

From: [Trevorrow, Deborah](#)
To: ["rburris@floyd-ringer.com"](#); ["ffloyd@floyd-ringer.com"](#); ["tstone@floyd-ringer.com"](#); ["bmaddera@floyd-ringer.com"](#); [rbonifas@wrighttree.com](#); [wmyers@wrighttree.com](#); [kpettijohn@wrighttree.com](#); [Sloan, Joseph \(Legal\)](#); [Cox, Roberta](#)
Cc: [Lantz, Martha \(Legal\)](#); [Jacobs, Charleen](#); [McLellan, Deborah](#); [Morrill, Tom](#)
Subject: PT17-0429F - Asplundh March 14 Protest Hearing at Tacoma Public Utility Board
Date: Wednesday, March 07, 2018 4:07:59 PM
Attachments: [20180305_155250 Additional Submission from Asplundh.pdf](#)
[ProtestPolicy052711.pdf](#)

To the Parties to the above-captioned protest:

Attorneys for Asplundh have submitted the attached letter dated March 1, 2018, to the Tacoma Public Utilities Board in support of its protest which will be heard on March 14, 2018. Please note that, while the letter is being provided to the Utility Board, that Attachments 2 and 3 to this letter are not in the materials considered by the C&A Board and as such are not part the record of the C&A Board which will be transmitted to the Utility Board or provided to the parties by the Purchasing Department. See attached City of Tacoma Protest Policy Section XVII I 2, "Appeals to the City Council/Public Utility Board at quasi-judicial hearings are limited in scope to issues and documentation considered by the C&A Board."

Tacoma Power or the Office of the City Attorney on Power's behalf and Wright Tree Services may each file a response to Asplundh's submission. Any such response must be submitted as a PDF by email to Deborah Trevorrow at dtrevorrow@ci.tacoma.wa.us, no later than 9:00 am Friday, March 9, with a cc to Charlene Jacobs at cjacobs@cityoftacoma.org and Debbie McLellan at dmclellan@cityoftacoma.org of the Public Utility Board.

It is anticipated that the record of the C&A Board will be transmitted to the parties in the very near future.

Please let me know if you have any questions,

Deborah Trevorrow

CITY OF TACOMA

Deborah Trevorrow | Office Administrator | Finance

(253) 502-8875 | 3628 S 35th St. | Tacoma, WA 98409

dtrevorrow@cityoftacoma.org

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March 1, 2018

VIA MAIL AND EMAIL

Public Utility Board
Tacoma Public Utilities
3628 South 35th Street
Tacoma, WA 98409
utilityboard@cityoftacoma.org

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DIRECTOR'S OFFICE
TACOMA PUBLIC UTILITIES

*Copy: Legal
Purchasing*

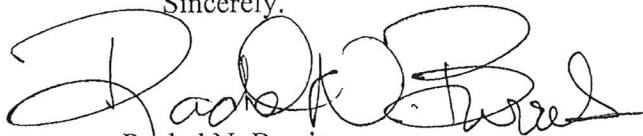
Summary of the Record for Asplundh Bid Challenge Bid Specification No. PT17-0429F, Power Line Vegetation Clearance Crews

Dear Sir or Madam,

Please find enclosed correspondence from Francis S. Floyd and Thomas W. Stone, in regards to the above-referenced matter.

Please copy me (Rachel Burris) Francis Floyd (ffloyd@floyd-ringer.com), Thomas Stone (tstone@floyd-ringer.com), and Brittany Madderra (bmadderra@floyd-ringer.com), of this office on all correspondence, notices, and other communications related to this matter, as we will be appearing on behalf of Asplundh before the Board.

