



Midpeninsula Regional
Open Space District

R-21-09
Meeting 21-02
January 20, 2021

AGENDA ITEM 1

AGENDA ITEM

Award of Contract to BHM Construction, Inc., for the Administrative Office Project located at 5050 El Camino Real, Los Altos, CA

GENERAL MANAGER'S RECOMMENDATIONS

1. Waive immaterial irregularities in the low bid submitted by BHM Construction, Inc.
2. Authorize the General Manager to enter into a contract with BHM Construction, Inc., of Napa, CA, for the base amount of \$19,984,221, which includes bid alternates #1 through #4.
3. Authorize a 10% contingency of \$1,998,422 to be reserved for unanticipated issues, bringing the total contract to a not-to-exceed amount of \$21,982,643.

SUMMARY

The Administrative Office Project (AO or Project) will repurpose an existing commercial office building located at 5050 El Camino Real in Los Altos, CA for use as the main administrative office for the Midpeninsula Regional Open Space District (District). The main scope of work includes interior insulation, interior building system upgrades (including a new energy-efficient heating/ventilation/air conditioning (HVAC) system), exterior building re-siding and roof repairs, rooftop solar panels, plumbing repairs and upgrades, re-paving and parking re-stripping, electric vehicle charging stations, drainage and utility improvements, and interior space reconfiguration to accommodate open work areas and space to host public meetings and public gatherings.

District staff issued a Request for Bids to eleven (11) prequalified contractors on November 2, 2020 and received four (4) bid proposals on November 30, 2020, with Sausal Corporation announced as the apparent low bidder. After a careful review of all bids, the General Manager recommended rejecting all bids and re-advertising the project, which the Board approved on December 16, 2020. District staff re-issued a Request for Bids to the eleven (11) prequalified contractors on December 17, 2020 and received seven (7) bid proposals on January 5, 2021, with BHM Construction, Inc., announced as the apparent low bidder. The General Manager recommends awarding the contract to BHM Construction, Inc., (BHM) for \$19,984,221. In addition, the General Manager recommends authorizing a 10% contingency amount of \$1,998,422 to cover additional construction-related services to address unanticipated issues that may arise such as unforeseen structural upgrades, waterproofing issues, and new repair needs that may be discovered as elements are removed and replaced in the building. The fiscal year 2020-21 (FY21) budget includes sufficient funds to complete the recommendations. Funding for future year budgets will be requested as part of the annual budget and action plan process.

BACKGROUND

The District has been evaluating options to address the lack of sufficient administrative office (AO) space to meet ongoing and long-term business needs since 2015, as the organization began to undergo significant internal growth to accelerate project delivery, expand public service delivery, and ensure sufficient resources to manage public land and access facilities. At the July 2017 public meeting, the Board of Directors (Board) adopted a resolution to enter into a purchase and sale agreement for the building located at 5050 El Camino Real, Los Altos, CA (R-17-90). Escrow closed on the purchase on February 1, 2019.

At the December 6, 2017 public meeting, the Board approved the Space Needs Assessment & Basic Program Report (R-17-128) for the Project. At the August 22, 2018 public meeting, the Board approved a contract with the design consultant, Noll & Tam, to assess and design the new AO based on the Board-approved project design goals, program elements, and space needs (R-18-97 and R-18-100). At the October 24, 2018 public meeting, District staff and the Board began the design process for the new AO by prioritizing project goals and space needs (R-18-123).

From January through May 2019, the Board held a public open house and several public meetings to solicit public input and provide feedback on the evolving schematic design options, cost estimates, and alternatives to reduce total project costs. At the May 22, 2019 public meeting, the Board approved the final schematic design and associated cost estimate (R-19-64). On the same date, the Board approved a contract amendment with Noll & Tam to continue with the remaining phases of the Project, including design development, construction documents, permitting assistance, construction administration, and as-built drawings.

