



# CITY OF MILPITAS

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September 18, 2020

## VIA CERTIFIED MAIL AND EMAIL

Pacific Electric Contracting Inc.  
330 Phelan Ave.  
San Jose, CA 95112

SUBJECT: City of Milpitas  
Enhanced Crosswalk Striping & Beacons/Radar Speed Feedback (CP 3454 & 3458)  
Notice of Intent to Reject Bid Protest

Dear Mr. Frank J. Camacho Jr.:

The City of Milpitas ("City") has reviewed the bid protest letter filed by Pacific Electric Contracting Inc. ("Pacific") dated September 15, 2020 ("Protest") with regards to the above captioned project ("Project"). Based on our review, the Protest is meritless as it pertains to the bid submitted by the lowest responsible bidder submitting a responsive bid on the Project – Bear Electrical Solutions, Inc. ("Bear Electric").

As a threshold matter, a bid must conform to the material terms of the bid package. (*DeSilva Gates Constr. v. Department of Transp.* (2015) 242 Cal.App.4th 1409; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175.) A bid is responsive if it promises to do what the bidding instructions demand. (*Williams v. Clovis Unified Sch. Dist.* (2007) 146 Cal.App.4th 757; *Valley Crest Landscape Inc. v. City of Davis* (1996) 41 Cal.App.4th 1432, 1438.) Responsiveness should be determined from the face of the bid. (*Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.* (2010) 187 Cal.App.4th 1425.) However, a bid may be responsive even if there is a discrepancy in the bid, as long as the discrepancy is inconsequential, that is, the discrepancy must not affect the amount of the bid or give a bidder an advantage over others. (*Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897; *Bay Cities Paving & Grading, Inc. v. San Leandro* (2014) 223 Cal.App.4th 1181.) A deviation must be capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders. These considerations must be evaluated from a practical rather than hypothetical standpoint, with reference to the factual circumstances of the case. (*Ghilotti Constr. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 908-09, internal citations omitted.)

With the foregoing in mind and in reviewing the bid submitted by Bear Electric, it is clear the alleged errors in the bid are not errors at all and certainly do not amount to material mistakes requiring the City to reject the bid as nonresponsive.

As a preliminary matter, Pacific misinterprets the definition of an unbalanced bid. A materially unbalanced bid is one where “there is a reasonable doubt that award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the Government.” (*Matter of: Crown Laundry and Dry Cleaners*, Comp. Gen. B-208795.2, April 22, 1983.) Here, Pacific is not alleging that the City will be required to pay more for the Project as a result of Bear Electric’s bid strategy. Rather, the only allegation seems to be that Bear Electric has bid amounts that are below the pricing Pacific was able to obtain for certain bid items. Pacific also presents a completely unsubstantiated assumption that Bear Electric moved pricing under the three base bid items in question to the alternate bid items strategically to ensure that its base bid (the basis for determining the low bidder) is lower. Even assuming that is the bidding strategy employed by Bear Electric, it is not objectionable or unlawful. Bidders are free to take risks in the bidding process and strategically bid projects – this is the nature of an open market and low competitive bidding process. To the extent it did so, Bear Electric’s choice to allocate costs to the alternate bid items is a risk taken by it since there is nothing obligating the City to award the alternate bid items. If the City does not choose to award those bid items, then Bear Electric will bear the burden of its bidding decisions.

Pacific also presents a secondary assumption regarding why Bear Electric may have bid the amounts it did for the three base bid items. Like the foregoing assumption, this secondary assumption is again frivolous conjecture without any factual support. Pacific notes Bear Electric may have bid lower amounts for these three base bid items because it will eventually choose to seek approval of or-equal substitutes for the specified products. It is again unclear why Pacific believes this to be unlawful. Bear Electric is free to take the risk of bidding potential substitute products. Under Public Contract Code section 3400, the City has complete discretion regarding whether those hypothetical substitutes are in fact equals to the products specified in the bid documents. Nothing in law prohibits Bear Electric from proposing a substitute – in fact the opposite is true under Public Contract Code section 3400, which precludes public agencies from sole sourcing products on public works projects unless there is a statutory basis for doing so and expressly allows contractors to propose equal substitute products in place of any product specified by name in the bid documents. The City is under no pressure to approve such substitute products nor is there any basis for the claimed delay that may occur should the City disagree that Bear Electric’s hypothetical proposed substitutes are equal products.

We note the clear policy and purpose associated with the review of bids and bid protests as dictated by the court in *Ghillotti, supra*:

They must also be viewed in light of the public interest, rather than the private interest of a disappointed bidder. ‘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, [and] 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 Pacific–Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377,383, 301 P.2d 97.)

(*Ghillotti, supra* 45 Cal.App.4th at 908-09.) Consistent with this policy, the City finds the Protest wholly meritless and rejects it in its entirety.

The City will consider award of this contract at its meeting on October 6, 2020. City staff intends to recommend rejection of Pacific's Protest as meritless and award of the contract to the lowest responsible bidder submitting a responsive bid, Bear Electric.

Sincerely,

*Steven Erickson*

Steve Erickson  
Engineering Director/City Engineer

cc: File