Sincerely,



Rachel N. Burris
Legal Assistant

FLOYD, PFLUEGER & RINGER

FRANCIS S. FLOYD⁺
KIM C. PFLUEGER (1954-2005)
REBECCA S. RINGER[†]
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** OF COUNSEL

March 1, 2018

VIA MAIL AND EMAIL

Public Utility Board
Tacoma Public Utilities
3628 South 35th Street
Tacoma, WA 98409
utilityboard@cityoftacoma.org

Summary of the Record for Asplundh Bid Challenge Bid Specification No. PT17-0429F, Power Line Vegetation Clearance Crews

Dear Sir or Madam,

Please accept this letter as Asplundh Tree Expert, LLC's ("Asplundh") formal submission to the Public Utility Board in advance of Asplundh's bid protest for the above-referenced contract. This letter summarizes the record and Asplundh's position, in its protest of the Board of Contracts and Awards' ("C&A") decision to reject Asplundh's bid as non-responsive and recommend that the bid be awarded instead to the second-lowest bidder, Wright Tree Service, Inc, effectively costing the City of Tacoma and its taxpayers hundreds of thousands of dollars. For the reasons below, the Public Utilities Board should award the contract to Asplundh as the lowest responsive bidder.

Summary of Prior Proceedings

On January 23, 2018, the City of Tacoma, Tacoma Public Utilities Division, opened bids on Specification No. PT 17-0429F, a contract for power line vegetation clearance. Section 4.01 describes the project as "ordinary maintenance work consisting of clearing foliage near existing Tacoma Power electrical transmission and distribution lines[,] as well as "other clearing work that may be required and directed by Tacoma Power during the term of the contract." Section 4.01 explains that the work "will consist of trimming and removing trees and other vegetation."

Before the bid deadline of January 23, 2018, three contractors had submitted bids: Davey Tree Surgery Co., Wright Tree Service, LLC, and Asplundh. The City's pre-bid estimate for the contract was \$4,550,000. Davey Tree Surgery Co.'s submittal amount was the highest, at

\$5,178,508.00 (\$5,587,176.31 when evaluated by the City); Wright Tree Service, Inc.'s bid was the second-highest, at \$4,745,270.00, (\$5,000,643.92 when evaluated by the City); and the lowest was Asplundh's bid, at \$4,500,808.00 (\$4,797,266.84 when evaluated by the City).

Asplundh's bid proposal accepted the language of the City's solicitation for bids positively and unequivocally. Coupled with this unqualified acceptance was an additional request for consideration, contained in a cover letter. See Attachment 1. The cover letter read: "[i]f we are awarded this bid, we request the following be considered to the contract terms and conditions[.]" This line was followed by nine individual requests:

- One request was to use Asplundh's correct corporate name.
- Five requests were to add to the contract the phrase "to the extent of the Contractor's obligations under the Contract."
- One request was to include a four percent surcharge to credit card payments.
- The last two requests were to modify the indemnification language under Section 2.05.

Asplundh's cover letter did not condition acceptance of the bid proposal on the inclusion of these requests. None of these requests appear in Asplundh's actual bid proposal. Indeed, Asplundh made clear that its request was only to be considered after the contract was awarded to Asplundh.

Although Asplundh's bid was approximately \$250,000 lower than Wright Tree Service, Inc.'s bid, Tacoma Power/Transmission and Distribution recommended that the contract be awarded to Wright Tree Service, Inc. On January 31, 2018, Tacoma Power stated that "[t]he bid offered by [Asplundh] was conditioned with exceptions seeking to amend the language of the solicitation. These exceptions were found to be a material deviation which could not be waived; therefore the bid was deemed non-responsive."

On February 2, 2018, the Procurement and Payables Division of the City's Finance Department also recommended that the contract be awarded to Wright Tree Service, Inc. The department stated that Asplundh's "low bid is not recommended for award by the requesting department because the bid was conditioned with exceptions seeking to amend the language of the solicitation. These exceptions were reviewed by the City Attorney's Office and considered material deviations from the solicitation and thus considered non-responsive."

Asplundh timely protested the proposed award of the contract to Wright Tree Service, Inc. on February 5, 2018. Asplundh's letter to "C&A" reiterates that Asplundh accepted the language of the solicitation in its "unconditioned submission"; reiterates that the cover letter merely requests that the City consider certain minor modifications; and clarifies that it "is willing to be bound by the bid, even if the [C]ity is unwilling to consider any requests[.]"

