2) Fresno County has displayed apparent unfair favoritism to Zim Industries, Inc. (a Fresno company). Namely, the County contacted Zim and sought clarification for its apparent non-responsive bid. This allowed Zim Industries, Inc. an opportunity to cure its defective bid package.
- 3) Re-advertising this project will benefit the public. First, the bid of Nor-Cal is \$31,214 below the bid submitted by Zim. Second, it is common knowledge that re-advertising a public project such as this inevitably results in bid reductions, thus saving the taxpayers even more money.

Clerk, Board of Supervisors
September 24, 2018
Page -2-

- 4) Legal action stemming from an unfair, inequitable bid awarding process will cost the County money and delay the project whereas re-bidding could be performed swiftly, without delay and ensure a fair, cost-effective process.

For the reasons set forth herein, Nor-Cal Pump & Drilling, Inc. respectfully requests that the Board of Supervisors take the most responsible action available and re-advertise Contract No. 18-07-C.

Thank you very much for your consideration. If anyone has any questions whatsoever, please request that they contact me directly.

Very truly yours,

TENNANT & INGRAM

A handwritten signature in black ink, appearing to read 'DM Ingram', with a long horizontal flourish extending to the right.

DAVID M. INGRAM



Nor-Cal Pump & Well Drilling, Inc
Main Office
1325 Barry Road
Yuba City, CA 95993
530-674-5861 Office
www.norcalpump.com

September 24, 2018

VIA E-MAIL AND FEDERAL EXPRESS

County of Fresno
2281 Turlare St., Rm 301
Fresno, Ca 93721

Re: Nor-Cal Pump & Well Drilling, Inc.
Project: Fresno County Westside Groundwater Project
Bid Number: 18-07-C

Dear Board of Supervisors:

Nor-Cal Pump & Well Drilling, Inc. ("Nor-Cal") hereby protests the award of the contract for the Fresno County Westside Groundwater Project (the "Project") by the County of Fresno (the "County") to Zim Industries, Inc. ("Zim"). Nor-Cal bid the Project as a prime contractor, which was bid with competitive sealed bids, on August 9, 2018 and submitted the lowest bid. The County is required to award the Project contract to the lowest responsive, responsible bidder.¹ Zim did not submit a responsive bid and the County, therefore, is required by law to reject Zim's bid. If the County will not award the contract to Nor-Cal, it must, under California law, reject all bids and re-bid the contract for the reasons discussed below.

Zim's bid, submitted on August 9, 2018, clearly and unequivocally states that it "has" been convicted during the preceding three years of specified criminal offenses. (See Zim's completed Public Contract Code section 10285.1 Statement Form, required by the County's bid documents). As such, Zim, would not be eligible for award of the contract. However, after the sealed bids were received by the County, the County allowed Zim to change its response. This conduct is not permitted under California law or the bid documents, and the County must reject Zim's bid.

Post-bid clarifications and changes in a bid response are improper and not allowed under California law. Any attempt by Zim to explain or modify its bid day submission is strictly prohibited by California law, is improper, and cannot be allowed. In *Valley Crest Landscaping vs. City Council* (1996) 41 Cal.App.4th 1432, the court of appeal addressed a factual scenario

¹ See *Kajima/Ray Wilson v. Los Angeles County Metro Transportation Authority* (2000) 23 Cal.4th 305.

similar to the instant matter. In *Valley Crest*, a bidder sought to clarify its initial bid after bid opening by recalculating the amount of work to be performed by the bidder's own forces. The *Valley Crest* court held that a public agency may not permit a bidder to explain its bid when such explanation would give the bidder the opportunity to back out of the bid.

By providing post-bid submission/information that differed from its initial bid day submission, Zim has set up the unfair opportunity to explain its initial bid, and this irregularity will give Zim the improper proverbial "two bites at the apple." (*Valley Crest, supra*, at 1436.) Further, a bidder may not correct its bid after bid opening. (*See e.g., National Coach Corp. v. Board of Control* (1982) 137 Cal.App.3d 754; *Amendola Construction Co.* (1984) Comp.Gen. Dec. B-214258 (bidder may not change, correct or explain bid "after bid opening since to permit this would give the firm the option of accepting or rejecting a contract after bids are exposed"); *Parco, a Division of Blue Mountain Products, Inc.* (1983) Comp.Gen. Dec. B-211016 (bid may not be considered for correction after bid opening because competitors' bids had already been revealed).)

