

THIS AGREEMENT, made and entered into by and between:

City of Reedley

hereinafter referred to as "Owner" and Smith Construction Company Inc.,

a corporation under the laws of the state of California;

a partnership composed of \_\_\_\_\_;

a joint venture composed of \_\_\_\_\_;

an individual doing business as \_\_\_\_\_;

hereinafter referred to as "Contractor."

Owner and Contractor agree as follows:

- (1) SCOPE OF WORK: Contractor will furnish all materials and will perform all of the work for the construction of

Wells 13 and 14 Improvements and Wellhead Treatment

in accordance with the plans and specifications and other contract documents therefor.

- (2) TIME FOR COMPLETION: The work shall be completed within the times set forth in Section 007300. Time is of the essence, and forfeiture due to delay will be assessed as provided for in the General Provisions.

- (3) CONTRACT SUM: Owner will pay Contractor in accordance with the prices shown in the Bid Form.

- (4) PAYMENTS: Monthly progress payments and the final payment will be made in accordance with the General Provisions as modified by the Special Provisions. The filing of the notice of completion by Owner shall be preceded by acceptance of the work made only by an action of the Governing Body of Owner in session.

- (5) COMPLIANCE WITH PUBLIC CONTRACTS LAW: Owner is a public agency in the State of California and is subject to the provisions of law relating to public contracts. It is agreed that all provisions of law applicable to public contracts are a part of this contract to the same extent as though set forth herein and will be complied with by Contractor.

- (6) CONTRACTOR'S REPRESENTATIONS: In order to induce Owner to enter into this Agreement, Contractor makes the following representations:

- (a) Contractor has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents.
- (b) Contractor has visited the Site and become familiar with and is satisfied as to the general, local, and Site conditions that may affect cost, progress, and performance of the Work.
- (c) Contractor is familiar with and is satisfied as to all federal, state, and local laws and regulations that may affect cost, progress, and performance of the Work.
- (d) Contractor has carefully studied all reports of explorations and tests of subsurface conditions at or contiguous to the Site and all drawings of physical conditions in or relating to existing surface and subsurface structures at or contiguous to the Site (except

underground facilities) which have been identified in the Supplementary Conditions as provided in the General Provisions.

- (e) Contractor has obtained and carefully studied (or assumes responsibility for having done so) any additional or supplementary examinations, investigations, explorations, tests, studies, and data concerning conditions (surface, subsurface, and underground facilities) at or contiguous to the Site which may affect cost, progress, or performance of the Work or which relate to any aspect of the means, methods techniques, sequences, and procedures of construction to be employed by Contractor, including applying the specific means, methods, techniques, sequences, and procedures of construction, if any, expressly required by the Contract Documents to be employed by Contractor, and safety precautions and programs incident thereof.
- (f) Contractor does not consider that any further examinations, investigations, explorations, tests, studies, or data are necessary for the performance of the Work at the Contract Price, within the Contract times, and in accordance with the other terms and conditions of the Contract Documents.
- (g) Contractor is aware of the general nature of work to be performed by Owner and others at the Site that relates to the Work as indicated in the Contract Documents.
- (h) Contractor has correlated the information known to Contractor, information and observations obtained from visits to the Site, reports and drawings identified in the Contract Documents, and all additional examinations, investigations, explorations, tests, studies, and data within the Contract Documents.
- (i) Contractor has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Contractor has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Contractor.
- (j) The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Work.

(7) ACCOUNTING RECORDS: Contractor shall check all materials, equipment, and labor entering into the Work and shall keep such full and detailed accounts as may be necessary for proper financial management under this Agreement, and the accounting methods shall be satisfactory to Owner. Owner shall be afforded access to all Contractor's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda, and similar data relating to the cost of the Work and Contractor's fee. Contractor shall preserve all such documents for a period of three years after the final payment by Owner.

