

MEMORANDUM

TO: Curleigh Carothers

FROM: Shawn MacPherson

RE: Bid Question re 3rd Avenue Bridge Seismic Retrofit

DATE: July 13, 2020

We met to discuss a potential bid issue concerning this project. The apparent low bidder, Conway Construction Company, submitted a bid that varies from the instructions. Specifically, the specifications require that the bidder submit a complete 'Specialty Subcontractor Pre-Qualification Form' related to experience with ground improvement construction. In this instance, Conway failed to complete the Form and include with their bid. The Form was completed and turned in after bid opening but the specialty contractor for ground improvements had been changed. Finally, there was a concern outlined which related to the bid amount set by Conway for the ground improvements as it was significantly lower than the other bidders. A protest to the City award of contract to Conway has been received from the second low bidder on the project, Stellar J Corporation, by letter dated July 1, 2020.

The first step when the City obtains bids that vary from the bid specifications in some respect is to ascertain whether those irregularities are substantial and material or whether they are minor in nature. A material irregularity is defined as an irregularity giving the bidder a substantial advantage or benefit not enjoyed by other bidders. Any bid containing a material irregularity must be rejected. On the other hand, if the irregularity is deemed to be minor, then the City may either reject the bid, or waive the irregularity and accept the bid. *East Side Disposal Company v. Mercer Island*, 9 Wn. App. 667 (1973); *Gostovich v. West Richland*, Wn. 2d 583 (1969); and *Farmer Construction v. State*, 98 Wn. 2d 600 (1983).

In determining whether there is an undue advantage conferred upon a bidder, the courts principally look to whether the defect is such as would allow the bidder to avoid performing the contract. A bidder is found to have a substantial advantage if it has the option of deciding whether to perform or not, depending on how the other bids are submitted. In *AAB Electric v. Stevenson Public Schools*, 6 Wn. App. 887 (1971), the low bidder neglected to sign its bid. The school board awarded the contract to the second bidder, and the school board's action was upheld by the court, because the bidder, not having signed its bid, was in a position where it could decide whether or not to accept the award and perform the work. The court held that the

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omitted signature could only be considered to be a material defect, because the bid was not binding upon the bidder until properly signed by its corporate officers.

In both *East Side Disposal* and *Farmer Construction*, the low bidders signed the bid bond, but neglected to sign the bid proposal. The court in both cases held that the failure to sign the bid proposal was a minor irregularity that could be waived. The court held that, if it appears from examination of all the writings that the writing which was signed by the party to be charged was signed with the intention that it refer to the unsigned writing, and that the writings are so connected by internal reference an assigned writing to the unsigned one, they may be said to constitute one paper relating to the same contract. Thus, the irregularity was deemed minor, because the bidder could not get out of the contract, and the city had the option to accept the low bid and waive the irregularity, or to reject the low bid on the basis of the irregularity.

It is clear from reading the cases that questions of whether a bid variance is material are questions for the city council. *R.W. Rhine Company v. Tacoma*, 13 Wn. App. 597 (1975). So long as the council's determination is made in good faith, it should be upheld by the court.

Thus, in this case, the City Council would need to make the following determinations:

1. Is the irregularity in the Conway Construction bid substantial or minor? If it is substantial, then the bid must be rejected.
2. If Council determines that the irregularity is minor, then they must decide whether to waive the irregularity and accept the bid, or to reject the bid on the basis of the minor irregularity.

You will be preparing a Staff Report which outlines the defects in the bid submitted by Conway. As guidance to the Council, it is my opinion that the irregularities do appear substantial in nature. As to the failure to timely submit the Form it appears from our discussion that Conway may have engaged in what is referred to as 'bid shopping'. Submission of the Form with information related to a named specialty contractor for ground improvements was called out in the specifications as part of the highlighted Bidder's Check List, which does indicate the City attached significance to receipt of this important information. Instead, not only was the Form not timely submitted but Conway changed their designated specialty contractor after bid opening. I believe the protest letter received from Stellar J correctly called out this omission as not creating a level playing field for all bidders as Conway could have seen the bid numbers and then simply failed to turn in the Form. The significantly lower bid amount for ground improvements further buttresses this conclusion in light of all the circumstances.

As a final note the purpose of competitive bidding is to provide for public contracts to be performed satisfactorily and efficiently, at the least cost to the public, while avoiding fraud and favoritism in the awarding of such contracts. The Council can of course be mindful of the public cost but insuring that one bidder does not receive a substantial advantage over other bidders must be taken into account as well.