At the October 9, 2019 Board meeting, the Board reviewed the design development plans and revised cost estimate to confirm that the Project as designed meets the Board-approved project goals, program elements, design direction, and project budget (R-19-130). As part of this review, the Board approved the design development plans, allowing Noll & Tam to proceed into the next project phase - construction documents (detailed, constructible plans) and permitting.

At the February 12, July 22, and September 9, 2020 Board meetings, the Board reviewed and provided feedback on the construction documents. Staff has addressed Board feedback and the Project to repurpose and reconfigure the 5050 El Camino Real building for long-term District use is ready for award of the construction contract. Project plans are currently in final review with the City of Los Altos building department.

DISCUSSION

The existing building at 5050 El Camino Real was constructed in 1981 and is a Class-B, multi-tenant office building. It is a 2-story structure with approximately 40,000 square feet of office space and a semi-underground parking garage. The building will be renovated and repurposed for use as the District's main office and include three separately leased tenant suites.

The Project construction cost was estimated at \$20.5M in October 2020 based on 100% construction documents. This estimate accounts for COVID-related impacts on the construction industry and market forces, and reflects the latest design changes based on Board direction. Construction is scheduled to start in March 2021 and be completed by March 2022. The construction work will be executed in compliance with applicable statutes, ordinances, rules, and

regulations of all Federal, State, County, City, and other agencies having jurisdiction over the Project.

Scope of Work

The Project generally consists of gutting and repurposing the existing building for District use. Improvements include:

- A two-story public atrium near the front entry that connects the lobby to the Boardroom
- Central skylight to bring natural light into the building
- Switchback stairwell to provide access to the main lobby, exhibit space and Boardroom
- Boardroom to host public meetings
- Windows with high-performance, energy-efficient glazing
- Bird-safe glass
- Rooftop photovoltaic panels
- Structural elements (columns, foundation, beams)
- Building façade to help visually direct visitors and the public to the main entrance
- Building cladding repairs
- Mechanical, Electrical and Plumbing (MEP) system upgrades (transformers, meters, plumbing, valves)
- New, energy-efficient HVAC system (heating and cooling units, duct work, ventilation system), testing, and commissioning
- Interior and exterior Americans with Disabilities Act (ADA) compliance improvements
- Stormwater drainage improvements and treatment
- Waterproofing systems
- Parking lot improvements, re-striping, and repairs
- Elevator replacement that meets ADA requirements
- Offsite concrete improvements (sidewalk, curb ramps, driveways)
- Native landscaping
- Use of salvaged wood for interior and exterior finishes

The work associated with the Project also includes grading, paving, new trash enclosure, lighting, utility upgrades, and other associated site work.

CONTRACTOR SELECTION

At the February 12, 2020 Board meeting, the Board expressed a desire for staff to pre-qualify all General Contractors interested in bidding on this Project. The California Public Contract Code, section 20101, establishes procedures for local agencies seeking to prequalify bidders on public works projects. The District has followed the process set forth under state law for this solicitation.

On August 20, 2020, staff released a contractor pre-qualification solicitation on BidSync.com to solicit interested contractors. Staff also reached out to six (6) firms via email and phone calls. Seventeen (17) general building contractors submitted qualification packets on September 10, 2020. The pre-qualification solicitation was also published in the newspaper per the District's public bidding process, pursuant to Public Resources Code section 5594. On November 18, 2020, the results of the pre-qualification process and a list of eleven (11) pre-qualified contractors was presented to the Board through an FYI memo.

A Request for Bids was issued on November 2, 2020 to the 11 prequalified contractors and the documents were uploaded to BidSync. As legal notices were posted in the San Jose Mercury News and San Mateo County Times and on the District website during the contractor pre-qualification process, additional legal notices were not required for this Request for Bids. A non-mandatory pre-bid meeting was held on November 16, 2020 with nine total contractors in attendance.