(8) CONTRACT DOCUMENTS: The complete contract includes all the Contract Documents set forth herein, to wit: Notice Inviting Sealed Proposals (Bids), Bid Form, Agreement, Bid Bond, Performance Bond, Payment Bond, Contractor's Certificate Regarding Workers' Compensation, Certificate of Insurance (Workers' Compensation and Employers' Liability), Insurance Endorsement (Workers' Compensation and Employers' Liability), Certificate of Insurance (Liability), Insurance Endorsement (Liability), Certificate of Insurance (Builders' Risk "All Risk"), Insurance Endorsement (Builders' Risk "All Risk"), General Provisions, Special Provisions, Technical Specifications, Drawings, Plans, and also addenda thereto and supplemental agreements.

(9) SUCCESSOR AND ASSIGNS: Owner and Contractor each binds itself, its partners, successors, assigns, and legal representatives to the other party hereto, its partners, successors, assigns, and legal representatives in respect to all covenants, agreements, and obligations contained in the Contract Documents.

(10) PROMPT PAYMENT: As required by California law, the provisions of California Public Contract Code Section 20104.50, regarding prompt payment to contractors, are hereby incorporated in their entirety.

- (11) ATTORNEYS' FEES: Should either party to the contract bring an arbitration or mediation proceeding or other action to enforce any provision of the contract, including an action pursuant to Public Contract Code Section 20104.4, the prevailing party shall be entitled to recover his reasonable attorneys' fees and costs in connection therewith. The term "prevail" as used in this section shall include any action at law, in equity, or pursuant to arbitration in which either party has been successful.

This Agreement is executed by the Owner pursuant to an action of its Governing Body in session on September 24, 2019 authorizing the same, and Contractor has caused this Agreement to be duly executed. The effective date will be the last date of execution by the parties.

Date: 10/14/19

By: [Signature]  
(Authorized Representative of Owner)

Title: City Manager

Dated 10/04/2019

Smith Construction Company, Inc.  
(Contractor)

By: [Signature]  
(Authorized Representative of Contractor)

(Seal if Corporation)

Title: Don Smith, President

(Attach Acknowledgment for Authorized Representative of Contractor)

APPROVED:

\_\_\_\_\_  
(Attorney for Owner)



## REEDLEY CITY COUNCIL

- ☐ Consent Calendar
- ☒ Regular Item
- ☐ Workshop
- ☐ Closed Session
- ☐ Public Hearing

ITEM NO: 12

**DATE:** September 24, 2019

**TITLE:** APPROVAL OF ITEMS PERTAINING TO THE CONSTRUCTION OF WELLHEAD TCP TREATMENT FACILITIES FOR MUNICIPAL WATER WELLS 13, AND 14.

- A. CONSIDER AND DISCUSS REJECTION OF THE LOW BID AS NONRESPONSIVE BASED ON BIDDER'S FAILURE TO ADHERE TO THE BIDDER'S QUALIFICATION REQUIREMENTS AS REQUIRED IN THE CITY'S BID DOCUMENT.
- B. ADOPT RESOLUTION NO. 2019-081 AWARDED A CONSTRUCTION CONTRACT TO SMITH CONSTRUCTION COMPANY, INC. IN THE AMOUNT OF \$949,875.09 FOR THE CONSTRUCTION OF WELLHEAD TCP TREATMENT FACILITIES FOR WATER WELLS NO. 13, AND 14 AND AUTHORIZE THE CITY MANAGER TO APPROVE AND SIGN CHANGE ORDERS UP TO AN AMOUNT EQUAL TO 10% OF THE CONSTRUCTION CONTRACTED AMOUNT.
- C. ADOPT RESOLUTION NO. 2019-082 AMENDING THE 2019-2020 ADOPTED BUDGET TO APPROPRIATE \$1,044,863 FROM THE GROUND WATER TREATMENT FUND FOR THE AFOREMENTIONED PROJECT.

**SUBMITTED:** Russ Robertson, Public Works Director

**APPROVED:** Nicole Zieba, City Manager

### RECOMMENDATIONS

A. Staff recommends the rejection of the low bid based upon the following: incorrect information submitted in the bid, failure to adhere to the bidder qualifications requirement as required in the City's bid document, and on the grounds described in the attached recommendation of the Public Works Director following the hearing with the low bidder.