By allowing a bidder such as Zim to explain, and in this instance even change, its initial bid response, the County is providing Zim with the option to affirm or deny its bid, and therefore request relief from its bid without forfeiting its bid bond under Public Contract Code § 5103. Here, if Zim had decided its bid was too low or it didn't want to proceed with the contract, it simply could have decided not to modify its answer to the Public Contract Code section 10285.1 form and its bid would have been disqualified. Zim could use the ambiguity in its bid response to avoid a contract, and it would have the unfair advantage – the opportunity to back out – not given to other bidders who properly submitted bids. It is precisely this type of situation that the *Valley Crest* case addressed and held, unequivocally, is impermissible as it gives a bidder, such as Zim, an unfair advantage over the other bidders. *See e.g., Thomson v. Call* (1985) 38 Cal.3d 633, 649 (the object of conflict of interests statutes of public officials is to limit the possibility of any personal influence). *See also, Konica Business Machines USA, Inc. v. Regents of the University of California* (1988) 206 Cal.App.3d 449, 456 (the inference of unfair competitive advantage, whether or not actual, is the standard by which legality of public contracts are judged).

Further, whether a bid is responsive can be determined from the face of the bid without outside investigation or information. *MCM Construction, Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 368. Zim's bid must be evaluated based on what was submitted at bid time and within the four-corners of its bid submission; a plain reading of the bid as submitted by Zim indicates that it is disqualified from contract award.

Accordingly, any attempt by the County to allow Zim to change its bid and to award the contract to Zim is in contravention of California law and the bidding procedures set forth under the County's bid documents. *See Pozar v. Department of Transportation* (1983) 145 Cal.App.3d 269, 271-272 (a public agency owner must strictly follow its own procurement rules). Nor-Cal again requests that the County follow the proper rules in evaluating Project bids and determining

September 24, 2018
Page 2

how the County is to award the contract for the Project. Nor-Cal is the low bidder and should be awarded the contract; however If the County will not do so it must, under California law, reject all bids and re-bid the contract.

Thank you for your attention to this matter, and please feel free to contact us if you have any questions or require additional information.

Very truly yours,



Nor-Cal Pump & Well Drilling, Inc.



DANIEL C. CEDERBORG
County Counsel

September 24, 2018

David M. Ingram
Tenant & Ingram
2101 W Street
Sacramento, CA 95818

VIA E-MAIL
David@tennantingram.com

Re: Conditional Award of Contract No. 18-07-C (Westside Groundwater Project)

Dear Mr. Ingram:

This letter is in response to your letter, which we received via e-mail earlier this afternoon (September 24, 2018), submitted on behalf of your client, Nor-Cal Pump & Well Drilling, Inc. (Nor-Cal).

It is well established by a long line of cases that Board has discretion to waive as immaterial deviations from strict bidding requirements. Under this line of cases, an irregular bid need not be set aside unless the deviation is capable of facilitating corruption, is likely to affect the amount of bids or the response of potential bidders, or provides the bidder with an "unfair competitive advantage."

In several cases that address the discretion possessed by the governing body of an awarding agency to waive a bidding irregularity, courts have observed that these considerations must be evaluated from a practical rather than a hypothetical standpoint, with reference to the factual circumstances of the case; and that they must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. (See, e.g., *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal. App 4th 359, 369-370; and *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal. App. 4th 897, 908.).

Nor-Cal was not "treated unfairly" by the County. The discrepancy between the two forms submitted by Zim Industries, Inc. (Zim) was an inconsistency that clearly had not provided Zim with any advantage over other bidders, and which allowed for clarification without changing the amount of its bid. It clearly could not possibly have been the case that that Zim both "had" and "had not" been convicted of the listed criminal offenses. Public Contract Code § 5101, *et seq.* and cases decided thereunder demonstrate that the only type of error that allows a bidder to seek relief from its bid without forfeiting its bid bond is a mathematical type of error. This most clearly was not a mistake of that type, nor did it have any effect whatsoever regarding the amount of Zim's bid. As such, Zim would not have been entitled to relief from its bid on the basis of such an error and thus no legitimate claim of "unfair competitive advantage" can be made.

Mr. David M. Ingram
September 24, 2018
Page 2

Indeed, as was reflected both in the Department's August 28 letter to Nor-Cal, a similar courtesy was extended to Nor-Cal, in that Department staff contacted Nor-Cal by telephone on August 22 and August 24, to ask if it had any additional DBE information available and if so, to submit it promptly. Staff was advised by telephone on August 24 that Nor-Cal had no further documentation to provide, but would subsequently provide an "explanatory letter" (which was received on August 27 and is included, together with the Department's responsive letter, in the record pertaining to this Item).

It has been confirmed in writing by the State Water Resources Control Board that: (1) Nor-Cal was non-compliant with DBE good faith effort requirements, due to its failure to advertise in a newspaper for a minimum 30 days prior to bid opening; and (2) an award to Nor-Cal therefore would risk the subsequent potential loss of the funding (\$8 million) for the entire project. As such, the overriding consideration in determining the recommended action for this matter was the potential loss of funding for the entire project, if the Board elects to waive your client's failure to comply with those bidding requirements, which were made very clear to all prospective bidders.

