CITY OF COACHELLA
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July 18, 2023

Attorney for Urban Habitat

Ms. Lauren B. Stec, Attorney at Law
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625 The City Drive South, Suite 190
Orange, CA 92868
Via Email Only to lbstec@lanak-hanna.com

Re: Notice of Intent to Reject Bid Protest: Las Lunas & Calle Bouganvilia Retention Basin Landscape Improvements City of Coachella Project No. LL-01 & LL-0

Dear Ms. Stec,

The City of Coachella ("City") is in receipt of the bid protest dated July 3, 2023 ("Protest") submitted on behalf of your client Urban Habitat ("Protester"), the third lowest bidder on the above referenced project, seeking the disqualification and rejection of the two (2) lower bidders Kormex Construction and Superb Engineering. The City declines Protester's invitation, and City staff intends to recommend to the City Council that the protest is **DENIED.**

Despite the early statement in the Protest that the (underline added) "Superb and Kormex's bids on the Project are non-responsive and not responsible thus must be rejected, as addressed in detail below[]", the detailed analysis set forth below therein never refers to either bidder as non-responsible, solely non-responsive. Protester is apparently aware of the distinction between the two, which was discussed at length in the twice cited *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425 ("*Great West*"): a bid rejected for non-responsiveness may be summarily rejected; but a bid rejected for non-responsibility, consistent with the requirements of due process of law imposed by the Constitution of the United States and the Constitution of this State, may only be rejected after the bidder to be disqualified is given notice and an opportunity to be heard. The principal consequence of this distinction is that a non-responsiveness defect is confined to the face of the bid and cannot be cured by a post-bid submittal, while a non-responsibility defect can be cured by a post-bid submittal in connection with due process of law.

The City provides this background to provide context for not only why the Protest is meritless, but also why the posture taken in the Protest threatens to deprive its targets of their constitutional rights. *Great West* highlights how: non-responsiveness issues do not typically carry the risk of reputational injury (*Id.* at p. 1453); non-responsibility determinations are associated with

reputational injury (*Id.* at p. 1456-1457) and where due process is triggered it requires that the bidder be given notice and opportunity to be heard. (*Id.* at p. 1428). *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861 ("*Inglewood*"), which is cited extensively in *Great West*, goes into significant detail as to sufficient notice and hearing for due process to be satisfied in connection with a non-responsibility finding. Specifically:

> *We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract. We do not believe, however, that due process compels a quasi-judicial proceeding prior to rejection of the low monetary bidder as a nonresponsible bidder.*

(*Inglewood* at p. 871 (underline added).) Public Contract Code section 1103, in turn, defines a responsible bidder (underline added):

> *"Responsible bidder," as used in this part, means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.*

The Protest alleges that its first target, Superb Engineering, "fraudulently" and/or "deceitfully", listed projects that were performed prior to its "incorporation" and that were performed in the course and scope of its staff's prior employment with the Protester and another firm. Protester's allegation of fraud relating to experience thus fits well within the parameters of the Public Contract Code section 1103 definition of responsibility rather than responsiveness, a conclusion reinforced by the obvious reputational injury associated with a finding that a bidder fraudulently, with intent to deceive, misled the government about its experience to win a public contract. But also, such argument fails to consider the fact that the bidder, as a sole proprietorship, is not a separate person from its owner, so to the extent that the owner performed projects as an employee, or agent, of the Protester or another firm, the owner did in fact perform the project and is entitled to list it in its experience with its bid. In any event, Protester's hearsay allegations of fraud, deceit, and other offenses of moral turpitude, being not alleged by a person with personal knowledge of the facts alleged, and not alleging the facts with specificity as would be expected in a normal judicial process, are insufficient to substantiate the grave allegations made. In fact, the record tends to show no intent to mislead because the bid admitted on its face that these projects were performed before the business's owner went into business for itself.

The Protest next alleges that its second target, Kormex Construction, omitted its contractor's license number, expiration date, and classification. Another case cited in *Great West*, *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4th 757, likewise found that the failure to list a licensed subcontractor was a responsibility rather than responsiveness issue. (*Id.* at p. 766). If listing an actually unlicensed subcontractor does not render a bid nonresponsive, then neglecting to list a prime contractor's license number, expiration date, and classification does not render the bid nonresponsive. It might be a responsibility issue, particularly

if the City was unable to take legislative notice of the fact that the records of the Contractors State License Board ("CSLB") show that the firm has the license number 1073142, with the expiration date 02/28/2025, and with both A and C27 contractor licenses, but where such legislative notice can and is taken, (*Murphy v. People of State of California* (1912) 225 U.S. 623, 629; *Azevedo v. Jordan* (1965) 237 Cal.App.2d 521, 528), and particularly where "the law neither does nor requires idle acts[]", (Civ. Code, § 3532), it would make no sense to reject Kormex Construction's bid on responsibility, let alone responsiveness, grounds.

As explained in *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 (internal citations omitted):

> *A public entity's award of a contract, and all of the acts leading up to the award, are legislative in character. [T]he letting of contracts by a governmental entity necessarily requires an exercise of discretion guided by consideration of the public welfare. [T]he mere fact that a proceeding before a deliberative body may possess certain characteristics of the judicial process does not convert legislative action into an adjudication of a private controversy. Thus, both the award of the contracts and the decision to reject the protest should be considered legislative actions. Review of a local entity's legislative determination is through ordinary mandamus under section 1085. Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support.*

Similarly, as stated in *Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 383 ("*Judson*"):

> *It must be remembered that competitive bidding statutes, and those requiring licenses for bidding on public work, are for the benefit of the public and not for the benefit of bidders or licensees. It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.*

Judson thus provides an apt description of why the Protest is meritless. It seeks to throw out two lower bids in the hope of securing the contract itself at significantly greater expense, on the basis of (1) allegations of its own former employee's supposed fraud and deceit, without substantiation of a person with personal knowledge let alone pleading such facts with specificity, in a situation where the City is not being misled, all postured in a way in which its target would be deprived of the opportunity of notice and opportunity to be heard, and (2) facts and information omitted from a bidder's bid that can be located on the CSLB's website and are the proper subject of legislative notice, and which in any event the bidder would have the right to supplement its bid with as required by due process because licensure issues are responsibility rather than responsiveness defects.

Upon examination, the Protest offers no persuasive (or lawful) reason why public policy favors awarding the contract at a higher cost than Superb Engineering's responsive bid. On the contrary,

one could say there are $61,256 reasons why the City should award to Superb instead of the Protester.

City staff finds the Protest wholly meritless and intends to reject it in its entirety. The City will consider award of this contract at its meeting on July 26, 2023. City staff intends to recommend rejection of the Protest as meritless and award of the contract to the lowest responsible bidder submitting a responsive bid, Superb Engineering.

Maritza Martinez
Public Works Director