B. Staff also recommends the adoption of Resolution No. 2019-081 awarding a construction

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contract to the second low bidder, Smith Construction Company Inc. for the construction of wellhead TCP treatment facilities for water wells 13, and 14 in the amount of \$949,875.09 and grant the City Manager authority to approve and sign contract change orders up to an amount equal to 10% (\$94,987.50) of the contract amount.

C. Finally, Staff also recommends the adoption of Resolution 2019-082 amending the 2019-2020 Budget to appropriate \$1,044,863 from the Ground Water Treatment fund for the aforementioned project.

## **EXECUTIVE SUMMARY**

The City of Reedley has three municipal water wells that have tested at levels exceeding the State mandated maximum contaminate level for TCP in potable water. Last year the City received settlement money from responsible parties to be used to install TCP treatment facilities at the three well sites.

The entire scope of work includes three phases:

Phase One: Procurement of TCP Treatment Vessels and GAC materials for all three wells.

Phase Two: Construction and site work at wells 13 and 14 to prepare for treatment vessels.

Phase Three: Construction and site work for well 12 to prepare for treatment vessels.

Phase one was approved and awarded by the City Council on February 12, 2019, and construction of the treatment vessels is nearing completion.

The project outlined in this staff report for Council's consideration and approval is Phase two, which includes all of the site preparation, infrastructure, pipe work, installation of the vessels, and associated SCADA and electrical work for wells 13 and 14.

Phase three is in the final planning stages and should be ready to go out to bid shortly.

On July 10, 2019, the City of Reedley began solicitation for sealed bids for the project. On August 1, 2019 the City conducted a bid opening for the project and the City received 6 bids ranging from a low of \$916,186 to a high of 1,432,580. The Engineer's Estimate for the project was \$1,009,400. Following the bid opening, the apparent low bidder was Steve Dovali Construction (SDC).

After a thorough review of the bid submitted by SDC it was determined that bid requirements were not met. The bid document contained a Bidder's Qualifications requirement in which the contractor must list three projects previously completed that have included GAC treatment facilities.

The bid document specifically stated:

"Systems cited in experience submittals shall have been downflow, pressure-type configurations using similar vessel diameter and design as this project".

SDC included three references for previous GAC wellhead projects in its bid. Those references were contacted, and each indicated that none of the three referenced projects contained GAC

potable water treatment systems. Accordingly, based on a review of the listed references, SDC did not meet the qualification requirements specified in the bid documents for this project.

SDC was informed of the information received from its listed references and its apparent lack of qualification to perform the project, and was given the opportunity to submit any information that would rebut the information received from the three listed references and establish that the three reference projects listed in its bid included GAC treatment facilities. A hearing was scheduled to be held on September 5, 2019, for SDC to meet with the Public Works Director to present any information and evidence.

Before the hearing, SDC submitted an envelope to the Public Works Director containing various documents. Upon reviewing the documents and contacting the additional references provided therein, it was discovered that none of the information provided by SDC was related to the three projects listed in its submitted bid. Rather, the documents and information submitted referred to other projects that SDC had previously completed, not the three projects listed in its bid.

The hearing was held on September 5th as scheduled. At the hearing, SDC admitted that none of the three reference projects listed in its bid included the required GAC treatment facilities as had been stated in the bid, and confirmed that those three projects were listed in its bid by mistake. Notwithstanding the mistake, SDC requested that the City consider the other reference projects SDC had submitted after the formal bid opening.

After considering all the bids submitted, the information received from references listed in submitted bids, information submitted after the bid opening by SDC, and the information provided by SDC at the September 5th hearing, and considering the applicable legal authority, the Public Works Director issued a written recommendation for award of the project. That recommendation is attached to this staff report, and describes the reasoning for the recommendation that SDC's bid be rejected as nonresponsive, and the contract be awarded to the second low bidder as the lowest responsible bidder who submitted a responsive bid. Based on the attached written recommendation, which is incorporated herein and made part of the record for this item, it is recommended that SDC's bid be rejected as nonresponsive based upon incorrect information submitted on the bid and the failure to adhere to the bidder qualifications requirement as outlined in the bid form.