The District publicly opened the bids on November 30, 2020 and announced Sausal Corporation as the apparent low bidder. However, after careful review of the bids, the General Manager recommended to reject all bids and re-bid the project. The District re-issued the Request for Bids on December 17, 2020 to the 11 prequalified contractors and documents were uploaded to BidSync. A virtual, non-mandatory pre-bid meeting was held on December 28, 2020 with five total contractors in attendance. The District publicly opened the bids on January 5, 2021 virtually; BHM Construction, Inc., was announced as the apparent low bidder. The total base bid was used to determine the lowest bidder. A detailed breakdown of the seven (7) bids received is as follows:

Bidder	Location	Total Base Bid	Percent +/- from Cost Estimate (\$20,500,000)
1. BHM Construction Inc. (BHM)	Napa, CA	\$19,641,221	-4.2%
2. Thompson Builders Corporation	Novato, CA	\$19,779,000	-3.52%
3. Sausal Corporation	Concord, CA	\$19,816,000	-3.34%
4. Rodan Builders, Inc.	Hayward, CA	\$20,057,322	-2.16%
5. Build Group, Inc.	San Francisco, CA	\$20,107,099	-1.92%
6. BCCI	San Francisco, CA	\$20,314,432	-0.91%
7. Wickman Development and Construction	San Francisco, CA	\$20,355,000	-0.71%

A bid protest was submitted by Sausal Corporation on January 12, 2021. The bid protest noted that BHM's base bid listed on the Bid Form contained a math error, and the correct sum of the itemized prices listed in the Bid Schedule resulted in a slightly different base bid. The District's instructions to bidders govern this situation by stating that if there is an incorrect total listed on the Bid Form, the actual total of itemized prices in the Bid Schedule will be deemed the base bid. The correct sum is listed in the table above. The bid protest and the District's response are attached as Attachment 1.

The District noted that BHM's bid form did not provide unit prices for stand down time. The bid form specifies that this pricing would not be considered for purposes of determining the lowest bid and that the actual rates will be verified by the contractor's certified payroll records. Therefore this is deemed an immaterial irregularity in the bid, and may be waived for purposes of awarding the contract to BHM, the lowest responsive bidder.

Upon review of the bid proposals and confirmation of the contractors' qualifications, in accordance with state law and current Board purchasing policy, the General Manager recommends awarding the contract to BHM Construction, Inc., as the lowest responsive and responsible bidder.

The Request for Bids included four bid alternates, detailed as follows:

Alternate 1: Solar Panels on Roof

Solar panel design-build system criteria to be provided by the District. Below are bids submitted by the contractors on this alternate:

- *BHM* - \$292,000
- Thompson Builders Corporation - \$350,000
- Sausal Corporation - \$285,000
- Rodan Builders, Inc. - \$284,988
- Build Group, Inc. - \$318,434
- BCCI - \$300,000
- Wickman Development and Construction - \$500,000

BHM's bid for this alternate appears to be within the industry standard.

Alternate 2: Sustainability Submittals

The Project is designed to meet LEED (Leadership in Energy and Environmental Design) Gold certification. The formal LEED certification process will require registration, review, and certification fees with U.S. Green Building Council and consultant fee during construction to document and submit each LEED point. As a cost saving effort, rather than going through the formal LEED certification process, the District intends to include information in the building, website, and other materials about the LEED Gold-equivalent design to inform the public of the environmental considerations taken in repurposing the building for District use. This bid alternate will provide building product information in compliance with LEED credits having to do with "Materials and Resources". The building product information would focus on "Environmental Product Declarations" and "Material Ingredients". These two credits would be needed if there was interest in achieving a Gold level performance equivalency.

This bid alternate was not part of the base bid because LEED certification is a Project requirement. Separating this item from the base bid allows the District to review the costs and have the flexibility to decide whether to comply with LEED Gold certification requirements. Below are bids submitted by the contractors on this alternate:

- *BHM* - \$45,000
- Thompson Builders Corporation - \$30,000
- Sausal Corporation - \$200,000
- Rodan Builders, Inc. - \$110,799
- Build Group, Inc. - \$31,386
- BCCI - \$20,000
- Wickman Development and Construction - \$500,000

BHM's bid for this alternate appears to be within industry standard.

