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March 29, 2022

VIA EMAIL

Attn: Matthew Earle,
Director/Chief, Procurement Services Department
Port District of San Diego
1400 Tidelands Avenue
National City, California 91950
MEarle@PortofSanDiego.org

Re: **Bid Invitation # 2020-15, Structural Pile Repairs to Navy Pier**

**Abhe & Svoboda, Inc.'s Reply to the Response Submitted by Reyes Constr.
Inc. regarding the Bid Protest by Abhe & Svoboda, Inc.**

Dear Mr. Earle:

As you know, Gordon Rees Scully Mansukhani LLP (“GRSM”) represents Abhe & Svoboda, Inc. (“ASI”). By this letter, ASI supplements its formal bid protest submitted on March 1, 2022 (the “Bid Protest”), and responds to the arguments raised by Reyes Construction, Inc. (“Reyes”) in its March 16, 2022 response to the Bid Protest (the “Reyes Letter”).

ASI’s reply will address the following points:

- 1) ASI’s bid was lowest and *responsive* because it materially complied with the bidding instructions and specifications – and the Port’s determination otherwise was, respectfully, in error;
- 2) Contrary to the Reyes Letter, the omission of the Statement of Experience in ASI’s electronic bid was not a “discrepancy.” Thus, Specification section 4.1.6.4 (on which the Reyes Letter relies) does not apply and should not be used to reach a forced or strained conclusion.
- 3) The Reyes Letter misstates and/or misapplies the applicable California law. ASI’s immaterial omission was waivable because ASI gained no advantage over Reyes or other bidders.
- 4) The Reyes Letter is wrong – ASI’s bid did fully comply with all the Specifications, including Addendum No. 8 which revised Section 6.0 of the Technical Specifications and deleted the 3% limit on General Construction costs.

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I. Rebuttal to the Reyes Letter

A. Specification 4.1.6.4 Does Not Control.

The Reyes Letter relies entirely on Specification Section 4.1.6.4, which states “[i]n the case of a discrepancy between the electronic bid and the original Bid Proposal package, the electronic bid will be the accepted bid.” However, the omission of the Statement of Experience in ASI’s electronic bid was not “a discrepancy.” ASI’s electronic submission did not differ from the actual, original bid proposal. ASI did not alter or change any inconsistency between its electronic submission and its original, hardcopy bid proposal. Rather, as discussed below, the only irregularity was that information contained in ASI’s bid was inadvertently omitted in the electronic submission, but that information didn’t go to affect ASI’s bid price. Thus, Specification section 4.1.6.4 – which is triggered by a “discrepancy” – does not apply and should not be used to reach a forced or strained conclusion.¹

B. ASI’s Immaterial and Inadvertent Omission is Waivable.

California law is clear: the Port has the immutable power to waive immaterial irregularities in a bid. “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 or, in other words, if the variance is inconsequential.” *Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 905-905 (citing 47 Ops.Cal.Atty.Gen. 129, 130).

Please consider the parallels between the circumstances here and the facts in *MCM Construction, Inc. v. City and County of San Francisco*. In the *MCM Constr.* Case, the court found that a bidder’s failure to list a subcontractor in the correct bidding envelope was a deviation that could be waived: “the failure to list the subcontractor in the 2 o’clock envelope and instead list it in the 5 o’clock envelope was not a change in the bid or a correction of a mistake in the bid. The envelope that came in at 5 o’clock was part of the bid. It admittedly came in at the wrong time, but it was a deviation which didn’t go to affecting the price or give a competitive advantage, and that’s why it can be waived.” *MCM Constr.* (1998) 66 Cal.App.4th 359, 378.

ASI’s circumstances are exactly like those in the *MCM Construction* case. ASI’s Statement of Experience was part of its original bid, but admittedly it was inadvertently omitted from the pages that ASI submitted electronically. But because the Statement was included with the timely submission of the hardcopy original, “it was a deviation which didn’t go to affecting the price or give a competitive advantage” – and that is why it can be waived. The omission of the Statement did not affect ASI’s price or give ASI a competitive advantage over other bidders because the amount of ASI’s electronic and original bid submissions were, of course, the same.

California law is also clear that competitive bidding laws and regulations are intended “for the benefit and protection of the taxpaying public.” *See Domar Electric Inc. v. City of Los Angeles*, (1994) 9 Cal.4th 161, 170-171. Bids “must be evaluated from a practical, rather than a hypothetical, standpoint to give due consideration to the public interests being served. These public interests are getting the best work at the lowest practicable price and avoiding favoritism and corruption. *See Domar Electric*

¹ “Discrepancy” is not a legally defined term, but the common dictionary definition is “a divergence or disagreement.” *See Overhill Farms, Inc. v. Lopez*, (2011) 190 Cal.App.4th 1248, 1264, fn. 5.

