City of Tacoma
Office of the City Attorney

March 8, 2018

Chair, Monique Trudnowski
Members, Public Utility Board
Tacoma Public Utilities
3628 South 35th Street
Tacoma, WA 98408-3192

RE: Specification No. P17-0429F, Power Line Vegetation Clearance Crews
Response to Asplundh Bid Award Challenge

Dear Ms. Trudnowski and Board Members:

Tacoma Power solicited bids for Power Line Vegetation Clearance Crews, and Asplundh Tree Expert, LLC (hereinafter referred to as "Asplundh") submitted the lowest bid of the three bids submitted. Though Asplundh submitted the lowest bid, with its bid submittal, Asplundh attached a letter in which it stated: *"[p]lease note that if we are awarded this bid, we request the following be considered to the contract terms and conditions:"* The letter continued with a list of proposed changes to specific provisions of the contract's special and general provisions, and proposed specific language. To some of the provisions, Asplundh proposed the following phrase: *"to the extent of the Contractor's obligations under the Contract."* As to other provisions, language limiting the Contractor's liability or providing for more compensation was proposed, such as a 4% surcharge for credit card use by the City.

Asplundh's Bid contained a material variance and was therefore nonresponsive.

Tacoma Power's Request for Bids did not solicit proposals for changes in the language of the Specification nor was it an invitation to negotiate; therefore, Asplundh's bid with the letter proposing changes to the Specification was a deviation or variance from the call of the Request for Bids. Under State competitive public bidding rules, the public entity must accept the lowest responsive bid. The entity must also reject any bids that are nonresponsive. *Gostovich v. City of West Richland*, 75 Wn.2d 583, 587, 452 P.2d 737 (1969). A bid that contains a material variance is nonresponsive. *Land Constr. Co., Inc. v. Snohomish County*, 40 Wn. App. 480, 482, 698 P.2d 1120 (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. at 482, 698 P.2d 1120 (quoting *Duffy v. Village of Princeton*, 240 Minn. 9, 60 N.W.2d 27, 29 (1953). *Cornell Pump Company v. City of Bellingham*, 123 Wn. App. 226, 232, 98 P.3d 84 (2004).

The language contained in the letter Asplundh attached and submitted with its bid afforded it an unfair advantage or benefit not enjoyed by other bidders. It provided Asplundh the advantage whereby it could elect to waive its proposed changes to the contract provisions and contract with the City if, after reviewing the competing bids, it believed its bid were high enough. On the other hand, if the competing bids were substantially higher than Asplundh's bid, Asplundh could claim that it intended the proposed language to be binding and enforceable conditions of its bid if it believed its bid were too low, and avoid having to contract with Tacoma Power at the low price. Knowing that the City could not possibly accept the changes when there were competing bids based upon the Specification other bidders relied upon, Asplundh could avoid a bid bond forfeiture.

Asplundh's Bid required unlawful negotiations to be awarded.

The content of the letter inserts ambiguity into the bid. The letter contains the language, ***"[p]lease note that if we are awarded this bid, we request the following be considered to the contract term and conditions"*** followed by the proposed changes. The letter with the proposed changes in the Specification was part of and submitted with Asplundh's Bid. The letter did not state that Asplundh would perform the work if the proposed language were rejected. Accordingly, Tacoma Power would not be able to award the contract to Asplundh without first communicating to Asplundh its rejection of the proposed changes to the contract provisions, and attempting to establish if Asplundh would still be willing to contract with the City without the proposed changes. This would be a negotiation, i.e. "revoke the proposed changes, then we will award to Asplundh."

It is well established law in the state of Washington that when competitive bidding is required of a municipality, the law does not permit the purchasing agent for the municipality to negotiate with a bidder to change its bid. *Platt Electric Supply, Inc. v. City of Seattle, Division of Purchasing*, 16 Wn. App. 265, 268, 555 P.2d 421 (1976). The Court in *Platt*, stated the following:

> When competitive bidding is required of a municipality, as it is of the City of Seattle, the law does not permit the city purchasing agent to negotiate privately with a selected bidder or bidders for the purpose of obtaining a change in bids. If none of the bids are found to be satisfactory as submitted, new bids may be called for, provided that all parties who desire to bid are given the opportunity to do so.
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> It must be borne in mind that although 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. Outside of the law, the city purchasing agent has no power to act. 10 E. McQuillin, Municipal Corporations § 29.72, at 418 (3d ed. rev. 1966).
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> It is now well settled that there is a strong public policy in the State of Washington favoring competitive bidding laws. The purposes of such laws, as declared by our State Supreme Court, are these:
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> We appreciate fully that requiring public bidding on municipal contracts is 'to prevent fraud, collusion, favoritism, and improvidence in the administration of public business,

> as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable.' *Edwards v. Renton*, 67 Wn.2d 598, 602, 409 P.2d 153, 157 (1965); 10 McQuillin, Municipal Corporations, § 29.29 (3d ed. rev. 1966).