Alternate 3: Unit Rate Credit Per Board Feet of District-furnished Reclaimed Redwood – Interior and Exterior Use

The District has salvaged a significant amount of old growth Redwood from a building at the Alma College property. The wood will be milled to size as a

separate project. The exact quantity of usable wood is currently not known. This bid alternate reflects a unit rate credit for board feet of reclaimed redwood provided and milled by the District for each of the areas calling out redwood at the building interior and exterior.

BHM's bid alternate 3 cost: \$10.00 credit per linear board foot. Because the amount of usable wood is currently unknown, the exact credit back to the District would be calculated and deducted from the base contract at a later time.

Alternate 4: Casework Finishes at Leased Spaces

The District has included a tenant suite of offices in the Project. The casework finishes in the leased space are durable and include laminate cabinets with Corian countertops. This bid alternate would upgrade the casework finishes to be wood cabinets with quartz countertops, which is consistent with the rest of the building. Below are the bids submitted by other contractors on this alternate:

- *BHM - \$6,000*
- Thompson Builders Corporation - \$35,000
- Sausal Corporation - \$10,000
- Rodan Builders, Inc. - \$7,411
- Build Group, Inc. - \$5,458
- BCCI - \$5,957
- Wickman Development and Construction - \$10,000

The General Manager recommends including **bid alternates 1 through 4** into the contract at a total additional cost of \$343,000, bringing the total base contract cost to \$19,984,221.

Due to unknown material conditions in the building and subsurface, a 10% contingency is requested to cover potential additional work associated with unforeseen structural upgrades, waterproofing concerns, or other needs that may come up during construction. The District intends to complete construction to allow occupancy by March 2022. In order to quickly respond to unforeseen and newly discovered issues as elements of the 30-year old building are removed, replaced, and repaired, a 10% contingency is recommended to keep the project on schedule. The District has a robust internal review process for contingency usage. After a contractor submits a change order, staff reviews and documents the scope of work and costs. This is then reviewed by the department manager and requires sign-off by the Assistant General Manager, who briefs the General Manager on the reasons for the use of the contingency. In addition, staff provides contingency usage information to the Board in the Bi-weekly Reports.

FISCAL IMPACT

At each major milestone, the District presents a revised cost estimate to ensure that the overall administrative office project remains within the May 2019 Board-approved project budget of \$27.4 million (R-19-64). The latest 100% construction cost estimate is approximately \$20.5 million. When the construction and other soft cost estimates (permit fees, construction management, inspections, design consultant, and interpretive elements) are combined, the overall project cost estimate is \$26.8 million, or \$0.6 million less than the Board approved project budget. The BHM Construction Inc., bid of \$19,984,221 is below the 100% cost estimate. There is sufficient budget to include bid alternates 1 through 4 as part of the contract.

Funding sources for the project include using *Committed for Infrastructure* reserve funds, any future additions to the reserve, rent income, parity bond proceeds, and interest earned from the parity bonds. Partial reimbursement will also come from the future sale of the current 330 Distel Circle office (R-20-117).

The FY21 adopted budget includes \$8,488,000 for the New Administrative Office (AO) Facility project #31202. There are sufficient funds in the project budget to cover the recommended action and expenditures through the end of the fiscal year. Funding for future year budgets will be requested as part of the annual Budget and Action Plan process.