Following the recommended rejection of SDC's bid, staff recommends that the construction contract be awarded to Smith Construction Company, Inc. as the lowest responsive bid. The bid received from Smith Construction Company, Inc. including the previous project references listed in the bid were reviewed and verified by City staff and the City's consultant engineer. Smith is a responsible bidder, and Smith's bid was responsive to the requirements of the bid form.

## **BACKGROUND**

Well 14 is located at the Reedley Sports Park. This well is the City's workhorse and one of the top producing wells in the City. It is also used to fill the City's 1.5 million gallon water storage tank. The well currently has four filter vessels which contain Granulated Activated Carbon (GAC). GAC is a proven method to filter and remove certain chemicals, such as TCP and

DBCP, from water. When the GAC has to be changed out, which is approximately every 12 months, the well must be shut down during the process. The installation of four additional GAC vessels will allow the City to keep the well operational even when change out is occurring.

Well 13 is located on Parlier Avenue, just west of Buttonwillow Avenue. Water tested from this well exceeded the State's adopted MCL for TCP, and has been off-line since that time. This well is important for servicing the north east section of the City. The City plans to install two GAC treatment vessels at this location. It is not a large production well, thus two vessels are sufficient for treatment.

### **FISCAL IMPACT**

A reduction of \$1,044,863 from the Groundwater Treatment Fund.

### **ATTACHMENTS**

1. Resolution 2019-081
2. Resolution 2019-082
3. Bid Tabulation
4. Public Works Director's Written Recommendation for Award of Project



## RESOLUTION NO. 2019-081

### **A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF REEDLEY AWARDING A CONSTRUCTION CONTRACT TO SMITH CONSTRUCTION COMPANY, INC. FOR THE CONSTRUCTION OF TCP TREATMENT FACILITIES FOR WATER WELLS 13 AND 14 IN THE AMOUNT OF \$949,875.09 AND AUTHORIZING THE CITY MANAGER TO APPROVE AND SIGN CHANGE ORDERS EQUAL TO 10% OF THE CONSTRUCTION CONTRACT AMOUNT**

**WHEREAS**, the City of Reedley issued a Notice to Bidders for the construction of TCP treatment facilities for municipal water wells 13 and 14 ("Project"); and

**WHEREAS**, the City received, opened and read aloud the bids received; and

**WHEREAS**, during its City Council meeting on September 24, 2019, the City Council rejected the low bid received from Steve Dovali Construction, Inc. ("SDC") because it was found to be nonresponsive; and

**WHEREAS**, following the rejection on SDC's bid as nonresponsive, the lowest responsive bid received from a responsible bidder was submitted by Smith Construction Company, Inc. in the amount of \$949,875.09.

**NOW, THEREFORE**, the City Council of the City of Reedley using their independent judgment hereby resolves as follows:

1. The above recitals are true and correct.
2. Smith Construction Company, Inc. is a qualified and responsible bidder and submitted the lowest responsive bid for the Project, and the Project contract is awarded to Smith Construction Company, Inc. for the amount of its bid of \$949,875.09.
3. The City Manager is authorized and directed to promptly execute the contract for the Project with Smith Construction Company, Inc. subject to the submittal of necessary bonds, insurance certificates, and other necessary documents required by the specifications and special provisions for this Project.
4. The City Manager is authorized to approve and execute contract change orders for this Project in the total amount not to exceed \$94,987.50, which is 10% of the base bid.
5. The total construction budget for this Project, including the construction contract and the allowance for approved change orders and contingencies, is \$1,044,862.59.

