

MEMORANDUM

TO: Rob Charles

FROM: Shawn MacPherson, City Attorney

RE: Bid irregularity

DATE: November 7, 2023

The apparent low bidder, Elite Electrical, submitted a bid that varies from the instructions. Specifically, the specifications require that a Bid Bond be submitted which is complete as well as signed by the bidder. Elite Electrical submitted an unsigned Bid Bond which was not complete in form from the Surety Company.

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.

By way of guidance in this matter, the Bid Bond which is required is a critical part of any bid submission for public work projects. The failure to sign the Bid Bond and provide a complete form from the Surety Company would appear to rise to the level of a substantial issue which would allow Elite Electrical to avoid entering into a contract or provide them with an unfair and substantial advantage. As such, if Council concurs then the bid must be rejected and the contract awarded to the second low bidder. Staff will outline the available motions for Council when this matter is presented on a regular agenda.