New Administration Office (AO) Facility #31202	Prior Year Actuals	FY21 Adopted	FY22 Projected	FY23 Projected	Estimated Future Years	TOTAL
Acquisition:	\$31,742,406	\$0	\$0	\$0	\$0	\$31,742,406
Planning/Design/Construction ² :	\$1,744,869	\$8,402,000	\$17,253,131	\$0	\$0	\$27,400,000¹
Move-in and Closeout ³ :	\$0	\$86,000	\$1,051,927	\$0	\$0	\$1,137,927
Total Budget:	\$33,487,275	\$8,488,000	\$18,305,058	\$0	\$0	\$60,280,333
Acquisition and associated purchase costs Spent-to-Date (as of 01/06/2021):	(\$31,742,406)	\$0	\$0	\$0	\$0	(\$31,742,406)
Spent-to-Date (as of 01/06/2021):	(\$1,744,869)	(\$43,140)	\$0	\$0	\$0	(\$1,788,009)
Encumbrances:	\$0	(\$596,343)	(\$296,823)	\$0	\$0	(\$893,166)
BHM Construction Inc. Base Amount ⁴ :	\$0	(\$7,848,517)	(\$12,135,704)	\$0	\$0	(\$19,984,221)
10% Contingency:	\$0	\$0	(\$1,998,422)	\$0	\$0	(\$1,998,422)
Budget Remaining (Proposed):	\$0	\$0	\$3,874,109	\$0	\$0	\$3,874,109

¹Amount includes Board approved project budget of \$27.4M

²FY22 amount reflects revised, updated estimate based on current accelerated schedule

³The FY22 projection of \$1.05 million has not been approved by the Board and will be reviewed by the Board as part of the FY22 Budget and Action Plan process

⁴Contract includes bid alternates 1 through 4.

BOARD COMMITTEE REVIEW

No Committee review has previously occurred for the recommended award of contract.

PUBLIC NOTICE

Public notice was provided as required by the Brown Act.

CEQA COMPLIANCE

In accordance with the State California Environmental Quality Act (CEQA) Guidelines, the proposed project is categorically exempt from CEQA under Section 15301, Existing Facilities. This exemption consists of the operation, repair, maintenance, permitting, or minor alteration of existing public or private structures, facilities, mechanical equipment, involving negligible or no expansion of existing or former use and allows an increase up to a 2,500 square feet addition.

The scope of work for this project is consistent with the description of this exemption. District staff filed Notices of Exemption with Santa Clara County on September 24, 2020.

NEXT STEPS

If approved, the General Manager will enter into a contract with BHM Construction, Inc. Final contract signature is subject to meeting all District requirements, such as having all required insurance and bonding in place. Construction will begin March 2021 and be completed by March 2022.

Attachment:

1. Bid Protest and District Response

Responsible Department Head:

Jason Lin, Engineering and Construction Department Manager

Prepared by:

Tanisha Werner, Senior Capital Project Manager, Engineering and Construction Department

SMITHCURRIE

REPLY TO:

CRAIG WALLACE
ATTORNEY AT LAW
TEL: 415 394-6688
cwallace@smithcurrie.com

January 12, 2021

Via email: twerner@openspace.org

Tanisha Werner, PE, QSD
Senior Capital Project Manager
Midpeninsula Regional Open Space District
330 Distel Circle
Los Altos, CA 94022

Re: *Midpeninsula Regional Open Space District
Administrative Office Project #31202
Protest of BHM Construction and Thompson Construction bids*

Dear Ms. Werner:

We represent Sausal Corporation. Sausal protests the 01.05.21 bids for the Administrative Office Project submitted by BHM Construction, Inc., and Thompson Builders. Both these bids are nonresponsive because not in compliance with the Bid Proposal form. Both bids should be deemed nonresponsive, leaving Sausal's bid as the lowest responsive bid, and Sausal should be awarded the project.

BHM Construction's bid is nonresponsive because the line item amounts in its bid do not equal the total Base Bid written on the cover page of BHM's Bid Proposal. BHM wrote on its Bid Proposal that its Base Bid amount is \$19,532,879.00. However, adding each of the line items in BHM's bid results in a total of \$19,635,181. This is a nonwaivable irregularity causing BHM's bid to be nonresponsive because it gives BHM the unfair advantage of having the option to withdraw its bid based on such error without fear of forfeiting its bid bond. In *MCM Construction, Inc. v City and County of San Francisco* (1998) 66 Cal.App.4th 359, 375-76, the court affirmed that an irregularity is not waivable if it gives a bidder the unfair advantage of being able to withdraw its bid due to clerical error without exposing its bid bond to forfeiture. The Court cited approvingly to *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1180-81, recognizing a bid can be rejected if it gives the bidder an advantage or benefit not enjoyed by