On February 14, 2018, Asplundh appeared before C&A to protest the award. C&A denied Asplundh's protest and voted to recommend awarding the contract to the higher bidder, Wright

Tree Service, Inc. Asplundh timely appealed C&A's decision prior to noon on February 16, 2018 by requesting a quasi-judicial hearing before the City of Tacoma Public Utility Board.

Summary of Asplundh's Protest

The City's position that "[t]he bid offered by [Asplundh] was conditioned with exceptions seeking to amend the language of the solicitation" contradicts hornbook contract law, as well as long-standing Washington law on public contracting.

The record shows that Asplundh positively and unequivocally accepted the language of the solicitation by submitting its bid proposal. The fact that Asplundh's bid proposal was accompanied by a request that *if Asplundh's bid is accepted*, the City consider certain modifications, does not render Asplundh's bid proposal non-responsive, because it is clear that acceptance of Asplundh's bid is not conditioned on the request being granted. Nowhere does Asplundh's cover letter condition acceptance of the bid proposal on the inclusion of the requests. None of these requests appear in Asplundh's actual bid proposal. The cover letter specifically states these items are "request[s] for consideration," *after* the contract is awarded, not conditions. The cover letter also states that Asplundh requested the items "be considered," as opposed to using conditional language.

Bidding is governed by general contract principles. Under contract law, a counter-offer generally constitutes a rejection of the original offer, and a conditional acceptance is a counteroffer. Williston on Contracts, § 5:3; Restatement (second) of Contracts § 39. By analogy, a conditional offer in the bidding context would constitute a rejection of the language of the solicitation and be deemed non-conforming.

However, mere inclusion of a request does not make an offer conditional. Under Washington law and general principles of contract formation, when an unequivocal acceptance is accompanied by a request for modification, the acceptance is still valid. *Duprey v. Donahoe*, 52 Wn.2d 129, 134 (1958) (holding the exercise of an option, accompanied by a request to deviate from the terms of the option, does not transform an otherwise unconditional acceptance into an acceptance "conditioned upon the granting of the request."). See also 1 Corbin, Contracts §§ 84, 93 (1963 ed.); Restatement (second) of Contracts § 39; 55 Am. Jur. 508 § 39; 91 C. J. S. 855 § 10; *Brangier v. Rosenthal*, 337 F.2d 952, 954 (9th Cir. 1964) (holding "Appellee's letter responding to appellant's offer indicated clearly enough an unconditional acceptance of the alternate procedure. Appellee's assent being clear and unqualified, the requests, inquiries, and mild grumblings which accompanied it did not convert it into a counteroffer."); *Agema v. City of Allegan*, 826 F.3d 326, 333-34 (6th Cir. 2016), citing *Duprey*, 52 Wn.2d at 134 (holding acceptance still valid where additional requests were "specifically worded as 'requests' and not a condition of acceptance."). Analogizing to the bidding context, a request for modification of the language of the solicitation, coupled with an unqualified acceptance in the form of a bid proposal, will not render a bid non-responsive.

This general principle of contract formation is explained by 1 Williston, Contracts § 79 (3d Ed. 1959) at 261-62 as follows: "Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as

it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed. So an inquiry as to the meaning of an offer, or a request for an explanation, will not invalidate a positive acceptance; *nor will a request for a modification of the offer coupled with an unqualified acceptance not dependent on the granting of the request.*" (footnotes omitted) (emphasis added).

This is precisely what occurred here. Asplundh's bid proposal constituted a positive and unequivocal acceptance of the language of the solicitation. It included all of the language required by the solicitation, complete with a signature page, proposals, bid bond, and all certifications and documents required by the solicitation. The fact that Asplundh's cover letter included a request for modification does not render Asplundh's bid proposal non-responsive, because it is clear that acceptance of Asplundh's bid is not conditioned on the request being granted. Asplundh specifically worded the items in its cover letter as requests, not conditions. Rather than use conditional language, the cover letter specifically requests the items "be considered." None of these requests appear in Asplundh's actual bid proposal.

