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August 23, 2019

Via Email: psaleen@wmlylesco.com
& overnight mail

Robert P. Saleen
W.M. Lyles Co.
1210 West Olive Avenue
Fresno, CA 93728

SUBJECT: OCSD Response to W.M. Lyles Co.'s Award Protest
Re: Project No. P2-123, Return Activated Sludge Piping
Replacement at Plant No. 2

This letter serves as the Orange County Sanitation District's ("OCSD") response to the Award Protest Statement ("Protest") filed by W.M. Lyles Co. ("W.M. Lyles") on August 13, 2019. The Protest challenges the recommendation that OCSD award the contract for the above-referenced project (the "Contract") to Shimmick Construction Company, Inc. ("Shimmick").

W.M. Lyles alleges that Shimmick is not a responsible and/or qualified contractor due to Shimmick's past safety violations. W.M. Lyles cites various OSHA Reports and accidents occurring on Shimmick projects to support this assertion. W.M. Lyles contends that Shimmick's purported inability to maintain safe work sites indicates that Shimmick is not a responsible bidder within the meaning of the California Public Contract Code ("PCC"), so OCSD should reject Shimmick's bid. W.M. Lyles further asserts that the requested disqualification would comport with sound public policy.

OCSD has reviewed the Protest and all necessary facts and written materials submitted, including the Protest response letter received from Shimmick on August 20, 2019, and hereby denies the relief requested based on the following:

Bidder Responsibility

Under California's competitive bidding laws, public agencies must award a public works contract to the lowest bidder unless the agency finds the bidder is non-responsible. (*City of Inglewood-L.A. Cnty. Civic Center Auth. v. Superior Ct.* (1972) 7 Cal.3d 861, 867.) The PCC defines a responsible bidder as "a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract." (PCC § 1103.)

Determining whether a bidder is responsible is "a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, the application of subtle judgment." (*Taylor Bus Service, Inc. v. San Diego Bd. of Educ.* (1987) 195 Cal.App.3d 1331, 1341-42.) Moreover, agencies may not employ concepts of relative superiority when making this responsibility determination. (*Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1452.) A low bidder may not be deemed non-responsible simply because another bidder is *more* qualified or *more* responsible.

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Shimmick is a Responsible Bidder

The Protest urges OCSD to find Shimmick non-responsible due to various accidents and safety incidents occurring on Shimmick projects. For the reasons stated below, OCSD believes these incidents provide an insufficient basis for finding Shimmick unable to satisfactorily perform this project.

First, many of the incidents cited in the Protest are not considered final for legal or administrative purposes as they are still open or pending appeal. In order to afford bidders full due process protections and allow the OSHA investigation and enforcement process to run its course, OCSD typically does not consider such incidents when evaluating a bidder's safety qualifications.

Second, several of the incidents identified in the Protest were not cited against Shimmick specifically, but rather against several of Shimmick's partners on joint venture projects. OCSD believes it is inappropriate to attribute these incidents to Shimmick without additional information.

Third, OCSD believes that the PCC and public policy behind California's competitive bidding laws prohibit public agencies from finding a bidder non-responsible for safety reasons unless the bidder demonstrates a clear and consistent pattern of significant safety violations or an inability to take appropriate safety precautions. This is especially true where, as here, the bidder meets the minimum safety qualifications of the IFB. Based on our review of the facts presented and OCSD's own investigation of these matters, OCSD does not believe the incidents cited by W.M. Lyles meet this high standard.

Simply put, the fact that a large contractor like Shimmick has had safety incidents in the past is not sufficient justification to find the contractor non-responsible. To be sure, a contractor's repeated failure to proactively address safety concerns may indicate that the bidder is not responsible, but OCSD does not find this to be the case here. OCSD has investigated the corrective actions taken by Shimmick following the violations cited in Shimmick's bid and finds these corrective actions acceptable. Moreover, Shimmick's accident frequency rate is below the industry average and OCSD has not encountered significant safety concerns on other OCSD projects performed by Shimmick.

For all these reasons, OCSD does not believe that Shimmick's past safety violations and performance history warrant a finding of non-responsibility for this project.



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Determination

OCSD has reviewed the Protest and all accompanying facts and documents and finds that Shimmick is a responsible bidder for the above-referenced project. Accordingly, OCSD respectfully rejects W.M. Lyles' Protest.

OCSD will proceed to recommend award of the Contract to the lowest responsive and responsible bidder, Shimmick Construction Company, Inc., at the Board of Directors Meeting on September 25, 2019.

A handwritten signature in blue ink, appearing to read "R. Zintzun".

Ruth Zintzun
Contracts & Purchasing Manager