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other bidders. It matters not whether BHM availed itself of such relief; the availability of such relief gives an unfair advantage over the other bidders and causes the irregularity to be nonwaivable, and the bid nonresponsive. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1442 (“It makes the bid materially different and is a mistake in filling out the bid. As such, under Public Contract Code section 5103, North Bay could have sought relief by giving the City notice of the mistake within five days of the opening of the bid. That North Bay did not seek such relief is of no moment. The key point is that such relief was available. Thus, North Bay had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an ‘irregularity.’” (footnote omitted.); see also, *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 238-39.)

Thompson Builders Corporation bid is also nonresponsive but for a different reason. Thompson failed to include any Base Bid amount in Section 1 on its Bid Proposal – the spot for its bid is left blank. On its face, this is a nonresponsive bid. The Bid Schedule attached as part of Thompson’s bid states in *two locations* that the bid amount on the Bid Schedule “must be identical to the Base Bid price entered in Section 1 of the Bid Proposal form.” Thompson failed to comply with this requirement, and failed to submit a Base Bid price in its Bid Proposal. The failure to include a bid price is a material failure in the bid and it must be rejected as nonresponsive. Similar to BHM’s bid, the failure to include a Base Bid price, even if considered a clerical error by the District, which it should not be, is nonwaivable because it gives Thompson the ability to withdraw its bid based on a clerical error without fear of forfeiting its bid bond, which is an advantage not enjoyed by the other bidders.

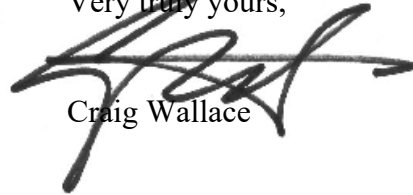
A basic rule of competitive bidding on public projects is that bids must strictly conform to specifications and that if a bid does not so conform, it can be rejected. (See, e.g., *Konica Business Machines U.S.A. Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 457, “[t]he importance 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.”) “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 with 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. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 907-08, citing to *Konica Business Machines USA, Inc. v. Regents of the University of California* (1988) 206 Cal.App.3d 449, 456-57, and internal citations omitted.)

In the initial bidding on this project, the District opted to reject all bids based on purported bid irregularities far less significant than the irregularities in both the BHM and Thompson bids. Rebidding the project, because all the bidders now knew each others’ bid prices, caused the bid price to drop nearly \$500,000 – perhaps good for the District, but not so fair for the bidders. This type of activity must end and the contract awarded. These two bidders’

Ms. Tanisha Werner
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proposals must be rejected as nonresponsive, and the project contract awarded to Sausal as the lowest responsive bidder.

Very truly yours,

A handwritten signature in black ink, appearing to read "Craig Wallace", written over the typed name.

Craig Wallace

Cc: Sausal (via email)
Jeffrey Mazet (BHM)(bids@bhmconstruction.com)
Clayton Fraser (Thompson)(claytonf@tbcorp.com)



Office of the General Counsel

Midpeninsula Regional Open Space District

January 19, 2021

Craig Wallace
 Smith Currie
 275 Battery Street
 San Francisco, CA 94111

Via Electronic Mail

Re: 5050 El Camino Real Administrative Office Renovation Project
 Sausal Bid Protest

Dear Mr. Wallace,

I am General Counsel for the Midpeninsula Regional Open Space District (“District”), writing in response to your letter of January 12, 2021, submitted on behalf of Sausal Corporation (“Sausal”) to protest the two lowest bids for the above-referenced project (“Project”).

Sausal, which submitted the third lowest bid, protested the lowest bid, submitted by BHM Construction, Inc. (“BHM”), on the grounds that BHM’s bid was “nonresponsive because the line item amounts in its bid do not equal the total Base Bid written on the cover page of BHM’s Bid Proposal” and that this is a “nonwaivable irregularity.” Sausal also protested the second lowest bid, submitted by Thompson Builders Corporation (“Thompson”), because Thompson left a blank in Section 1 of its Bid Proposal form instead of entering the base bid amount from its Bid Schedule form.