In addition, the cover letter requested that the City consider these items only *after* Asplundh was awarded the contract. Thus, any request for further modification is just that, a request, which could have been made with or without including the notation in the cover letter. In reality, there is legally no difference in this regard between Wright Tree Service, Inc.'s bid and Asplundh's bid, because Wright Tree Service, Inc. could also make further "requests for consideration of modifications" of the City, which may or may not be accepted by the City, and which do not affect or nullify in any way the terms on which the contract was awarded.

Therefore, under the long line of cases following the Washington State Supreme Court's holding in *Duprey* and applying general principles of contract formation, Asplundh's request for modification does not render its bid invalid or non-responsive. As the lowest responsive bidder, Asplundh should be awarded the contract.

Moreover, rejection of Asplundh's bid as non-responsive at this stage is inappropriate, because Asplundh has effectively clarified its offer. The City's Purchasing Policy Manual specifically allows for the City to request additional information and clarifications, no doubt to allow the City to ensure that it is obtaining the lowest qualified bids. (City of Tacoma Purchasing Policy Manual, § XV(F)(3)). To the extent it could be argued that there was inconsistency or ambiguity in its cover letter, Asplundh clarified that its bid proposal was an "unconditional submission" in its protest letter to C&A. Asplundh reiterated that its cover letter contained no conditions or conditional language in that same letter. Asplundh further clarified that it "is willing to be bound by the bid, even if the [C]ity is unwilling to consider any requests[.]" Asplundh made those same representations at the hearing before the C&A on February 14, 2018.

It is unfathomable why, particularly in the face of this clarification, the City would nonetheless choose to waste hundreds of thousands of taxpayer dollars by choosing a higher bid, simply because it chooses to stubbornly stick to an untenable legal position that the lowest bid was conditional and thus, "non-responsive." Such a decision to cost the City hundreds of thousands of dollars without any sound legal or factual basis would raise serious concerns as to the fairness and impartiality of the City's bidding process.

March 1, 2018

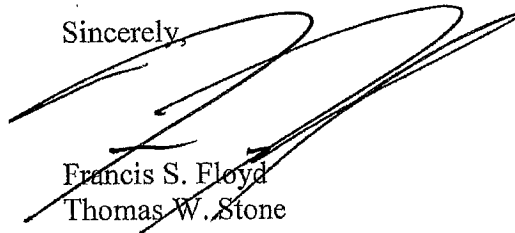
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Significantly, the City has not explained why Asplundh's 2015 and 2012 bid proposals, which had virtually identical requests in their cover letters, were considered responsive by the City but Asplundh's recent bid proposal was not. See Attachment 2. In fact, Asplundh was awarded the contract in 2012. The cover letter accompanying Asplundh's 2012 bid proposal contains virtually identical requests. The City's decision to consider Asplundh's current bid non-responsive based on language it has previously not only considered responsive, but accepted, is inexplicable.

While a municipal purchasing agent necessarily has some discretion in selecting the lowest and best bidder, "that discretion must be exercised not only reasonably and in good faith, but wholly within the law." *Platt Elec. Supply v. Seattle, Div. of Purchasing*, 16 Wn. App. 265, 269 (1976). Where, as here, "*less than all* the bids are rejected, the right to reject is more limited [...] [t]he rejection cannot be done arbitrarily or in bad faith. When it is the low bid which is rejected, particularly close scrutiny of the reasons given for the rejection is warranted." *Id.* at 274-75 (internal citations omitted) (emphasis in original).¹ Given that the items in the cover letter were specifically worded as requests, given the absence of conditions or conditional language in the cover letter, given that Asplundh's bid proposal completely conformed to the language of the solicitation, given that Asplundh's bid was approximately \$250,000 below that of the next closest bidder, and given that the City found comparable requests responsive on prior occasions, a court would no doubt find that the City of Tacoma's rejection of Asplundh's bid was arbitrary, capricious, in bad faith, an abuse of discretion, or otherwise not in accordance with the law.

For all of these reasons, Asplundh requests that the Public Utilities Board award it the contract as the lowest responsive bidder. Thank you for your time and consideration of this matter.