Platt, id.

Furthermore, the language of the General Provisions contained in the Request for Bids placed Asplundh on notice that its bid had to conform to the call of the solicitation, or be rejected. Section 1.08 of the General Provisions to the Contract, entitled: "Evaluation of Bid" states: *"[i]n the evaluation of bids, the Respondent's experience, delivery time, quality of performance or product,* ***conformance to the specifications*** *and responsibility in performing other contracts (including satisfying all safety requirements) may be considered in addition to price. In addition, the bid evaluation factors set forth in City Code Section 1.06.262 may be considered by the City.*

Emphasis added.

Asplundh's Bid Challenge mistakenly characterizes its bid as a clear and unconditional acceptance of an "offer".

In its March 1, 2018 "Bid Challenge" letter, Asplundh has invested much time and energy arguing how its comments in a letter accompanying its bid (not submitted after award) should be interpreted as a clear and unconditional acceptance of an "offer," and quoted various legal authorities, e.g., "that when an unequivocal acceptance is accompanied by a request for modification, the acceptance is still valid"[1], "...assent being clear and unqualified, the requests, inquiries, and mild grumblings which accompanied it did not convert it into a counteroffer"[2], "[f]requently 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."[3] Asplundh has concluded that *"[t]he 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."*[4]

Contrary to the authorities cited by Asplundh, in the State of Washington, the rule is that a public agency's invitation to bid on a public works contract is not an offer to contract, but rather a solicitation for an offer. *Pearless Food Products, Inc. v. State*, 119 Wn.2d 584, 595, 835 P.2d 1012 (1992). It is the general rule in public contract law that a bid is an offer to contract and does not constitute an acceptance of a government "offer" to contract. *Id.* Therefore, the argument that its bid was an unconditional acceptance with a post award request for modification is contrary to Washington law.

For purposes of argument only, even assuming Asplundh's analysis is applicable, it presumes that its bid was clearly an unequivocal "acceptance," or that it was only a post

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[1] *Duprey v. Donahoe*, 52 Wn2d 129, 134 (1958)
[2] *Agema v. City of Allegan*, 826 F.3d 326, 33-34 (6th Cir. 2016)
[3] 1 Williston, Contracts §79 (3d Ed. 1959)
[4] Asplundh's "Summary of the Record for Asplundh Bid Challenge", p. 4.

acceptance request for modification. Tacoma Power had to consider the fact that the letter requesting the modification accompanied the bid, and was not submitted after the award. Furthermore, that letter did not state that Asplundh would contract with Tacoma Power to do the work if the requested modifications to the Specification were rejected. Even the language of the request could have alternative interpretations, e.g. "…we request the following be considered to the contract terms and conditions". Is the word "considered" being used to mean "contemplate", or "deemed"? Furthermore, as stated above, the letter does not state that Asplundh would contract with Tacoma Power if the proposed modifications to the Specifications were denied.

Asplundh's suggestion that Tacoma's Purchasing Policy Manual would have allowed Asplundh to in effect withdraw its Specification modification proposal, lacks merit.

In its "Bid Challenge," Asplundh has argued *"[t]he 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)".* However, this section of the Purchasing Policy Manual pertains to Request for Proposals for professional services, etc. when factors other than lowest price are to be considered. Section XIV of the Purchasing Policy Manual applies to Requests for Bid like the one at issue, and does not provide for negotiating or other contacts with the bidders pre-award.

Asplundh's suggestion that its previous bids were accepted by Tacoma Power under similar circumstances is inaccurate.

Asplundh has argued on page 5 of its "Bid Challenge" that in the years 2012 and 2015, Tacoma Power awarded it the contract under circumstances similar to the present competitive bid process. According to information provided to the Legal Department, Asplundh was the sole bidder for the contract in 2012; therefore, any negotiation of the terms post bid opening would not have provided an unfair advantage to Asplundh. In 2015, Asplundh was not awarded the contract because it did not submit the lowest bid.

Conclusion.

Based upon the foregoing facts and authorities, it remains the position of the Legal Department that Asplundh's Bid was nonresponsive, for it contained a deviation or variance that was material, and would have required an unlawful negotiation of its Bid. Accordingly, it must be rejected.

Respectfully submitted,

M. Joseph Sloan
Deputy City Attorney
MJS/dk

Cc: Charleen Jacobs, Executive Assistant of Director of Utilities' Office
Deborah McLellan, Office Manager of Power Superintendent's Office