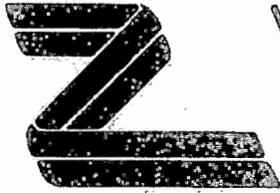
Very truly yours,

DANIEL C. CEDERBORG
County Counsel



By: MICHAEL E. ROWE
Principal Deputy County Counsel

C: Members of the Board of Supervisors
Steven E. White, Director, Department of Public Works and Planning
Daniel C. Cederborg, County Counsel



ZIM INDUSTRIES, INC.

4532 E. Jefferson Ave. • Fresno, CA 93725
Ph. (559) 834-1551 • FAX (559) 834-5156
www.zimindustries.com

September 24, 2018

VIA EMAIL (Clerk/BOS@co.fresno.ca.us)
Clerk, Board of Supervisors
County of Fresno
2281 Tulare Street, Room 301
Fresno, CA 93721-2198

Re: Response to Nor-Cal Pump & Well Drilling, Inc.'s (Nor-Cal) letter dated September 24, 2018 protesting the Award of the Fresno County Westside Groundwater Project (Bid Number 18-07-C) on September 25, 2018 to Zim Industries, Inc. (Zim) by the County of Fresno (County)

Dear Board of Supervisors:

Nor-Cal's protest letter states that Zim did not submit a responsive bid. This statement is incorrect and untrue. Zim submitted a responsive bid and is the lowest responsive, responsible bidder. The County is required to award the project contract to the lowest responsive, responsible bidder. Therefore, the County has correctly made the recommendation to the Board of Supervisors to award this Project to Zim.

California Public Contract Code, Section 10285.1 states that "Any state agency may suspend, for a period of up to three years from the date of conviction, any person from bidding upon, or being awarded, a public works or services contract with the agency under this part or from being a subcontractor at any tier upon the contract, if that person, or any partner, member, officer, director, responsible managing officer, or responsible managing employee thereof, has been convicted by a court of competent jurisdiction of any charge of fraud, bribery, collusion, conspiracy, or any other act in violation of any state or federal antitrust law in connection with the bidding upon, award of, or performance of, any public works contract, as defined in Section 1101, with any public entity, as defined in Section 1100, including, for the purposes of this article, the Regents of the University of California or the Trustees of the California State University. A state agency may determine the eligibility of any person to enter into a contract under this article by requiring the person to submit a statement under penalty of perjury declaring that neither the person nor any subcontractor to be engaged by the person has been convicted of any of the offenses referred to in this section within the preceding three years."

California Public Contract Code, Section 10285.2 states that "Before suspending any person under this article, the state agency shall provide a hearing upon reasonable notice. In determining whether to suspend, and the duration of any suspension, the state agency shall consider, in addition to any other relevant factors, both of the following:

- (a) The degree to which the person cooperated with the state or federal authorities in the criminal proceeding.
- (b) The degree to which the person has agreed to restitution for any damages incurred by the public entity as a result of the acts upon which the conviction was based."

During the County's review of the bids, Zim was asked to provide the County an explanation of the conviction of Public Contract Code Section 10285.1 statement in Proposal 6 of the bid. Zim responded that Zim has not been convicted within the preceding three years of any offences referred to in section 10285.1 and that Zim had unintentionally and incorrectly placed a check mark in front of "has not" instead of behind "has not". The check mark placed on the Proposal 6 form was a typographical error placed on the wrong space. The "has not" phrase is the intended and correct space to be checked on this form as there are in fact, no convictions as described on the form. The County correctly considers this error by Zim on the California Public Contract Code, section 10285.1 Statement Form as a minor irregularity. In addition, the County has decided to waive this error as a minor irregularity in Zim's bid. Proposal 3 (Evaluation of Bid Proposal Sheets) clearly states that errors of bidders may be waived as minor irregularities by the County and "The decision of the Owner respecting the amount of a bid, or the existence or treatment of an irregularity in a bid, shall be final." The County has made its decision and its recommendations to the Board of Supervisors. There is no legal basis in Nor-Cal's protest letter that pertains to the County's decision to waive this error as a minor irregularity or the County's recommendations to the Board of Supervisors to award this project to Zim. Therefore, Zim requests that the Board of Supervisors award this project to Zim, the lowest responsive, responsible bidder.

Sincerely,

A handwritten signature in cursive script that reads "Curt B. Zimmerer". The signature is written in black ink and includes a long horizontal flourish at the end.

Curt B. Zimmerer
President