



CARPENTERS LOCAL UNION 405

SERVING SANTA CLARA & SAN BENITO COUNTIES

September 15, 2020

City of Milpitas
City Hall, 455 E. Calaveras Boulevard
Milpitas, CA 95035

Re: Milpitas Fire Station No. 2 Replacement Project –Bid Advisory Regarding Sausal Corporation

Please accept this bid advisory on behalf of members of Carpenters Local 405 (herein "Local 405"), which represents working men and women in the City of Milpitas.

INTRODUCTION

In addition to our other duties as a labor organization, Local 405 monitors local construction projects to help ensure that fair and open competitive bidding practices are utilized and that taxpayers get the best value for their tax dollars. This is important because the policies underlying our State's competitive bidding laws not only foster fairness among bidders, but also protect the public trust.

Fair competitive bidding acts as a "guard against favoritism, improvidence, extravagance, fraud, and corruption; to prevent the waste of public funds; and to obtain the best result for the public."¹

"Competitive bidding laws are passed for the benefit and protection of the taxpaying public, not for the benefit and enrichment of bidders."² Proper enforcement of these laws results in more responsible contractors bidding and performing construction jobs, reduces instances of health and safety problems, promotes the timely completion of the contracted work, and helps to ensure the final product is of the highest quality and value for the taxpayer dollar.

The California Public Contract Code requires a public agency to award construction contracts funded in whole or in part by public funds to the lowest responsive and responsible bidder.³ The Code defines a responsible bidder as a "bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract."⁴

The City of Milpitas ("City") bid the Milpitas Fire Station No. 2 Replacement Project ("Project") on September 10, 2020. We urge the City to conduct a factual inquiry to determine whether the Project's apparent low bidder, Sausal Corporation, 3550 Willow Pass Rd., Concord, CA 94519 ("Sausal Corporation"), qualifies as a "responsive" and "responsible" bidder as defined under law.

¹ *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-171.

² *Id.*

³ Public Contract Code § 20162.

⁴ Public Contract Code § 1103.

In considering whether to accept Sausal Corporation's bid, Local 405 also urges the City to request additional information from Sausal Corporation regarding its bid amount. There is an unrealistically large difference between Sausal Corporation's bid and, both, the second low bidder and the engineer's estimate, posing the question whether the contract contains sufficient funds to cover the costs of compliance with all relevant legal requirements under California Labor Code section 2810.

DISCUSSION

1. Sausal Corporation's Bid Was Unrealistically Low in Comparison with Both the Second Lowest Bid and the Engineer's Estimate, Raising the Questions Whether the Bid is Non-Responsive for Not Accurately Reflecting the Cost to Perform the Work and Whether It Violates Labor Code Section 2810

Local 405 has carefully reviewed the bid results on the Project. The lowest three bids, according to the bid summary released on September 10, were: 1. Sausal Corporation \$7,638,200.00; 2. C. Overaa & Co., \$8,500,000.00; and 3. DL Falk Construction Inc., \$9,519,000.00. The Engineer's Estimate for the base contract work (labor, material, services, equipment) for the Project is \$10,830,000.00.

"A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted."⁵ Failure to satisfy all bid specifications renders a bid non-responsive as a matter of law. Such non-responsive bids must be rejected.

According to Tab 30 of the Instructions to Bidders for the Project ("Bidder Instructions"), *"The City may reject any Bid which, in its opinion when compared to other Bids received or to the City's internal estimates, does not accurately reflect the cost to perform the Work. The City may reject as non-responsive any Bid which unevenly weights or allocates costs, including but not limited to overhead and profit to one or more particular bid items."*

Additionally, Labor Code section 2810 ("section 2810") provides (in relevant part) as follows:

(a) A person or entity shall not enter into a contract or agreement for labor or services with a construction ... contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.

...

(g)(1) An employee aggrieved by a violation of subdivision (a) may file an action for damages to recover the greater of all of his or her actual damages or two hundred fifty dollars (\$250) per employee per violation for an initial violation and one thousand dollars (\$1,000) per employee for each subsequent violation, and, upon prevailing in an action brought pursuant to this section, may recover costs and reasonable attorney's fees.

...

⁵ *Konica Bus. Machines U.S.A. Inc. v. Regents of Univ. of California* (1988) 206 Cal. App. 3d 449, 454.

(i)(1) The term “knows” includes the knowledge, arising from familiarity with the normal facts and circumstances of the business activity engaged in, that the contract or agreement does not include funds sufficient to allow the contractor to comply with applicable laws.

(2) The phrase “should know” includes the knowledge of any additional facts or information that would make a reasonably prudent person undertake to inquire whether, taken together, the contract or agreement contains sufficient funds to allow the contractor to comply with applicable laws.

(3) A failure by a person or entity to request or obtain any information from the contractor that is required by any applicable statute or by the contract or agreement between them, constitutes knowledge of that information for purposes of this section.