The protest argues that the District must reject the two lowest bids as nonresponsive and that it should award the contract for the Project to Sausal for its higher bid amount. BHM and Thompson have both responded to Sausal’s bid protest via their respective legal counsel. Based on its review of the two protested bids, the responses from counsel for BHM and Thompson, and governing law, the District has concluded that it is not compelled to disqualify the two low bids. Therefore, staff is recommending that the District’s Board of Directors award the contract to the Project to BHM as the lowest responsible bidder.

Due to computational error, the base bid total of the line items on BHM’s Bid Schedule form is actually higher than \$19,532,879, the total entered by BHM. BHM’s is still the low bid, even with the corrected base bid total. This type of computational error on the Bid Schedule form is governed by Section 17.1 of the Instructions to Bidders, which states, in pertinent part (emphasis added):

- 17.1 Incorrect Totals.** In the event a computational error for any bid item (base bid or alternate) results in an incorrect extended total for that item, the submitted base bid or bid alternate total will be adjusted to reflect the corrected amount as the product of the estimated quantity and the unit cost. In the event of a discrepancy between the actual total of the itemized or unit prices shown on the Bid Schedule for the base bid, and the amount entered as the base bid on the Bid Proposal form, *the actual total of the itemized or unit prices shown on the Bid Schedule for the base bid will be deemed the base bid price.*

The error in totaling the unit prices for BHM's base bid amount must be corrected as specified in Section 17.1 so that the *actual* total is deemed the base bid price. The District must follow its own bidding rules with respect to correction of computational errors that are within the purview of Section 17.1, such as the computational error in BHM's bid. (See *Pozar v. Dept. of Transportation* (1983) 145 Cal.App.3d 269, 271-272 [holding that Caltrans had a ministerial duty to apply its own computational rules to a bidding error subject to those rules].) Effectively, there is no irregularity to waive since it must be resolved by Section 17.1.

Contrary to your assertion, BHM does not have an advantage not available to other bidders since *all* bidders are subject to the provisions of Section 17.1. A computational error such as BHM's which is subject to correction under Section 17.1 would not serve as grounds for withdrawal without forfeiture of bid security under Public Contract Code section 5103.

The District has determined that the only irregularities in BHM's low bid are immaterial and may be waived by the District. Staff is recommending that the Board of Directors waive the immaterial irregularities and award to BHM using the actual base bid price as correctly computed pursuant to Section 17.1.

Accordingly, the protest of Thompson's bid is likely moot. However, the District agrees with the analysis set forth in the January 14, 2021 response letter submitted by counsel for Thompson. The omission of the base bid price on Thompson's Bid Proposal form is an immaterial irregularity which may be waived by the District. It is analogous to the missing bid signature in *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, and could therefore be waived as an immaterial irregularity since the base bid price is provided in Thompson's Bid Schedule. (See also *Bay Cities Paving and Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181 [holding that a bidder's failure to include the cover page of its bid bond was an immaterial irregularity that could be waived by the city].) Further, any discrepancy between the blank for the base bid amount on the Bid Proposal form and the base bid amount shown on Thompson's Bid Schedule is resolved by Section 17.1 to provide that the total shown on the Bid Schedule would be deemed the base bid amount on the Bid Proposal form. The District would not be legally compelled to reject Thompson's bid as nonresponsive, even if the Board declined to waive the immaterial irregularities in BHM's lower bid.

The District appreciates Sausal's interest in its Project, including the time and effort it put into prequalifying and bidding, and wishes it success on future bids.

Very truly yours,

/s/

Hilary Stevenson, General Counsel

c: Robert L. Leslie, Oles Morrison, LLP
Timothy L. McNerny, McNerney & Dillon, P.C.
Clare M. Gibson, Jarvis Fay & Gibson, LLP