The foregoing resolution was adopted by the City Council of the City of Reedley at a regular meeting held on September 24, 2019, by the following vote:

AYES:  
NOES:  
ABSTAIN:  
ABSENT:

ATTEST:

\_\_\_\_\_  
Frank Piñon, Mayor

\_\_\_\_\_  
Sylvia B. Plata, City Clerk



**BUDGET AMENDMENT  
RESOLUTION 2019-082**

The City Council of the City of Reedley does hereby amend the 2019-2020 Budget as follows:

**Section I - Additions:**

FUND-DEPT.OBJECT	AMOUNT
047-4503.5140 TCP Treatment Facilities	\$1,044,863

Purpose: Amends the FY 2019-2020 Adopted Budget and appropriates \$1,044,863 from the Ground Water Treatment Fund for the construction of TCP Treatment facilities for water wells 13 and 14.

**Section II – Source of Funding:**

FUND	AMOUNT
047-2710 Ground Water Treatment Fund Balance	\$1,044,863

Impact: Reduction of the Ground Water Treatment Fund balance by \$1,044,863.

Reviewed:

 9/19/19  
Assistant City Manager

Recommended:

  
City Manager

The foregoing resolution is hereby adopted this 24th day of September, 2019 by the following vote:

AYES:  
NOES:  
ABSENT:  
ABSTAIN:

APPROVED:

\_\_\_\_\_  
Frank Piñon, Mayor

ATTEST:

\_\_\_\_\_  
Sylvia B. Plata, City Clerk

City of Reedley  
Wells 13 and 14 Improvements and Wellhead Treatment  
Bid Results

Bid Opening: August 1, 2019, 2 p.m.