In sum, section 2810 prohibits public entities from entering into a construction contract that they should know does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws and regulations governing the labor or services to be provided.⁶ Violations of section 2810’s requirements may subject the public entity to liability if the contractor fails to meet its obligations to workers on the Project.⁷

While we appreciate the City’s desire to complete the Project in an economical manner, Sausal Corporation’s bid was unrealistically low in comparison with *both* the second lowest bid *and* the engineer’s estimate, raising the question whether a contract with Sausal Corporation would include funds sufficient to allow compliance with prevailing wage and all other applicable labor laws. Sausal Corporation’s bid for \$7,638,200.00 was **\$861,800.00** less than the second low bid of \$8,500,000.00 – approximately a 10% difference, and **\$3,191,800.00** less than the engineer’s estimate of \$10,830,000.00 – approximately a **29.4%** difference. Where the discrepancy between the bid prices is this great, with the low bid substantially lower than other bids received, the questions emerge as to whether the apparent low bidder has calculated the bid price correctly and, if so, whether the apparent low bidder is intending to avoid prevailing wage requirements.

Under these circumstances, the reasonable and prudent course of action would be for the City to request additional information from Sausal Corporation to ensure that its proposed contract contains sufficient funds to cover the costs of compliance with prevailing wage and all other applicable labor laws. If the contract does not contain sufficient funds, the City should reject Sausal Corporation’s bid as non-responsive pursuant to its Bidder Instructions because the bid would not accurately reflect the cost to perform the work. The City’s failure to do so would expose the City to liability under section 2810.

2. Sausal Corporation’s Bid May Also Be Non-Responsive for Failing to Disclose Civil Wage and Penalty Assessments (“CWPA’s”) Issued By the DIR’s Division of Labor Standards Enforcement

Sausal Corporation checked the option relating to the Bidder status in regard to the “Wage Theft Certification”: *“Neither the Bidder nor any of its subcontractors have been found by a final court order or administrative action of an investigatory government agency to have violated federal, state or local*

⁶ Cal. Lab. Code § 2810, subd. (d).

⁷ Cal. Lab. Code § 2810, subd. (g)(1).

wage and hour laws, including but not limited to the federal Fair Labor Standards Act, the California Labor Code and the Milpitas Minimum Wage Ordinance, within the past five (5) years from the bid submission deadline.” Sausal Corporation certified this statement under penalty of perjury.

However, through a California Public Records Act request, Local 405 obtained information regarding two Civil Wage and Penalty Assessments against Sausal Corporation’s subcontractors, for which Sausal Corporation was jointly and severally liable, as determined by the Department of Industrial Relations (“DIR”), Division of Labor Standards Enforcement (**Attachment 1**):

Case Number	Awarding Body	Project Name	Prime Contractor	Subcontractor	Date	Wages and Penalties
40-43994	County of Alameda Housing Authority	HACA Main Office (Remodel & Addition)(HACA 201304)	Sausal Corporation	V.E.M. General Engineering, Inc.	June 17, 2016	Wages: \$20,715.13 Penalties: \$24,950.00 \$13,560.00
40-47961-137	Sunnyvale School District	Lakewood Elementary School Modernization	Sausal Corporation	Trahan Mechanical, Inc.	May 19, 2016	Wages: \$29,681.83 Penalties: \$32,880.00

It therefore appears that Sausal Corporation was not forthcoming when it represented that it and its subcontractors had not been found by an “administrative action of an investigatory government agency to have violated ... state or local wage and hour laws... within the past five (5) years form the bid submission deadline.”

3. Sausal Corporation May Not Be a “Responsible” Bidder as Required By the Public Contract Code.

For the reasons set forth below, Sausal Corporation may lack fitness and capacity to satisfactorily perform the contract at issue, based on a potential failure to adequately screen its subcontractor and documented performance history explained in this section. The District should therefore examine Sausal Corporation’s bid to determine if Sausal Corporation is truly a responsible contractor capable of completing the Project on time and on budget.

a. Potential Failure to Adequately Screen Subcontractor Tri Valley Excavating

Sausal Corporation listed Tri Valley Excavating Co Inc., (“Tri Valley Excavating”) CSLB License number 541927, as its subcontractor. Local 405 has a major concern with Tri Valley Excavating.

The Bidder Instructions, Tab 14, states: “If awarded a contract, the bidder and its subcontractors, of any tier, shall maintain active registration with the Department of Industrial Relations for the duration of the Project”.

The source of this bid requirement is Labor Code section 1771.7(a), which states: “[a] contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal, . . . or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5.” Labor Code section 1725.5 establishes the requirements for contractor registration, which are also listed on the DIR’s website (**Attachment 2**⁸). Contractors must meet, among others, the following requirements to register: 1) have a Contractors State License Board license if applicable to trade; and 2) not have any delinquent unpaid wage or penalty assessments owed to any employee or enforcement agency.

