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September 29, 2009

VIA EMAIL AND FACSIMILE

The City Council  
CITY OF LEMOORE  
Lemoore City Hall  
119 Fox Street  
Lemoore, California 93245

Re: Well No. 12 Storage Tank and Booster Pumps and Well No. 7 Booster  
Pump Addition Project  
ARRA NO. 161005-003  
*Bid Protest Letter of BMY Construction Group, Inc. and Notice of  
Potential Loss of SDWSRF Funding*  
File No. 17645

Dear Council Members:

This law firm represents BMY Construction Group, Inc. ("BMY") related to the above-entitled project (the "Project"), for which bids were opened on September 18, 2009. BMY is informed and believes that the apparent low bidders for the Project are Steve Dovali Construction ("Dovali") and Smith Construction Company, Inc. ("Smith"). Although no formal "Notice of Award" or "Notice of Intent to Award" has been received by BMY, my client is informed that Dovali did submit the lowest base bid, followed by the second lowest base bid of Smith. BMY respectfully disputes that Dovali or Smith are the lowest responsive, responsible bidders, and hereby protests the award of the Project to anyone other than BMY. In addition, BMY respectfully advises the City of the potential loss of funding for the Project due to the failure of the contractor bidders to comply with funding requirements contained in the bid solicitation.

BMY submitted the lowest responsive bid, as the Dovali and Smith bids were nonresponsive and must, therefore, be rejected. Both the Dovali and Smith bids are nonresponsive because each bidder failed to follow the requirements of the Bid Conditions and requisite bid forms included with Addendum No. 1, with a stated requirement that **"[T]he attached DBE Forms and information shall become part of these Bid Conditions."**

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The Bid Conditions and attached DBE Forms provided through Addendum 1 specifically state that “**The bid solicitation must include federal forms related to Subcontracting. These forms are intended to prevent bait and switch tactic by prime contractor bidders seeking subcontractors.**” [See ¶ II, entitled *Inclusion of EPA DBE forms in Bid Solicitation.*] The forms specified in Addendum 1 include the “EPA Form 6100-3-DBE Program Subcontractor Performance Form.”<sup>1</sup> The inclusion of this form with the bid packet by the bidding contractor is mandatory:

Prime contractor bidder must submit EPA Form 6100-3 [completed by the DBE subcontractor] to the Water System as part of bid submission.

Neither Dovali nor Smith included EPA Form 6100-3 with its respective bid package. As such, each contractor’s bid is nonresponsive to the bid solicitation, and must be rejected by the City.

The contract for the construction of the above-referenced Project was required by law to be competitively bid, and the City is required to award the work to the lowest responsible bidder. California Public Contract Code § 20162 provides in relevant part:

“20162. When the expenditure required for a public project exceeds five thousand dollars (\$5,000), it shall be contracted for and let to the lowest responsible bidder after notice.”

The responsiveness of a bid must be assessed on the face of the bid at the time the bids are opened, and may not be assessed on information submitted after the time of the bid submission. Construction Bidding Law, Cushman and Doyle, 1990, Section 1.9, page 13. The rule of responsiveness is, in effect, the unyielding barrier to favoritism and manipulation in the application of the solicitation requirements. The awarding authority is required to comply with the provisions of the California Public Contract Code and Government Code, and it must review the responsiveness of all bids based upon a uniform standard imposed by statute and by the solicitation to ensure that no contractor is afforded an advantage over its competitors. The fact that Dovali and Smith failed to submit the requisite DBE Program Subcontractor Performance Form (EPA Form 6100-3) as mandated by the *SDWSRF Guidance to Public Work Systems* and

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<sup>1</sup>Addendum 2 replaced the existing form with a revised form.

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the Bid Solicitation, runs afoul of the potential for bid solicitation and shopping the requisite form was intended to address. In fact, the stated intent for the inclusion of the forms related to subcontracting are to “prevent bait and switch tactic [sp] by prime contractor bidders seeking subcontractors.” The omission of the requisite form provides Dovali and Smith an unfair advantage over the other bidders to the extent it permitted bid shopping and peddling. As you know, the competitive bidding process has been enacted to ensure that no bidder is afforded an unfair advantage not available to the other bidders. In that sense, bids are required to be sealed and presented by a time certain. In addition, subcontractors are required to be listed for that portion of work that is intended to be performed. The purpose and intent of the "Subletting and Subcontracting Fair Practices Act" is to ensure that a prime contractor awarded the project does not engage in bid shopping - for example, contacting unlisted subcontractors to solicit lower bids and substituting the lower subcontractor for the listed subcontractor. That bid shopping was precisely what was intended to be circumvented by the requisite inclusion of EPA Form 6100-3 in the bid submission.

BMY’s bid conforms in all material respects to the requirements of the Notice Inviting Bids and Bid Conditions and it represents an unqualified and unconditional offer to perform such requirements in accordance with the material terms and conditions of the specifications. Even if Dovali and/or Smith attempt to cure their respective defect after bid opening, the bids must still be rejected as nonresponsive. The responsiveness of a bid must be assessed on the face of the bid at the time the bids are opened, and may not be assessed on information submitted after bid opening. Construction Bidding Law, Cushman and Doyle, 1990 Section 1.9, page 13. The rule of responsiveness is, in effect, the unyielding barrier to favoritism and manipulation in the application of the solicitation requirements.

