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# LOZANO SMITH

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## MEMORANDUM

**DATE:** September 23, 2009 **CLIENT/MATTER:** 1943-01

**TO:** David Wlaschin, Public Works Director  
City of Lemoore

**FROM:** Jerome M. Behrens, City Attorney  
Dale E. Bacigalupi

**RE:** Well No. 12 Storage Tank and Booster Pumps Project; Bid Protest

**Question:** Is the bid protest received by the City from the second low bidder, Smith Construction Company, Inc., that the low bid submitted by Steve Dovali Construction is a non-responsive bid, a valid bid protest?

**Answer:** It is our opinion that the bid protest is **not** a valid bid protest and that the Steve Dovali Construction bid substantially complied with the bid specifications.

### **Explanation**

The bid specification published by the City required bidders to complete a *Major Material Suppliers Information* worksheet to be submitted with the bid.

The low bidder for this project, Steve Dovali Construction, completed the proper worksheet and the worksheet was submitted on a timely basis.

After the bids were opened, and it became evident that Steve Dovali Construction was the low bidder, the second low bidder, Smith Construction Company, Inc., filed a bid protest on the basis that there is an error in one of the 16 entries on page BC-24, the *Major Materials Suppliers Information* worksheet submitted by Steve Dovali Construction. The bid protest correctly points out that in the category for "Motor Control Center," Steve Dovali Construction entered the name of the manufacturer or supplier as "Tesco".

As it turns out, that was an error by Steve Dovali Construction and, in fact, the company name that should have been inserted in the worksheet is “Alan Bradley” (a different equipment supplier).

The bid protest asserts that because of this error, the bid was non-responsive and, therefore, should be rejected.

Steve Dovali Construction has submitted a letter in response to the bid protest in which the company explains that this error in the page BC-24 worksheet occurred due to an oversight in the last minute rush to complete the bid forms and that the supplier of the “Motor Control Center” in fact is supplying the device to the electrical subcontractor for this project, Lighthouse Electric, Inc. The City has also received a letter from Lighthouse Electric, Inc. to confirm this fact. The technical error in filling out the bid form does not change the bid in any way and the City Engineer has no objection to the supplier (Alan Bradley) of the “Motor Control Center”.

The bidding laws provide opportunity for a bidder to correct clerical mistakes so long as the correction is made according to the provisions of Public Contracts Code § 5103.

The provisions of § 5103 of the Public Contracts Code have been followed here and the low bidder has provided an adequate explanation of the clerical mistake in filling out the bid form and it is clear that there was no intent by the low bidder to manipulate the bidding process in any way.

The City’s bid specifications also provide that the City has reserved the right to “waive any informality” and California case law has made it clear that cities retain the right to waive or overlook what are called “inconsequential deviations” from the bidding requirements. In addition, the City instructions to bidders on the page on which the mistake was made make it clear that the City has reserved the right in all circumstances to require a bidder to change manufacturers or suppliers.

### **Recommendation**

For the foregoing reasons, it is our opinion and advice to you that Steve Dovali Construction be allowed to correct the clerical error in page BC-24, and that, as a result, the bid protest is not a valid bid protest and that it should be rejected and overruled. A resolution has been prepared for the Council to reject the bid protest, should the Council determine to follow this advice.

In adopting the resolution which has been prepared, the Council will overrule the bid protest for the reasons listed above and will also award the contract to the low bidder, Steve Dovali Construction, in the amount of \$884,567.50.