Local 405’s review of the Contractors State License Board online licensed contractor database (**Attachment 3**) shows that the license of Tri Valley Excavating is current and active. However, the “Additional Status” section of Tri Valley Excavating’s license page states the following: “Pending Disciplinary Action. Disciplinary action is pending against this licensee in the form of a citation.” A review of the citation disclosure information indicates that Tri Valley Excavating has pending citations for the Business & Professions Code sections 7109.A (departure from trade standards) and 7113 (exceeded contract amount). Each violation constitutes a cause for disciplinary action and, according to the California State License Board, if an accusation is filed and upheld, the license may be suspended or revoked.

It therefore appears that Tri Valley Excavating is currently subject to a pending disciplinary action that can cause the suspension or revocation of its CSLB license. Accordingly, Tri Valley Excavating may be unable to maintain the DIR registration necessary to perform work on public projects.

If Tri Valley Excavating does not maintain DIR registration for the duration of the Project, it will be illegal for it to continue to work on the Project. Moreover, the City of Milpitas will be subject to penalties from the DIR. Local 405 will monitor the Project and file a public works complaint against Tri Valley Excavating and the City of Milpitas if appropriate. Thus, Local 405 strongly encourages the City of Milpitas to conduct a factual investigation to determine if Tri Valley Excavating complies with DIR registration requirements, such that it can maintain DIR registration for the duration of the Project.

b. Delays on Past School and College Projects

- i) In December 9, 2014 the Burlingame School District Board of Trustees awarded a contract to Sausal Corporation for the Burlingame Intermediate School (BIS) Classroom Building Project (**Attachment 4**) in the amount of \$9,908,500.00. Once approved, the contract set the original completion date to January 22, 2016. Local 405 obtained documentation from the Burlingame School District which shows the following: (1) according to multiple change orders (**Attachment 5** change order 4, change order 20 and final Change order 22) Sausal Corporation proposed to extend the contract date required for Substantial Completion first for 69 days, then for 62 days, and for 66 days, a total of 197 days.

⁸ Also available at: <https://www.dir.ca.gov/Public-Works/Contractor-Registration.html>

- ii) In February 16, 2016 the West Valley Mission Community College awarded a contract to Sausal Corporation for the Facilities Replacement Building- Increment 2 Project in the amount of \$13,660,200.00. The Local 405 obtained the attached documentation from the West Valley Mission College which shows that, Sausal Corporation requested a time extension of 183 calendar days. The College approved the extension but determined that only 44 of the 183 days should be compensable. The College submitted a notice of completion which shows the project was eventually completed on December 11, 2018. **(Attachment 6)**

In addition to the delays and increase of the contract amount, the West Valley Mission Community College performed testing and evaluation of water intrusion at the project and identified it as a "construction issue," specifically involving inconsistent and missing mortar. The College is currently remediating the issue of water intrusion at this project and has withheld funds for incomplete and defective work. On February 28, 2019, the College issued a withhold of funds to Sausal Corporation requesting completion and repair of incomplete work and assessed an estimated total of \$102,000 in incomplete work. **(Attachment 7)**

We urge the City to review the enclosed documents and conduct its own investigation into Sausal Corporation's work history, to determine whether Sausal Corporation should be considered a responsible contractor.

c. History of Litigation

It is crucial for the City to be aware of Sausal Corporation's history of litigation as well as its performance record in the critical area of health and safety.

A review of area court records shows that Sausal Corporation has been involved in a series of connected court cases as both a plaintiff and a defendant in a matter stemming from the performance of a public works project. In Marin County, Sausal Corporation has been a party to the following lawsuits:

CIV1402511 Volpe Company, Inc. vs Sausal Corporation (COMPLEX)

Case Type: Breach of Contract

Date Filed: 6/30/2014

Judgment date: 12/20/2019

Currently in Court of Appeals: A159372

CIV150267 Steven E. Berlin, Inc. vs Sausal Corporation

Case Type: Breach of Contract

Date Filed: 7/20/2015

The lawsuits are related to a project that the City of Novato awarded to Sausal Corporation. The original claims were filed by subcontractors against Sausal Corporation for failure to pay, but later in the process the City of Novato as the project owner also became involved in the legal dispute.

As part of this complex litigation, Sausal Corporation filed a cross-complaint against the City of Novato and several of its subcontractors on 09/10/2015 (**Attachment 8**). In turn, the City filed a counter-claim against Sausal Corporation on 9/23/2015 (**Attachment 9**, page 4). The City was dismissed as a party on 8/28/2019 (**Attachment 9**, page 69). After a jury trial in which Sausal was found liable, The Marin County Superior Court issued a Second Amended Judgment against Sausal Corporation in the total amount of \$1,385,580.23, including attorney's fees and costs, on 01/23/2020 (**Attachment 9**, page 76). Sausal filed an appeal.