Sincerely,



Francis S. Floyd
Thomas W. Stone

Enclosures

cc: City of Tacoma
Finance Department
Procurement & Payables Division
3628 South 35th Street
Tacoma, WA 98409
Phone (253) 502-8468; Fax (253) 502-8372
PurchasingProtests@cityoftacoma.org

¹ Asplundh notes the C&A's characterization of the requests in Asplundh's cover letter as "material deviations" would not stand up to such scrutiny. If Asplundh had phrased the items in its cover letter as conditions (which it did not), these items would still not constitute material deviations from the language of the solicitation. A bid that contains a material variance is nonresponsive. *Land Constr. Co. v. Snohomish County*, 40 Wn. App. 480, 482 (1985). "The test

of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders." *Land Constr.*, 40 Wn. App. 480 at 482 (quoting *Gostovich v. West Richland*, 75 Wn.2d 583, 587 (1969)). Here, Asplundh acquires no substantial advantage by proposing that the City use its correct corporate name, because presumably the other bidders used their correct corporate names. Asplundh acquires no substantial advantage by proposing to include the phrase "to the extent of the Contractor's obligations under the Contract," because this simply reiterates that the contract will be followed—a requirement that applies to any bid accepted by the City. Asplundh acquires no substantial advantage by proposing a surcharge for credit card payments, because (1) by the terms of the solicitation, the City is not obligated to pay by credit card, and (2) this section of the solicitation specifically contemplates that the City "may consider cash discounts when evaluating the submittals[.]" which shows that the City expressly contemplated this section would be modified and that other bidders could have made comparable proposals. Finally, Asplundh acquires no substantial advantage by proposing to modify Section 2.05, because (1) assumption of the risk is inherent to the indemnification clause, such that inclusion of such a provision is redundant, and (2) Asplundh's proposal regarding the negligence and sole negligence language conforms to RCW 4.24.115(1)(a)-(b), such that Asplundh proposes removing language that is void as against public policy and unenforceable.

Similarly, where an intended acceptance adds a condition that "can be implied in the original offer, then it does not constitute a material variance so as to make the acceptance ineffective." *Johnson v. Star Iron & Steel Co.*, 9 Wn. App. 202, 205 (1973) (quoting *Northwest Properties Agency, Inc. v. McGhee*, 1 Wn. App. 305, 312 (1969)). The above proposals are all implied in the language of the solicitation. Thus, even if a court found that Asplundh's requests were conditions (which they are not), the City's reason for rejection of the lowest bid would not withstand scrutiny.

ATTACHMENT 1

ORIGINAL



20004 144th Ave NE • Woodinville, WA 98072 • 425-483-9339

Tacoma Power
Procurement & Payable Division
3628 S. 35th St.
Tacoma, WA. 98409

January 22, 2018

Bid PT17-0429F Power Line Vegetation Clearance Crews

Dear Valued Customer

Asplundh offers the experience of 90 years in the line clearance industry. We strive to create sound working relationships with our customers and the public. Asplundh has over a decade long history with Tacoma Power and looks forward to many more.

In addition to our Line Clearance Qualification Standard, Asplundh has developed a Wildland Fire Protection Plan that all employees are trained on, is implemented throughout the fire season, and is audited by a third party. We can also offer a storm emergency response program to effectively help you put your system back in order if that need would ever arise. It is our goal to help apply the best distribution line clearance program possible for your system by having the most professional personnel on all levels, and by using the innovative ideas and equipment that have helped put Asplundh at the top of the line clearance industry.

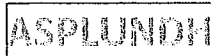
We appreciate the opportunity to submit our proposal and hope we may be of service to you. If you have questions concerning our proposal or require additional information, please contact us at your convenience.

Please note that if we are awarded this bid, we request the following be considered to the contract terms and conditions:

- Correct Corporate name. It is "Asplundh Tree Expert, LLC". (and throughout the document.)
- C.2 and 3 – Please add "to the extent of the Contractor's obligations under the Contract" to end of each sentence.
- I.1 – Add "to the extent of the Contractor's obligations under the Contract" after "endorsement" on line 4.
- V.A.1.j – Please add "to the extent of the Contractor's obligations under the Contract" after "insured" on line 1.
- 3.05.B, ¶2 – Please add "to the extent of the Contractor's obligations under the Contract" after "insured" on line 4.
- 4.17.2.B.1 – If a Credit Card is used for payment a 4% surcharge will be added to the amount of the invoice.
- Ex B 3.A.1 – Please add "to the extent of the Contractor's obligations under the Contract" to end of 2nd sentence.
- 2.05 –
 - Change "To the greatest ... and expense and" to "Contractor" on line 2-3.
- 2.05 –
 - Change "arising out of and in connection with or incident to the" to "to the proportionate extent such is caused by Contractor's negligent" on line 8.
 - Please delete "sole" on line 10.