Base Bid	Quantity	Engineer's Estimate		Overall Construction		Smith Construction		WM Lyles Co.		Brough Construction		Dewson-Mauldin		Sylvan Field	
		Unit Price	Total	Unit Price	Total	Unit Price	Total	Unit Price	Total	Unit Price	Total	Unit Price	Total	Unit Price	Total
1 Mobilization	LS	-	40,000	-	40,000	-	36,852.00	-	31,800	-	39,500	-	40,000	-	40,000
2 Record Drawings	LS	-	2,000	-	500	-	3,345.00	-	1,060	-	5,500	-	2,500	-	5,500
Well 13															
3 Storm Water Pollution Prevention Plan Implementation	LS	-	2,000	-	1,200	-	812.00	-	1,060	-	3,500	-	2,000	-	8,500
4 Cleaning, grubbing, grading, AC paving, and surfacing	LS	-	30,000	-	5,100	-	44,479.00	-	57,440	-	42,500	-	3,000	-	50,000
5 Installation of one pair of Owner-furnished GAC vessels and vessel piping	LS	-	35,000	-	26,600	-	20,007.00	-	23,020	-	22,600	-	65,000	-	29,000
6 GAC vessel pair foundation	LS	-	25,000	-	22,750	-	32,829.00	-	38,260	-	40,500	-	17,000	-	55,000
7 Backwash tank including foundation	LS	-	110,000	-	86,720	-	120,026.00	-	94,240	-	135,000	-	60,000	-	129,000
8 Yard piping, meter, and sampling piping	LS	-	60,000	-	123,110	-	80,818.00	-	113,980	-	112,760	-	130,000	-	142,000
9 Chlorination equipment and residual analyzer	LS	-	40,000	-	41,300	-	31,184.00	-	30,240	-	55,000	-	52,000	-	41,500
10 Electrical work and instrumentation	LS	-	100,000	-	70,000	-	189,951.00	-	116,230	-	131,200	-	175,000	-	135,500
11 Painting and coating including vessel touchup	LS	-	20,000	-	8,415	-	8,341.00	-	7,930	-	11,000	-	10,000	-	11,000
12 Start-up and testing	LS	-	15,000	-	1,200	-	4,066.00	-	3,900	-	12,900	-	3,000	-	12,000
13 Landscape irrigation and planting	LS	-	20,000	-	47,300	-	16,727.00	-	21,580	-	19,000	-	43,000	-	27,000
14 Miscellaneous site work	LS	-	15,000	-	6,900	-	16,340.00	-	19,980	-	2,500	-	34,000	-	21,000
Well 14															
15 Storm water pollution prevention plan implementation	LS	-	2,000	-	1,700	-	421.00	-	1,060	-	4,800	-	1,000	-	8,900
16 Cleaning, grubbing, grading, concrete paving, and	LS	-	20,000	-	20,000	-	16,380.00	-	30,590	-	22,800	-	6,000	-	32,000
17 24-inch storm drain pipe	1,380 LF	-	110,400	-	91,080	-	70,211	-	178,020	-	85,560	-	138,000	-	249,780
18 48-inch storm drain manhole	7 EA	-	21,000	-	5,800	-	31,225.04	-	7,900	-	8,200	-	7,800	-	63,000
19 Type C storm drain offset structure	1 EA	-	20,000	-	7,000	-	9,352.00	-	6,430	-	9,500	-	7,000	-	11,000
20 5x5 storm drain inlet at tank overflow	LS	-	6,000	-	12,405	-	8,921.00	-	23,850	-	14,000	-	8,000	-	12,000
21 48 feet of 18-inch storm drain pipe with grained inlet	LS	-	6,000	-	11,051	-	9,479.00	-	12,410	-	6,800	-	10,000	-	9,400
22 Excavation of existing storm drain basin	LS	-	15,000	-	13,715	-	14,416.00	-	9,720	-	12,000	-	29,000	-	45,500
23 Installation of two pairs of Owner-furnished GAC vessels and vessel piping	LS	-	70,000	-	48,000	-	35,671.00	-	43,820	-	46,000	-	35,000	-	45,000
24 GAC vessel pair foundations for two pairs	LS	-	50,000	-	45,480	-	66,174.00	-	76,510	-	75,000	-	35,000	-	89,000
25 Yard piping	LS	-	60,000	-	56,800	-	60,598.00	-	66,470	-	65,000	-	125,000	-	62,000
26 Electrical work and instrumentation	LS	-	50,000	-	43,000	-	36,021.00	-	39,830	-	49,000	-	53,000	-	51,000
27 Painting and coating including vessel touchup	LS	-	25,000	-	9,515	-	9,432.00	-	8,970	-	15,000	-	12,000	-	12,500
28 Chlorine injection vault cover and modifications	LS	-	15,000	-	3,800	-	16,274.00	-	7,110	-	17,000	-	9,000	-	12,600
29 Start-up and testing	LS	-	15,000	-	1,200	-	4,873.00	-	3,900	-	13,200	-	4,000	-	13,000
30 Miscellaneous site work	LS	-	10,000	-	17,945	-	6,968.00	-	5,360	-	4,500	-	18,000	-	11,900
Total		-	1,009,400	-	906,186	-	948,875.84	-	1,130,100	-	1,141,020	-	1,175,500	-	1,432,580
Total Shown on Bid Form (if different)		-	-	-	916,168	-	949,875.09	-	-	-	-	-	-	-	-

## **RECOMMENDATION FOR AWARD OF CITY OF REEDLEY WELLHEAD TCP TREATMENT FACILITIES FOR WELLS 13 AND 14**

### **Factual Summary**

The City of Reedley ("City") issued a notice to bidders for the Wellhead TCP Treatment Facilities for Wells 13 and 14 Project ("Project") on July 10, 2019. The sealed bids were due and the bid opening occurred on August 1, 2019. Six bids were received, and the lowest monetary bid was received from Steve Dovali Construction, Inc. ("SDC").

The City's bid form contains an express requirement for bidder's qualifications, as follows:

### **Bidder's Qualifications**

The Bidder for the Wellhead Treatment and Improvements for Wells 13 and 14 shall have previously constructed wellhead treatment projects using GAC potable water treatment systems within the United States for a minimum of 750 gpm. Systems cited in experience submittals shall have been downflow, pressure-type configurations using similar vessel diameter and design as this project. The Bidder shall have had system responsibility, including site work construction and installation, and vessel and piping assembly on at least three separate project sites.