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at 173. Here, ASI's irregularity was minor and immaterial. Under these circumstances, and giving due consideration to the public interests being served, the Port should waive the immaterial irregularity and find that ASI's bid is responsive.

C. The Reyes Letter is Wrong – ASI's Bid Fully Complies with the Specifications, including Addendum No. 8.

The Reyes Letter makes the surprising contention that even if the Port waives the immaterial omission in ASI's electronic bid submission, the Port must still find ASI's bid as non-responsive for violating a 3% limit on General Construction costs. Reyes' contention is, simply, baseless and entirely without merit – because, as the Port is undoubtedly aware – there is no 3% limit on General Construction costs.

In the Port's Q&A process, Question 18.4 asked as follows (emphasis added):

Question: Reference is made to Contract Specification SECTION 01 27 00 - MEASUREMENT AND PAYMENT - 1.3 BASE BID ITEM 1 – GENERAL CONSTRUCTION D. which states: "General Construction cost shall not exceed 3% of the total construction cost." ***This limitation on General Construction Costs not exceeding 3% is unrealistic.*** Heavy Civil Construction Project of this nature and value require a significant amount of supervision, planning, project management, construction progress documentation, preparation of work plans, work access plans, and requirements for access to the work, preparation of Injury and Illness Prevention Plan (IIPP), temporary facilities and utilities, temporary construction signs, cleanup, disposal, etc. This fact was recently demonstrated when the Port of San Diego recently received bids for the CURTAIN WALL REPAIRS AND BACKFILLING AT B STREET PIER 2020-25 where the General Construction Costs were between 7% and 11%. ***Accordingly, it is requested that this limitation of 3% of the total construction cost be eliminated.***

The Port responded as follows (emphasis added):

Answer: Contract Specification SECTION 01 27 00 - MEASUREMENT AND PAYMENT - BASE BID ITEM # 1 – GENERAL CONSTRUCTION, ***Paragraph 1.3.D is deleted.*** Refer to Addendum No. 8.

Accordingly, on February 17, 2022, the Port issued Addendum No. 8 to Specification No. 2020-15. Among other revisions, the Port made the following change:

TECHNICAL SPECIFICATIONS CHANGES:

Section 6.0 Technical Specifications - SECTION 01 27 00 – MEASUREMENT AND PAYMENT

a. DELETE: Paragraph 1.3.D

In short, the 3% limit on General Construction costs cited by Reyes was eliminated from the Specifications. Thus, ASI's bid was in full compliance with the Specifications, and was fully responsive. The Reyes Letter's contention is without merit.²

² Note that it appears Reyes calculated its bid based on the wrong, outdated version of the Specification, and it deliberately kept its line item 1 and line item 2 costs (General Construction and Mobilization/Demobilization, respectively) at less than 3% of its total construction costs. Given that Questions 18.3 and 18.4 identified this 3%

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II. Conclusion & Relief Requested.

ASI respectfully renews its request that the District reconsider its determination that an immaterial, inconsequential irregularity made Abhe & Svoboda, Inc.'s bid nonresponsive. For the reasons discussed above, the arguments made by Reyes Construction are without factual or legal merit. Thus, the bid submitted by ASI should be accepted as responsive, and the Contract should be awarded to Abhe & Svoboda as the lowest responsive, responsible bidder.

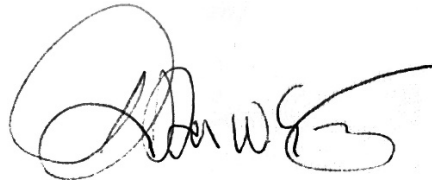
Alternatively, ASI requests that the District reject all bids, correct any ambiguities or inconsistencies in the bidding instructions, and re-bid the Contract.

Thank you for your close attention to this matter. If you have any questions or need further clarification, please do not hesitate to contact me.

Abhe & Svoboda, Inc. stands ready, willing and able to perform the Contract and looks forward to another successful project with the Port.

Respectfully,

GORDON & REES SCULLY MANSUKHANI
LLP

A handwritten signature in black ink, appearing to read 'Allen W. Estes, III', with a large, stylized initial 'A'.

Allen W. Estes, III

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

limitation as “unrealistic,” and the fact that the Port clearly agreed, it begs the obvious questions: why was Reyes unaware of the applicable specifications, and in what other ways might Reyes’ bid be amiss as a result of that oversight?