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April 27, 2011

VIA OVERNIGHT MAIL & FACSIMILE [559] 924-6708

City of Lemoore  
Attn: David R. Wlaschin, Public Works Director  
711 W. Cinnamon Drive  
Lemoore, CA 93245

Re: City of Lemoore 2011 Street Paving Project  
Our File No: 23624-00006  
Subcontractor: Emmett Valley Construction

Dear Mr. Wlaschin:

This office and the undersigned represent Emmett Valley Construction ("Emmett"). This letter is written in response to your letter of April 22, 2011, and to contest your proposed recommendation to the City Council of Lemoore on May 17, 2011, that Emmett's bid be determined non-responsive based upon an alleged technical defect. A copy of this letter is being sent to Dale Bacigalupi, who has advised that he is counsel for the City of Lemoore.

As a general proposition, public entities can waive a deviation in a bid where that deviation does not confer a competitive advantage on the bidder. As a responsible bidder, Emmett understands the potential harm associated with bidding shopping. Although it is within the discretion of the City of Lemoore to accept or reject the bid proposals, we request the discretion be reasonably exercised in this case.

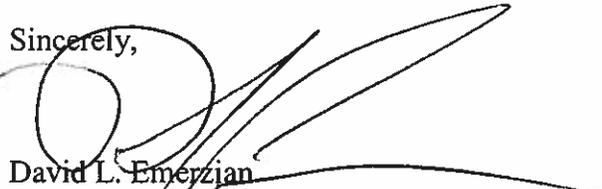
There were no defects associated with Emmett's bid proposal as it related to the scope of work bid, costs, and any other matter which Emmett was required to disclose under the Public Contract Code. The only alleged defect was a technical defect, the lack of identification of supplier information, which is apparently an item imposed by the owner in its discretion. According to BC-15, the form provides that a "[f]ailure to comply with this requirement *may* render the proposal informal and *may* cause its rejection [emphasis added]." It is Emmett's contention that Form BC-15, is discretionary in nature, and that a lack of completion of Form BC-15, does not confer any type of competitive advantage on Emmetts or another bidder.

My clients and I have discussed at length what competitive advantage, if any, could be obtained by a late submission of the BC-15 form. It makes no difference in the computation of Emmetts' bid when that form is completed and/or submitted. Emmetts' proposed bid price would not change by a late disclosure of its suppliers. Any materials actual used by Emmett on the project must be approved by the project engineer or other person via the submittal process. If the materials proposed are non-conforming at the submittal stage, Emmett will be required to provide the confirming materials without additional compensation beyond Emmetts' bid amount. There simply is no benefit to conferred on Emmett by a late submittal of the BC-15 form.

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Emmett intends to appear at the Lemoore City Council meeting on May 17, 2011, at 7:30 p.m., and present its opposition to the proposed recommendation. If for any reason this issue is calendared for a different meeting date/time, please advise immediately.

Sincerely,



David L. Emerzjan  
McCormick Barstow LLP

DLE:mah

cc: Dale Bacigalupi [[dbacigalupi@lozanosmith.com](mailto:dbacigalupi@lozanosmith.com)]

# ***R.J. BERRY JR., INC.***

***P.O. BOX 468 – SELMA, CA. 93662  
BUS. (559) 896-1680 FAX (559) 896-1682  
STATE LIC. #433753***

May 4, 2011

City of Lemoore  
Public Works Department  
711 W. Cinnamon Dr.  
Lemoore, CA 93245

Via Facsimile: 559-924-6708

Attn: Mr. David Wlaschin

Subject: City of Lemoore 2011 Street Paving Project  
Non-responsive bid & waived right to protest by Emmett Valley Const.

Dear Mr. Wlaschin;

We are aware that Emmett Valley Construction did not submit a completed "Major Material Suppliers Information" form (page BC-15 of Bid Conditions), as required at bid time. R.J. Berry Jr., Inc. submitted a complete and responsive bid and is, therefore, the lowest responsive responsible bidder. We are in agreement with your letter dated April 22, 2011 (attached) recommending that the above-referenced job should be awarded to R.J. Berry Jr. Inc.

We received a copy of the letter to you from Mr. Emerzian, who is representing Emmett Valley Construction (attached). Though the letter expresses Emmett Valley's intention to raise the matter at the upcoming City Council meeting, by not following the very clear Bid Protest Procedures outlined on page BC-5 and BC-6 of the Bid Conditions, Emmett Valley has waived their right to further pursue its protest.

Lastly, we disagree with Mr. Emerzian's position that no competitive advantage is obtained by a late submission of the Material Supplier form. In fact, an unscrupulous bidder would have the ability to submit a bid proposal for less money up front, knowing that he or she can create profit after bid time by "bid shopping" material prices amongst competing suppliers, or by colluding with them. To be clear: I have no knowledge of Emmett Valley having engaged in bid shopping or collusion and am making no such accusations here. The Material Suppliers Form has a distinct purpose and was not arbitrarily included in the Bid documents. We maintain that waiving this important bid requirement would unduly compromise the integrity of the City's bid process.

Very Truly Yours,  
R.J. Berry Jr., Inc.



Mark Berry  
Vice President

Enclosures