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To: Jon Hutchings and Mark Sandal, City of Lynden Public Works
From: Robert Carmichael and Bridget Bryck
Date: April 17, 2025
Subject: Wastewater Treatment Plant (WWTP) Demolition Project Bidder Issues

In February, the City of Lynden ("City") solicited bids for the Stage 2 Prep – Wastewater Treatment Plant (WWTP) Demolition Project, Proj. 2024-11, ("Project"), requiring bidders to list three comparable wastewater treatment plant demolition projects completed within the last five years, each with a minimum contract value of \$1 million.

- **Lowest Bidder – BOSS Construction** listed only two completed projects over \$1 million, plus three ongoing projects, which do not meet the requirement for "successfully completed" projects. Two additional completed projects were under \$200,000 and not comparable in scale. BOSS does not meet the supplemental bidder responsibility criteria.
- **Second Lowest Bidder – Razz Construction** listed two completed projects over \$1 million, but one was completed more than five years ago. The third listed project is ongoing and does not meet the completion requirement. Razz did not include the correct bid bond with its bid packet. Razz's failure to submit a proper bid bond constitutes a material irregularity and renders the bid non-responsive. As a result, Razz's bid must be rejected without further consideration of responsibility.
- **Third Lowest Bidder – Faber Construction** listed three projects exceeding \$1 million but did not provide completion dates. One of Faber's projects does not involve demolition of a wastewater treatment facility, therefore Faber does not meet the supplemental bidder responsibility criteria.
- **Fourth Lowest Bidder – Strider Construction** listed three projects exceeding \$1 million, however each improved a water treatment plant improvement, rather than a wastewater treatment plant demolition. Further, the bid total exceeded the Engineer's estimate.

No bidders meet the supplemental bidder responsibility criteria set in the bid documents. This raises the question of whether the City has discretion to waive or overlook deficiencies in meeting those criteria when evaluating bidder responsibility.

ISSUE: Are the supplemental bidder responsibility criteria in the Bidder Qualification Form and Special Provisions mandatory, or does the City have discretion to waive strict compliance?

ANALYSIS:

1. Statutory Framework for Bid Evaluation

RCW 39.04.010 requires local agencies to award public works contracts to a responsible bidder with the lowest responsive bid. A *responsive bid* complies with all bid specifications and mandatory submittal requirements. A *responsible bidder* demonstrates the capability to successfully complete the project,

including meeting supplemental responsibility criteria. Responsiveness and responsibility are evaluated separately, and the bidder awarded the contract must submit a responsive bid and meet mandatory and supplemental bidder responsibility criteria.

Generally, responsiveness is evaluated first. A bid is non-responsive if it contains a material defect. Bids submitted for public contracts must substantially conform to the specifications contained in the invitation to bid. Material defects are those irregularities that give one bidder a substantial advantage over others, thereby undermining fair competition. [*Land Constr. Co. v. Snohomish Cty.*, 40 Wn. App. 480, 482, 698 P.2d 1120, 1122 \(1985\)](#). Minor variances may be considered informality in the bidding process and may be waived if they do not significantly affect the competitive character of the bidding process. *Id.*

Bidders who submit a responsive bid are then evaluated for responsibility. RCW 39.04.350(1) lists seven mandatory bidder responsibility criteria that a bidder must meet to be considered a responsible bidder. RCW 39.04.350(3) allows municipalities to adopt supplemental criteria, which bidders "must" meet. If a bidder fails to submit the requested information related to those supplemental criteria, subsection (3)(c) permits the municipality to either base its responsibility determination on any available information or to find the bidder not responsible. Read together with the preceding subsections, this provision alone does not permit the city to waive compliance with the supplemental criteria but instead allows the use of external information in making the responsibility determination when the bidder does not fully respond.

2. Project Bid Documents

The City of Lynden imposed supplemental bidder responsibility criteria on bidders for this Project. Project Specific Special Provision 1-02.1(2) lists supplemental bidder responsibility criteria, including that "Bidder, Bidder's designated project manager, and Bidder's designated superintendent/foreman for this project shall each have successfully completed at least three (3) projects of a similar size and scope as required by the Contract Documents for this project within the last five (5) years." The Bidder Qualification form is a Contract Documents, which further provides that comparable projects are those which "involve[ed] demolition of a building or elevated structure constructed of concrete and/or concrete masonry units of similar scale at a wastewater treatment plant facility having a minimum contract value of at least \$1 million." While there is no case law interpreting whether supplemental criteria, when adopted, are mandatory, both the RCW 39.04.350(3) and Special Provision 1-02.1(2) provide that bidders "must" meet these supplemental criteria, indicating meeting these supplemental criteria is a qualification standard rather than a discretionary factor.

3. Interpretation of Supplemental Responsibility Criteria

On the whole, statutory and contractual interpretation supports a strict reading of the supplemental responsibility criteria as mandatory requirements. Contract interpretation principles favor giving effect to all provisions when possible. While Special Provisions 1-02.1(2) and 1-02.14 may initially seem contradictory, the latter does not state that its list of disqualifications is exhaustive. In fact, Special Provision 1-02.1(4) provides additional grounds for disqualification, including failure to meet supplemental responsibility criteria. Finally, if supplemental criteria were discretionary, the City would not have used "must" in its language.

In our opinion, compliance with supplemental criteria is mandatory. Taken together, RCW 39.04.350(3) and Special Provision 1-02.1(2) provide a stronger basis for treating the supplemental bidder responsibility criteria as mandatory, as they explicitly state that bidders "must" meet the experience requirements. Neither BOSS nor Faber satisfy the supplemental bidder responsibility requirements set out in the bid documents, they are therefore not responsible bidders.

4. Rejection of All Bids

RCW 35.23.352(1) allows a city to reject all bids, and the City expressly reserved this right in Solicitation for Bids for the Project. Because the City has decided to reject all bids and re-advertise the project, the appropriate procedure is for the City Council to adopt a resolution formally rejecting all bids at its next meeting. Once the resolution is adopted, the City should notify all bidders of the decision.

CONCLUSION

The plain terms of RCW 39.04.350(3), the mandatory language in Project Specific Special Provision 1-02.1(2), and established principles of contract interpretation support the conclusion that bidders for this Project must strictly meet the stated supplemental criteria. Given that none of the bidders satisfy these requirements, the most straightforward and legally defensible course of action is to reject all bids by resolution and re-solicit bids for the Project.