More than five years after the initial legal filing, the appeal filed by Sausal is still pending before the Court of Appeal, First Appellate District (**Attachment 10**) Case Nos: A159372 and related cases A158140 and A157577.

While our litigation review was limited in scope, this series of related cases is concerning and suggests there is cause to further examine Sausal Corporation's record of performance.

c. OSHA Violations

In addition, regarding California or federal OSHA violations, here too, Sausal Corporation has committed serious violations. A search of OSHA's online database lists the following inspections involving alleged serious violations by Sausal Corporation dating back to 2016.⁹

Nr: 1172950.015, Report ID: 0950615, Open Date: **08/19/2016**, Sausal Corporation, 2100 Napa Vallejo Highway, Mailing: 422 Whitney Street, San Leandro, CA 94577, Case Status: CLOSED

Violations Cited:

ID: 01001 Type: Other Standard: 1509(A) Issuance: 11/21/2016 Current Penalty: \$300 Initial Penalty: \$300 Last Event: I - Informal Settlement	ID: 02001 Type: Other Standard: 1632(B) Issuance: 11/21/2016 Current Penalty: \$1,350 Initial Penalty: \$1,350 Last Event: I - Informal Settlement	ID: 03001 Type: Other Standard: 1712(C)(1) Issuance: 11/21/2016 Current Penalty: \$1,350 Initial Penalty: \$1,350 Last Event: I - Informal Settlement
--	--	---

Nr: 1166921.015, Report ID: 0950615, Open Date: **07/28/2016**, Sausal Corporation, 100 Montgomery Street, San Ramon, CA 94583, Mailing: 422 Whitney Street, San Leandro, CA 94577 Case Status: CLOSED

Violations Cited:

ID: 01001 Type: Other Standard: 1509(A) Issuance: 11/21/2016	ID: 02001 Type: Other Standard: 1621(A) Issuance: 11/21/2016	ID: 03001 Type: Other Standard: 1712(C)(1) Issuance: 11/21/2016
---	---	--

⁹ OSHA's searchable online database, which maintains records of its enforcement inspections, is available at: <https://www.osha.gov/pls/imis/establishment.html#disclaim>.

Current Penalty: \$300 Initial Penalty: \$300 Last Event: I - Informal Settlement	Current Penalty: \$1,350 Initial Penalty: \$1,350 Last Event: I - Informal Settlement	Current Penalty: \$1,350 Initial Penalty: \$1,350 Last Event: I - Informal Settlement
--	--	--

The City should contact OSHA directly with any additional questions regarding these inspections.

CONCLUSION

In light of the issues we have described above, Local 405 respectfully urges the City to proceed carefully in exercising its fiduciary responsibility. Specifically, we request the City to consider the following course of action before awarding the Project:

1. Request additional information from Sausal Corporation to ensure that its proposed Project contract contains sufficient funds to cover the costs of compliance with prevailing wage and all other applicable labor laws;
2. Determine whether Sausal Corporation's failure to disclose information about Civil Wage and Penalty Assessments ("CWPA's") issued by the DIR's Division of Labor Standards Enforcement, renders its bid non-responsive as a matter of law;
3. Conduct a thorough inquiry into Sausal Corporation's history of ongoing and concluded litigation and OSHA assessments and Sausal Corporation's failure to adequately screen Tri Valley Excavating, to verify whether Sausal Corporation qualifies as a responsible bidder with the attributes of trustworthiness, quality, fitness, capacity, and experience to satisfactorily perform this public works contract; and
4. Consider awarding the project to the second lowest bidder, C. Overaa & Co.

Adequately investigating issues of responsiveness and responsibility goes directly to the heart of the City's fiduciary responsibility to taxpayers. Local 405 would appreciate notification of what steps you will take in order to ensure compliance with the State's competitive bidding laws. We look forward to your response by September 25, 2020.

Thank you for your time and consideration to this very important matter.

Sincerely,

Cesar Sanchez

Labor Compliance Investigator

Enclosures

Cc: City of Milpitas City Council:
Rich Tran, Mayor, email: rtran@ci.milpitas.ca.gov
Bob Nuñez, Vice Mayor, email: bnunez@ci.milpitas.ca.gov
Karina R. Dominguez, Councilmember, email: kdominguez@ci.milpitas.ca.gov
Carmen Montano, Councilmember, email: cmontano@ci.milpitas.ca.gov
Anthony Phan, Councilmember, email: aphan@ci.milpitas.ca.gov

Steve P. Erickson, Engineering Director / City Engineer, email: serickson@ci.milpitas.ca.gov
Lyhak Eam, P.E. Associate Civil Engineer, email: leam@ci.milpitas.ca.gov