MEMORANDUM

TO: Curleigh Carothers

FROM: Shawn MacPherson

RE: Bid irregularity – Citywide HMA Repairs Project

DATE: April 3, 2025

The apparent low bidder, Granite Contruction Company, submitted a bid that varies from the instructions. Specifically, the specifications require that a copy of the E-Verify Program MOU be provided with the bid proposal. I understand the MOU showing their enrollment in the E-Verify Program was provided by to the City soon after the bid opening and the MOU shows enrollment by the contractor. Lakeside Industries, the second low bidder, has given preliminary indications they will contest the award to Granite, which will be discussed below.

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 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 bid substantial or minor? If it is substantial, then the bid must be rejected.

2. If you determine that the irregularity is minor, then you must decide whether to waive the irregularity and accept the bid, or to reject the bid on the basis of the minor irregularity.

3. Please note that the City always reserves the right to reject all bids and rebid the project.

As to the failure to submit the MOU, this appears to be a record keeping function which, while required, does not rise to the level of a substantial issue preventing the apparent low bidder from entering into the contract. Accordingly, the discretion as to whether to waive this irregularity as well is within the discretion of the Council. For guidance here the Council should note that this *exact same issue* arose in 2019, with the parties reversed. In that case Lakeside did not timely submit the MOU and Granite was the second low bidder. The Memorandum from that case has been provided here as well. In that case the Council also waived the irregularity and awarded the bid to Lakeside.

Accordingly, whether to waive this irregularity in the bid is within the discretion of the Council. If the Council determines that the irregularity is minor, then when deciding whether or not to waive the irregularity, it should remember that 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.