

MEMORANDUM

TO: Jim Hodges

FROM: Shawn MacPherson

RE: Bid Question re Water Transmission Main Project

DATE: June 1, 2016

We met to discuss a potential bid issue concerning the water transmission main project. The apparent low bidder, McDonald Excavating, submitted a bid that varies from the instructions. Specifically, the specifications require that a bidder's list for all subcontractors containing certain information be provided with the bid proposal. Further, the bid specifications include an insert for municipal borrowers, which sets forth certain requirements for construction contracts receiving financial assistance from the Washington State Department of Commerce. In this instance, McDonald Excavating failed to sign a "Certification of Non-Segregated Facilities" form, which would otherwise be incorporated into any construction contract.

The first step when the City obtains bids that vary from the bid specifications in some respect is to ascertain whether those irregularities are substantial and material or whether they are minor in nature. A material irregularity is defined as an irregularity giving the bidder a substantial advantage or benefit not enjoyed by other bidders. Any bid containing a material irregularity must be rejected. On the other hand, if the irregularity is deemed to be minor, then the City may either reject the bid, or waive the irregularity and accept the bid. *East Side Disposal Company v. Mercer Island*, 9 Wn. App. 667 (1973); *Gostovich v. West Richland*, Wn. 2d 583 (1969); and *Farmer Construction v. State*, 98 Wn. 2d 600 (1983).

In determining whether there is an undue advantage conferred upon a bidder, the courts principally look to whether the defect is such as would allow the bidder to avoid performing the contract. A bidder is found to have a substantial advantage if it has the option of deciding whether to perform or not, depending on how the other bids are submitted. In *AAB Electric v. Stevenson Public Schools*, 6 Wn. App. 887 (1971), the low bidder neglected to sign its bid. The school board awarded the contract to the second bidder, and the school board's action was upheld by the court, because the bidder, not having signed its bid, was in a position where it could decide whether or not to accept the award and perform the work. The court held that the omitted signature could only be considered to be a material defect, because the bid was not binding upon the bidder until properly signed by its corporate officers.

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In both *East Side Disposal* and *Farmer Construction*, the low bidders signed the bid bond, but neglected to sign the bid proposal. The court in both cases held that the failure to sign the bid proposal was a minor irregularity that could be waived. The court held that, if it appears from examination of all the writings that the writing which was signed by the party to be charged was signed with the intention that it refer to the unsigned writing, and that the writings are so connected by internal reference an assigned writing to the unsigned one, they may be said to constitute one paper relating to the same contract. Thus, the irregularity was deemed minor, because the bidder could not get out of the contract, and the city had the option to accept the low bid and waive the irregularity, or to reject the low bid on the basis of the irregularity.

It is clear from reading the cases that questions of whether a bid variance is material are questions for the city council. *R.W. Rhine Company v. Tacoma*, 13 Wn. App. 597 (1975). So long as the council's determination is made in good faith, it should be upheld by the court.

Thus, in this case, the City Council would need to make the following determinations:

1. Is the irregularity in the McDonald Excavating bid substantial or minor? If it is substantial, then the bid must be rejected.
2. If you determine that the irregularity is minor, then you must decide whether to waive the irregularity and accept the bid, or to reject the bid on the basis of the minor irregularity.

As guidance to the Council, it is my opinion that the irregularity appears minor in nature. As to the failure to submit the bidder's list, this appears to constitute a record keeping function, which, while required, does not rise to the level of a substantial issue preventing McDonald Excavating from entering into the contract. As to the failure to sign the "Certification of Non-Segregated Facilities", Section 1-02.13 of the bid specifications, entitled "Irregular Proposals", includes the failure to submit a federal form known as the "Disadvantaged, Minority, or Women's Business Enterprise Certification". The specifications do not specifically call out failure to sign the "Certification of Non-Segregated Facilities" as a disqualifying irregularity. Accordingly, the discretion as to whether to waive this irregularity in the bid is within the discretion of the Council, but it is appropriate to consider that the bid specifications did not indicate that the failure to sign the form was equivalent to an immediate rejection of the bid proposal.

Finally, if the Council determines that the irregularity is minor, then when deciding whether or not to waive the irregularity, it should remember that the purpose of competitive bidding is to provide for public contracts to be performed satisfactorily and efficiently, at the least cost to the public, while avoiding fraud and favoritism in the awarding of such contracts.