



ROBERT A. CARMICHAEL | Attorney
bob@carmichaelclark.com

April 26, 2024

VIA E-MAIL ONLY

Mr. Jon Hutchings
Public Works Director
City of Lynden
300 4th Street
Lynden, WA 98264

Re: Jim Kaemingk Sr. Trail – Depot Road to 8th Street Phase 3 Project

Dear Mr. Hutchings:

This letter is in response to the City of Lynden’s request for legal review of the bids and related documents associated with the bid opening on April 18, 2024 for the above-referenced project. I have also reviewed the bid protest filed by WRS on April 19, 2024. Following review of the WRS bid protest, a letter from Reichhardt & Ebe Engineering dated April 23, 2024, and the bid documents, including Project Specifications, it is my opinion that the City of Lynden (“City”) has the right and authority to reject Ritter Dirt & Asphalt (Ritter)’s low bid for the Jim Kaemingk Sr. Trail – Phase 3 project.

Under Chapter 39.04 RCW, local agencies are required to award public works contracts to responsible bidders with the lowest responsive bids. A bid is deemed responsive if it is submitted on time and includes all information as requested by the agency. Bids with material defects are nonresponsive and must be rejected by the agency. Material defects are those irregularities that give one bidder a substantial advantage over others, thereby undermining fair competition. While agencies are required to reject bids containing material defects, minor variances or errors may be considered informalities in the bidding process and may be waived if they do not significantly affect the competitive character of the bidding process.¹ However, the City is not required to waive such irregularities, and maintains discretion to reject nonconforming bids. The Ritter bid is nonconforming, and the City has the right to reject it.

There are two irregularities in Ritter’s bid proposal and two math errors. Several bid items are missing the cents in the unit price and totals, as required by WSDOT Standard Specification 1-02.6. In addition, several bid items have been crossed out or were otherwise altered, and none of them are initialed by the signer of the bid as required by Contract Special Provision 1-02.6,

¹ [Land Constr. Co. v. Snohomish Cty., 40 Wn. App. 480, 482, 698 P.2d 1120, 1122 \(1985\)](#)

item 5.² While omitting cents in unit prices may be considered a minor irregularity, Ritter's failure to initial alterations to unit prices in violation of Special Provision 1-02.6 raises concerns. The failure to explain or initial changes to a unit price could potentially advantage one bidder unfairly. This letter is not suggesting that Ritter would seek to disavow the altered unit prices; the concern is that without initials accompanying the alterations, the potential to do so exists.

The issue of whether failure to initial alterations to unit prices is a material defect has not been addressed in Washington. However, a New Jersey court addressed a bid with similar defects and held that failure to explain or initial changes to a unit price constitutes grounds for rejection of a bid. In that case, the Borough of Fort Lee rejected the lowest bid because the bid contained alterations that were not explained or noted in the bid over the signature of the bidder as required by the Bid Specifications, raising concerns that because of this, the contractor could disclaim the alterations as having been made without authorization and seek to withdraw its bid on this ground.³ That court determined that failure to initial alterations to unit prices constituted an irregularity, and that it was not necessary to determine whether the irregularity was material because an irregularity in the bid can be grounds for rejection even if the irregularity is not a material defect.

Here, as in the Borough of Fort Lee case, it is not necessary to determine whether the flaws in Ritter's bid were material defects or minor irregularities. If the flaws were material defects that undermined fair competition, the City has a duty to reject the bid. If the flaws were minor irregularities, the City has the discretion to reject the bid based on prudent judgment.⁴ In short, the City is well within its legal right and sound discretion to reject the Ritter bid for its failure to initial alteration of unit prices, as required by the bid specifications.

Please let me know if you have questions.

Yours truly,



Robert A. Carmichael
Lynden City Attorney

c: John Williams, City Administrator
Brent DeRuyter, Parks Director
Mark Sandal, Programs Manager, Public Works

² Per Contract Special Provision 1-02.6, item 5, "Any correction to a bid made by interlineation, alteration, or erasure shall be initialed by the signer of the bid."

³ [Serenity Contracting Grp., Inc. v. Borough of Fort Lee, 306 N.J. Super. 151, 153, 703 A.2d 352, 353 \(Super. Ct. App. Div. 1997\)](#)

⁴ The existence of the two math errors add to Ritters bid nonconformance, but are not necessary for this opinion.