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April 6, 2022

VIA EMAIL

Attn: Matthew Earle,
Director/Chief, Procurement Services Department
Port District of San Diego
MEarle@PortofSanDiego.org

Re: **Bid Invitation # 2020-15, Structural Pile Repairs to Navy Pier**
Abhe & Svoboda, Inc.'s Bid Protest

Dear Mr. Earle:

As you know, Gordon Rees Scully Mansukhani LLP (“GRSM”) represents Abhe & Svoboda, Inc. (“ASI”). By this letter, ASI further supplements its bid protest submitted on March 1, 2022 and the correspondence dated March 29, 2022 in regards to the award of the above-referenced contract.

ASI wishes to underscore the following key points:

- 1) The bid instructions and specifications are less than clear and contain internal inconsistencies;
- 2) The Port has discretion to waive the immaterial error in ASI’s Bid;
- 3) As between ASI and Reyes, there is no difference in the performance qualifications;
- 4) ASI’s bid clearly provides the best value to the public.

I. ASI’s Bid Provides the Best Value to the Public

A. The Port’s Bid Instructions and Specification are inconsistent

The Project’s Contract Documents are set forth in Specification No. 2020-15. Specification Section 1.0, entitled “Notice to Inviting Bids,” states that bidders must (“shall”) submit their written, “original” proposals to the District:

Bidder shall submit their original Bid Proposal Package to the Procurement Services Department, 1400 Tidelands Avenue, National City, California 91950 within the date stated on the Contract Documents page after electronic bidding (See Section 4.0, Instruction to Bidders).

The Notice concludes by stating: “In the public interest, the Port reserves the right to reject any or all bids, or *to waive any informality in a bid.*”

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Subsection 4.1.7.1.2 of the “Instructions to Bidders” states that bids “*may be made electronically*”:

4.1.7.1.2 Bids may be made electronically and only upon the forms included in the Bid Proposal Package, which form a part of the Contract documents. Bid Proposal Package forms cannot be altered or modified. All bid items in the Bid Proposal Package should be properly and completely filled in electronically with a unit price or lump sum and totals. The signature of all persons signing shall be in longhand. Any document which is detached from the bound Bid Proposal Package documents or altered or modified or not properly completed, may render the bid non-responsive and may result in rejection of the bid. In addition to the documents contained in the Bid Proposal Package, no Contract documents shall be altered or modified.

Subsection 4.1.7.1.8, states that a copy of the Bid Proposal Package must be attached to the electronic bid submission, but it also states that only the failure to timely provide the “*original Bid Proposal Package*” can result in forfeiture of the bid bond or outright rejection of the bid:

4.1.7.1.8 A copy of the Bid Proposal Package shall be attached to the electronic bid on or before the day and hour set for the opening of bids. The original Bid Proposal Package shall be delivered to the District office as specified in the “Notice Inviting Bids,” and on the date and time indicated on the Contract Documents cover page. Failure to provide the original Bid Proposal Package may result in forfeiture of the Bidder’s bid security and/or rejection of bid.

Subsection 4.1.6 governs “Electronic Bidding” and 4.1.6.1 makes clear that all Bidders are required to submit their bids electronically. It specifies in particular that Bidders “shall be required to submit their *Bid Schedule and Subcontractors List* electronically” *but does not so specify for all portions of the bid package*.

To be clear, there is no dispute that ASI timely submitted its Bid electronically and that its Bid Schedule and Subcontractor List were included as required by Section 4.1.6.1.

B. The Port has discretion to waive the immaterial error in ASI’s Bid

California’s courts have made the clear the legal standard that governs the Port’s decision in this matter: “[a] basic rule of competitive bidding is that bids must conform to the specifications, and that if a bid does not so conform, it may not be accepted. *However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders.*” See *Ghilotti Construction Co. v. City Of Richmond*, 45 Cal.App.4th 897 (1996), quoting 47 Ops.Cal.Atty. Gen. 129.

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While a public entity is not *required* to waive a nonmaterial bid deviation, the determination of whether a bid deviation is material or inconsequential is a question of fact. Factors include: (i) could the deviation affect the price of the bid; (ii) did the deviation give the bidder an advantage not allowed other bidders; (iii) was the deviation a vehicle for favoritism; (iv) did the deviation impair the public entity's ability to make bid comparisons; and (v) did the deviation permit the contractor to withdraw its bid, without forfeiting its bid bond, under Public Contract Code section 5103.

Here, ASI submits that all of the above factors allow for, and should convince the Port to waive ASI's nonmaterial mistake for awarding this contract. *See e.g., MCM v. City & County Of San Francisco*, 66 Cal.App.4th 359, 373 (1998) (a deviation could be waived because a successful bidder's mistake in submitting the name of one contractor in wrong envelope was an inconsequential deviation that did not affect price or give competitive advantage).

C. There is no difference in the performance qualifications between Reyes and ASI

This point is critically important: Reyes and ASI both intend to utilize the exact same divers who will perform the underwater pile encasement work. Both ASI and Reyes listed **Harbor Offshore, Inc.** as the qualified diver on their SBE Sub-Participation Form in their bid packages.

The following is important further context: in the Port's bid Q&A process, Question & Answer #4.1 was asked and answered as follows:

Question: will a qualified subcontractor for the underwater pile encasement work who is working under a Prime Contractor be satisfactory for and fulfill the Prime bidder's statement of experience?

Port's Answer: Bidder may list experience of qualified Subcontractor(s) for this work if said Subcontractor(s) are to perform this work.

Clearly, the Port acknowledges that Harbor Offshore is a qualified diving/underwater repair company. Thus, since they both met the requisite experience based on the identical subcontractor, there is literally no difference in the experience or performance qualifications as between Reyes and ASI for this critical component of the contract.

D. ASI's bid clearly provides the best value to the public

The only key difference between the ASI and Reyes bids is that ASI's low bid will save taxpayers almost \$190,000.

According to the California Supreme Court, a fundamental purpose of competitive bidding is "to secure the best work or supplies at the lowest price practicable and they are enacted for the benefit of taxpayers." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 174 (1994). By waiving the nonmaterial clerical error and awarding the contract to ASI, the Port and will provide the best value to the public.

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II. Conclusion & Relief Requested.

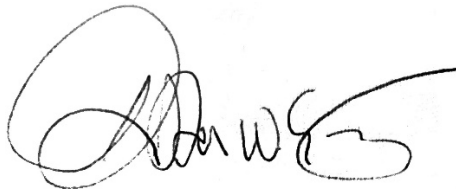
Respectfully, ASI again renews its request that the Port District reconsider its determination that an immaterial, inconsequential irregularity made Abhe & Svoboda, Inc.'s bid nonresponsive. For the reasons discussed above, the Port has full discretion to waive a nonmaterial irregularity in ASI's bid, and awarding the contract to ASI will give the best value to the public to the order of almost \$190,000.

In the alternative, ASI renews its secondary request that the District reject all bids, correct any ambiguities or inconsistencies in the bidding instructions, and re-bid the Contract.

Thank you for your continued close attention to this matter. We intend to appear at the Port's meeting on April 12th. If you have any questions or need further clarification in the meantime, please do not hesitate to contact me.

Respectfully,

GORDON & REES SCULLY MANSUKHANI LLP

A handwritten signature in black ink, appearing to read 'Allen W. Estes, III', written over a light grey circular stamp.

Allen W. Estes, III

cc: Gail Svoboda, President / Abhe & Svoboda, Inc.