For a bid to be responsive, it must constitute a definite and unqualified offer to meet the material terms of the solicitation. “Material terms” are those which (1) could affect price, quantity, quality, or delivery, or (2) are clearly identified by the solicitation, and which, for reasons of public policy, must be complied with at the risk of bid rejection for nonresponsiveness. Construction Bidding Law, Cushman and Doyle, 1990, Section 1.8, Page 11. The causes which make a bid nonresponsive may be placed into one of three categories: (1) reservation of rights, (2) “two bites at the apple,” and (3) failure to meet specified requirements. Construction Bidding Law, Cushman and Doyle, 1990, Section 1.8, Page 11, and cases cited therein.

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In this case, the failure to include the completed EPA Form 6100-3 is a material deviation from the specified bid requirements, and is in blatant disregard of both the Addendum No. 1 and Bid Condition (and Federal DBE) requirements.

The competitive bidding statutes are not intended to be for the benefit of bidders, but for the benefit and protection of the public. (Universal By-Prod., Inc. v. Modesto (1974) 43 Cal.App.2d 145, 152; Rubino v. Lolli (1970) 10 Cal.App.3d 1059, 1062.) The public can only be adequately protected in this case by upholding the requirement of submission of all required bid documents, including the EPA Form 6100-3 as required by Addendum No. 1. Dovali and Smith cannot simply submit the requisite form post-bid. Each bidder will gain a clear competitive advantage over other bidders if it is allowed to illegally submit the requisite form after the bid opening, or simply not submit it at all.

While the City may reject all bids and re-advertise, in its discretion, if it so chooses, it is not allowed to award the contract to a bidder who has not submitted the lowest **responsive** bid. The public interests are only served if the lowest **responsive** bid is accepted. In this situation, rebidding the project should not be necessary, as BMY's bid is completely responsive to the solicitation in all regards, and it is within the City's budget constraints.

In deciding whether a public contract award is proper and can be upheld, it is important to consider the purpose of requiring governmental entities to have public bidding of public works contracts, which is articulated in California Public Contract Code section 100. There, it is provided that the Legislature intends to "ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds," to give all qualified bidders "a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices," and to "eliminate favoritism, fraud, and corruption in the awarding of public contracts."

Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance to bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money. **The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.** (Konica

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Business Machines, U.S.A., Inc. v. Regents of University of California (1988) 206 Cal.App.3d 449, 456-457, emphasis added.)

Although generally the lowest qualified bidder has no legal right to compel the acceptance of his or her bid and the awarding authority's decision is not subject to review, when an award is made in violation of the law, such as when an award is made to a bidder who is not the lowest responsive bidder or not properly qualified in some respect, or made pursuant to specifications that are illegal and invalid and that fail to provide for full and fair competitive bidding, the public entity has abused its discretion and the bidding procedure may be set aside. (Konica Business Machines v. Regents of University of California (1988) 206 Cal.App.3d, 449, 453-457 (setting aside contract that had been awarded to bidder who did not comply with specifications in public entity's request for bids.) See also Inglewood-Los Angeles County Civic Center Auth. v. Superior Court (1972) 7 Cal.3d 861, 867.)

In this case, BMY is the lowest responsive bidder, and the City is obligated to award the Project accordingly to my client, not only pursuant to the Public Contract Code, but in accordance with the City's own bid solicitation documentation. Because the City Council as the governing body of the awarding authority is required to comply with the provisions of the California Public Contract Code and its own solicitation documents, it must review all bids based upon a uniform standard imposed by statute and by bid solicitation to ensure that no contractor is afforded an advantage over its competitors. BMY's bid conformed in all material respects to the requirements of the bid solicitation, and it represents an unqualified and unconditional offer to perform such requirements in accordance with the material terms and conditions of the specifications.

**In fact, if the City does, award the Project to Dovali or Smith, it runs the distinct risk that it will lose the funding earmarked by the SDWSRF program.** The funding requirements set forth by the SDWSRF were mandatory. Without compliance, the funds will most likely be withheld.

In summary, the City finding that the Dovali or Smith bid is responsive is incorrect, as the failure to submit all of the proper signed bid documents is not a minor irregularity which can be waived, but rather a major deviation from the requirements of the solicitation. BMY disputes that Dovali and Smith are the lowest responsive, responsible bidders for the work to be awarded. As such, BMY hereby formally protests the award of the subject project to Dovali, Smith, or to

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any bidder other than BMY, as well as a demand for a hearing and an opportunity to be heard in that regard, should the City not be inclined to make the award to BMY.

Should the City fail to appropriately make the award to BMY (or to no one at all), notice is hereby given that a writ of mandate may issue from the superior court to compel the City to act in accordance with the law and its own written guidelines. Finally, if the City maintains any formal or informal bid protest procedures (written or otherwise) which remain applicable, we request that you forward the same to this office on an immediate basis.

I look forward to hearing from the City as soon as possible. In the interim, please feel free to call me if you have any questions or require further information.

Very truly yours,

LANG, RICHERT & PATCH



Matthew W. Quall

MWQ:ac

cc: BMY Construction Group, Inc.  
Nanci C.O. Lima, City Clerk