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March 11, 2020

*Via Email*

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Lauren Profeit

City of San Jose

Department of Public Works

200 E. Santa Clara Street, 5<sup>th</sup> Floor

San Jose, CA 95113

**Re: Response to City's Intended Determination of GoodLand Landscape Construction, Inc.'s Bid  
Project 8469 – Tamien Park – Phase II – Rebid #2**

Dear Ms. Profeit:

This office represents GoodLand Landscape Construction, Inc. ("GoodLand") in connection with the City of San Jose's Project 8469 – Tamien Park – Phase II – Rebid #2 ("Project"). We understand from your correspondence dated February 28, 2020 and March 6, 2020 that the City intends to recommend that GoodLand's bid for the Project be deemed non-responsive. GoodLand's bid is responsive and as the lowest responsive responsible bidder the contract **must** be awarded to GoodLand for the following reasons.

The City has asserted that GoodLand's bid was deemed to be non-responsive because the City alleges that GoodLand did not include a properly executed bidder's bond. GoodLand submitted one notary acknowledgment for its signatures on both the non-collusion affidavit and the bidder's bond. California Public Contract Code Section 20413, which governs bidder's security, provides as follows:

All bids for construction work shall be presented under sealed cover and shall be accompanied by one of the following forms of bidder's security:

- (a) Cash.
- (b) A cashier's check made payable to the city.
- (c) A certified check made payable to the city.
- (d) A bidder's bond executed by an admitted surety insurer, made payable to the city.***

***The security shall be in an amount equal to at least 10 percent of the amount of the bid. No bid shall be considered unless one of the forms of bidder's security is enclosed with it.***

Emphasis added.

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GoodLand submitted a bidder's bond in compliance with the statute. Notably absent in the statute is any requirement whatsoever that the bidder's bond be notarized by the bidder itself. The City has what it needs from GoodLand – the bidder's bond is in compliance with Cal. Pub. Contract Code Section 20413(d) and is entirely enforceable by the City if necessary. A low bidder who fails to execute a construction contract forfeits its bidder's bond. A notarized acknowledgment of the bidder's bond by the contractor is not a condition precedent to the City collecting from the surety – and the City's ability to collect the funds is the whole purpose of the bidder's bond. (See *Town of Mill Valley v. Massachusetts Bonding & Ins. Co.* (1924) 68 Cal.App.372.)

Despite the clear authority of Cal. Pub. Contract Code Section 20413(d), the City claims in its March 6, 2020 letter that it requires three notary acknowledgements to be submitted with each bid: one for the contractor's signature on the Proposal/Non-Collusion Affidavit; one for the contractor's signature on the Bidder's bond; and one for the surety's signature on the Bidder's Bond. However, the Proposal to City of San Jose only require (1) a bidder's bond executed by an admitted surety and (2) the bidder's signature on the bidder's bond. Notably absent in the above language from page 2 of the Proposal to City of San Jose is any reference whatsoever to a notarized signature from the bidder for the bidder's bond.<sup>1</sup> (See page 2 of Proposal to City of San Jose.)

Despite the City's own bid documents and the clear language of the Public Contract Code, which clearly does not require it, GoodLand submitted one notary acknowledgment for both of its signatures on the non-collusion affidavit and the bidder's bond. Nothing in the City's bid documents or specification requires that there be separate notary acknowledgments.<sup>2</sup> The bidder's bond signature page only says "attach notarized acknowledgment" which GoodLand did attach.

There is case law that establishes that "a bid which substantially conforms to a call for bids may, though not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words if the variance is inconsequential." (*Konica Business Machines U.S.A., Inc. v. The Regents of the University of California* (1988) 206 Cal.App.3d 449, 454 (Citations omitted).) Furthermore, a public entity may waive inconsequential deviations from contract specifications in a public contract bid. (*Ghilotti Const. Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 900.) To be considered inconsequential, a deviation must neither give the bidder an unfair competitive advantage nor otherwise defeat the goals of ensuring economy and preventing corruption in the

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<sup>1</sup>Page 2 of the Proposal to City of San Jose states that "City may at its option, request additional supplemental information after bid opening." The City could have (but did not) asked GoodLand for a notary acknowledgment on its already executed bidder's bond following the opening of bids.

<sup>2</sup> The City curiously point out that GoodLand submitted a separate notary acknowledgment for its bidder's bond on a previous bid submitted to the City *one year ago*. Past bids are irrelevant to the City's review of the bid for this Project; this is a standalone bid submitted by GoodLand and should be handled as such.

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public contracting process. (*Id.*) Here, it is not even clear that GoodLand's bid deviated from the specifications, but even if it did, GoodLand's theoretical failure to include a separate notary acknowledgment with its bidder's bond is inconsequential and in no way affects GoodLand's bid amount nor does it provide GoodLand with an unfair competitive advantage.<sup>3</sup>

The bid documents further give the City the authority to waive inconsequential or minor bid irregularities. "Bidder understands that the ***City reserves the right to reject any or all bids and to waive any informalities in the bidding.***" (Emphasis added.) GoodLand's purported "failure" to include a separate notary acknowledgment for the bidder's bond is entirely inconsequential. As discussed above, the purpose of a bidder's bond is to provide insurance for the City in the event the low bidder fails to execute the contract. The Public Contract Code only requires the bidder's bond to be executed by an admitted surety insurer. The City has received this and GoodLand would forfeit its bidder's bond if it failed to execute the contract for the Project. This fits squarely within the definition of an inconsequential or minor bid irregularity. This "omission" should be waived by the City as an inconsequential bid irregularity and the City should deem GoodLand's bid responsive.

For the reasons set forth above, the City should deem GoodLand's bid responsive and award the contract to GoodLand as the lowest responsive, responsible bidder. Please notify this office of acknowledgment of receipt of this letter. If you require further information please advise promptly. Further, please provide us with notice of the date, time and location of any hearing at which this matter will be determined or the contract award is to be considered. GoodLand intends to have a representative present. Finally, please provide a copy of this letter to each Board member before any such hearing so that they may be fully apprised of GoodLand's position in advance of the hearing.

Very truly yours,

*ESanchez*  
Erin S. Sanchez

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<sup>3</sup> It should be mentioned that GoodLand's bid is \$57,200 lower than the next bidder, and the City and its taxpayers would benefit from awarding the Project to GoodLand.