Sincerely,
Steve Blum
Regional Manager

ATTACHMENT 2



ASPLUNDH TREE EXPERT CO.
7524 NE 175th St. Kenmore, WA. 98028 PHONE 425-483-9399

February 14, 2012

Asplundh respectfully requests your consideration in language modifications to the City of Tacoma Transmission and Distribution Augmented Tree Trimming Crews contract specification PT11-0765F as follows;

1. Spec §2.05.A – Request change to a comparative negligence standard. Delete “sole” on line 10.
2. Spec §2.10, ¶2 – The right to charge us for any required correction/completion already exists in the contract. Delete last sentence allowing Tacoma to take our equipment.
3. Spec §3.05.B, ¶2 – We will make them additional insured as required under the *Insurance Certificates Requirements* document. Delete “named” on line 1.

If you should have any questions or need additional clarification or information, please feel free to contact me at you convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "M.R. Kavran".

Michael R. Kavran
Vice President

ASPLUNDH

ASPLUNDH TREE EXPERT CO.

7524 NE 175TH STREET, KENMORE, WA 98028 • OFFICE: 425-483-9339 • FAX: 425-806-9750

February 3, 2015

Tacoma Public Utilities
Administration Building North – Main Floor
3628 South 35th Street
Tacoma, WA 98409

Request for Bids
Augmented Tree Trimming Crews
Specification No. PT14-0698F

Due: Tuesday, February 3, 2015 @ 11:00 AM, Pacific Time

To Whom It May Concern:

In accordance with your request and specifications, Asplundh is pleased to submit our price for Specification No. PT14-0698F – Augmented Tree Trimming Crews.

Asplundh offers the experience of 87 years in the line clearance industry. We strive to create sound working relationships with our customer and the public. Asplundh can offer you a storm emergency response program to effectively help you put your system back in order if that need would ever arise. It is our goal to help apply the best distribution line clearance program possible for your system by having the most professional personnel on all levels, and by using the innovative ideas and equipment that have helped put Asplundh at the top of the line clearance industry.

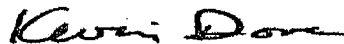
We appreciate the opportunity to submit our proposal and hope we may be of service to you. If you have questions concerning our proposal or require additional information, please contact us at your convenience.

Asplundh respectfully requests your consideration in the language modification to the City of Tacoma Augmented Tree Trimming Crews contract specification PT14-0698F as follows:

1. Insurance §C.1 – Add sentence *"The additional insureds shall fully cooperate with the Contractor and its insurers on any claim."*
2. Prov §2.05 – We cover all but their sole negligence. Make comparative negligence.
 - i. Delete *"assumes the risk of all damages, loss, cost, penalties and expense and"* on line 3. We cannot automatically assume.
 - ii. Insert *"to the extent"* before *"arising out of"* on line 8.
 - iii. Delete *"sole"* on line 10.
3. Prov §2.10, ¶2 – Delete last sentence.

4. Prov §3.05.B, ¶2 – Add *"to the extent of the Contractor's obligations"* after *"insured"* on line 1.
5. Prov §3.05.B, ¶2 – Add 2nd sentence *"The additional insureds shall fully cooperate with the Contractor and its insurers on any claim."*
6. App K §R, ¶2 – We cover all but their sole negligence. Make comparative negligence.
 - i. Insert *"to the extent"* before *"related to or rising out of"* on line 4.
 - ii. Delete *"in any way connected with"* on line 4.
 - iii. Delete *"sole"* on line 8.

Respectfully,



Kevin Dove
Vice President