Immediately following the stated Bidder's Qualifications requirement, the bid form contained blanks for the bidder to include reference information for three GAC wellhead treatment projects previously performed by the bidder. SDC's bid included the following information in this section for previous project reference information:

### **Reference GAC Wellhead Projects**

	Date	Project and Owner	Contact Person with Phone and Email	Treatment Capacity (gpm)
1.	2007	City of Fresno KB Homes PS 331	Lito Bucu 559-621-1621 Lito.Bucu@fresno.gov	4 Tanks
2.	2007	Fresno City PS 305	Lito Bucu 559-621-1621 Lito.Bucu@fresno.gov	4 Tanks
3.	2006	City of Madera Well 28	Jerry Martinez 559-661-5424 jmartinez@cityofmadera.com	4 Tanks

Following the bid opening, the City's engineering consultant contacted each of the references for the previous projects listed in SDC's bid. Based on the information received from the listed



references, none of the previous projects listed in SDC's bid met the qualifications required for the Project. As a result, the City sent written notice to SDC on August 16, 2019, informing SDC that the based on the information received from the listed references, SDC did not meet the qualifications to perform the Project. As a result, SDC was informed that City staff intended to recommend SDC's bid be rejected. SDC was offered the opportunity to respond and present evidence to counter the information received from the references listed in its bid, and was offered an informal hearing with the Public Works Director ("Director") to address the matter.

Upon receiving the City's August 16, 2019, notice, SDC requested the offered hearing. The City sent written notice to SDC on August 19, 2019, setting the hearing for September 5, 2019, and confirming the purpose of the hearing.

Thereafter, SDC submitted a letter and various materials to the Director on August 19, 2019, and on August 28, 2019. The letter and materials were reviewed by the Director and the City's engineering consultant. The letter and materials included references for eight projects that SDC asserted it had previously performed which included the required GAC potable water treatment systems. In exercising due diligence, the City's engineering consultant contacted the references for the eight additional projects. The comments from the references for the additional projects were mixed about SDC's performance on those projects. Additionally, the City's engineering consultant included a comment about its experience with the electrical subcontractor listed in SDC's bid involving late submittals and delays by the subcontractor.

On September 4, 2019, the Director sent SDC the summary prepared by the City's engineering consultant containing the information received from the references for the three projects listed in SDC's bid, and the summary of information received from the references provided by SDC in the materials submitted on August 19th and August 28th for the 8 other projects identified, and the comment by the engineering consultant about its experience with the electrical subcontractor listed in SDC's bid. SDC responded to the Director via email on September 4th that the summary was misleading, and confirmed SDC would attend the hearing for the next day.

The hearing was held on September 5, 2019, as scheduled. At the hearing, SDC admitted that none of the three reference projects listed in its bid included the required GAC treatment facilities as had been stated in the bid, and confirmed that those three projects were listed in its bid by mistake. Notwithstanding the mistake, SDC requested that the City consider the other reference projects SDC had submitted after the formal bid opening. The electrical subcontractor attended the hearing and addressed the late submittal on the other project referenced by the City's engineering consultant in the summary.

At the conclusion of the hearing, and via an email to the Director following the hearing on September 5th, SDC requested that the City accept its bid as responsive and waive the irregularity with the listed previous projects, and award the project to SDC.

## **Discussion**

### **A. Introduction.**

SDC's failure to list any previous projects in its bid for which it had performed the required GAC potable water treatment system, was not determined from the face of the bid but only after the City's engineering consultant contact the references. Upon the discovery, the City provided adequate notice and opportunity to SDC to address the issues with its bid and its qualifications to perform the project.

The notices and information provided by the City to SDC after the bid opening, and the hearing the City afforded SDC, all satisfy the requirements required by applicable law. (*City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861; *D.H. Williams v. Clovis Unified School District* (2007) 146 Cal.App.4th 1432; *Great West Contractors, Inc. Irvine Unified School District* (2010) 187 Cal.App.4th 1425.) SDC was provided sufficient notice and opportunity to rebut the information the City received from the three listed project references in SDC's bid.

The City has discretion to waive irregularities in a bid, as long as the irregularity is inconsequential. Although authorized, a City is not required to waive inconsequential bid defects or irregularities in a bid, and can demand strict compliance with its bid document. (*Taylor Bus Service v. San Diego Board of Education* (1987) 195 Cal.App.3rd 1331).

The determination of what is an inconsequential bid defect or irregularity involves a number of factors. However, if the bid defect or irregularity establishes a ground for a bidder to withdraw its bid without incurring liability under its bid bond, then it is not inconsequential and cannot be waived. (*Bay Cities Paving & Grading, Inc. v. San Leandro* (2014) 223 Cal.App.4th 1181.) The City is prohibited from waiving a bid defect if that defect would allow a bidder to withdraw its bid without liability under the bid bond, because to do so would give the bidder a competitive advantage over other bidders. Finally, a bidder is prohibited from changing a bid because of a mistake in its bid. (Public Contract Code 5101.)

## **B. SDC's Responsibility.**

The bid documents require that bidders have performed previous projects with GAC potable water treatment systems. The three projects listed in SDC's bid did not meet the qualifications required for the Project. After being informed by the City, SDC submitted information on eight different projects to attempt to establish its qualifications.

The comments received from the references were mixed about SDC's performance on the additional projects submitted after the bid opening. SDC and its listed electrical subcontractor addressed the comments during the hearing, and it was confirmed that SDC had performed previous projects with GAC water treatment systems. In the end, it appears SDC may be qualified to perform the Project. However, as explained below, the City cannot consider the additional information submitted by SDC after the bid opening.<sup>1</sup>

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<sup>1</sup> Because SDC's bid must be rejected as nonresponsive, a recommendation of whether SDC is a responsible bidder may not be necessary. However, to the extent necessary, if SDC's bid is found to be responsive, it is recommended that SDC be found to be not responsible on the grounds of a failure to follow clear bid instructions, and based on the comments regarding SDC's performance received from the references for the additional projects SDC provided after the bid opening. A determination of non-responsibility is not made lightly, as it may have an adverse impact on

C. SDC's Bid was Nonresponsive and the City Cannot Waive the Defect in SDC's Bid.

SDC confirmed that the three previous project references listed in its bid were a mistake. This mistake is not a minor irregularity or inconsequential defect that can be waived by the City. Rather, this is the type of mistake that would allow SDC to withdraw its bid pursuant to Public Contract Code sections 5101, *et. seq.*<sup>2</sup> and claim it was not qualified to perform and incur no liability under its bid bond. This creates an unfair competitive advantage prohibited in the competitive public contracting arena. Accordingly, the City may not waive SDC's bid defect and its failure to list previous projects with GAC potable water treatment systems.<sup>3</sup>

Moreover, allowing SDC to replace the previous project reference information listed in its bid with completely different projects submitted more than two weeks after the bid opening would result in a change in the bid because of a mistake, which is expressly prohibited by Public Contract Code § 5101.

**Conclusion and Recommendation**

For the reasons described above, SDC's bid must be rejected as nonresponsive. It is recommended that the City Council reject SDC's bid as nonresponsive. Following rejection of SDC's bid, the City Council may award the project to the next lowest responsible bidder who submitted a responsive bid.



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SDC's business reputation. However, because the review of SDC's references listed in its bid is beyond the face of the bid, similar to the review of the subcontractor's license in *D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, a determination of non-responsibility may also need to be made.

<sup>2</sup> Although SDC asserts it does not want to withdraw its bid because of the mistake, a competitive advantage exists because the bid mistake creates an actual ground for SDC to withdraw its bid, even if SDC was awarded the contract, without incurring liability under its bid bond. (See *Bay Cities Paving & Grading, Inc. v. San Leandro* (2014) 223 Cal.App. 4th 1181.)

<sup>3</sup> It must be noted that none of the three previous projects listed in SDC's bid meet the qualification requirement. Had SDC listed one or two previous projects involving GAC systems, the result and recommendation would likely be different.