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**BY FAX, E-MAIL & U.S. MAIL**

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**RE: Jackson Springs Water Treatment Plant  
 Project No. W10-1858/CIP No. 50789**

Dear Messrs. Green and Coon:

On behalf of Graham Construction Services, Inc., we would like to offer the following information in rebuttal to the information furnished by Messrs. Gustafson and Lust at the April 12, 2011, meeting on the above referenced procurement.

**1. Relevant Provisions from the Bid Documents**

Messrs. Gustafson and Lust took umbrage with the City's post-bid consideration and evaluation of Graham's indisputable qualifications. However, they failed to mention several key provisions from the Bid Documents that dispose of their complaints. Article "2.11 Contract Award" states: "[i]n bid evaluation, Owner **shall** consider the qualifications of the bidders, **whether or not the bids comply with the prescribed requirements**". (Emphasis added). Thus, the Bid Documents required the City to evaluate Graham's qualifications. The City had no discretion to simply throw out Graham's bid as requested by Messrs. Gustafson and Lust.

Article "2.11 Contract Award" also states that "Owner may conduct such investigations as he deems necessary to assist in the evaluation of any bid and to establish the responsibility, qualifications, financial ability, and technical expertise of the bidders . . . to the Owner's

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satisfaction within the prescribed time.” As set forth in our April 8, 2011, letter matters relating to the responsibility of a bidder, qualifications being one aspect of responsibility, can be considered after bid opening as set forth in the plethora of caselaw we cited in our April 8, 2011, letter. Article 2.11 simply states the rule established by decades of caselaw on the topic.

Furthermore, the original bid specifications indicated that the City would be evaluating bidder qualifications after bids were opened. *See* Supplementary Conditions, 8.01.A. Evaluating qualifications after bid opening is not a basis for objection. The specifications in the addenda indicate that the Contractor’s Qualification Statement can be submitted “up until the stated time of bid opening” and that contractors who do so “shall be informed of the determination after the date and time of bid opening.” Thus, the City’s specified procedure always contemplated post-bid review of bidder’s qualifications. Messrs. Gustafson and Lust have no basis to complain about the process followed by the City.

## **2. Statutory Definition of “Technical Irregularities”**

Mr. Lust properly noted that the City can by statute “waive technical irregularities in the bid or proposal of the low bidder.” *See* S.D.C.L. 5-18A-5(6). Mr. Lust claimed that the term “technical irregularities” is not defined, but he failed to read the rest of the statute which provides the very definition he claims does not exist. The rest of S.D.C.L. 5-18A-5(6) makes clear that technical irregularities are those that “do not alter the price, quality, or quantity of the services, or items of tangible personal property bid or offered.” During his presentation, Mr. Gustafson admitted that he had no basis to say that Graham was not a qualified contractor, or that Graham’s bid price was modified, that Graham did not offer the quality of material specified, or the quantity of work specified. Thus, by definition, at best the complaint is over a “technical irregularity” that can be waived.

Mr. Lust also did not mention the last sentence of S.D.C.L. 5-18A-5(6), which provides that the City can permit corrections or clarifications of a bid after the bid opening if the decision to permit such a correction or clarification is “supported by a written determination made by the purchasing agency, and included in the bid file.” Thus, it is clear that the legislature intended to provide discretion to government purchasers and to defer to such discretion.

## **3. Qualifications of Graham**

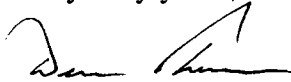
The whole complaint raised against Graham is no complaint at all. Graham furnished with its Contractor’s Qualification Statement resumes of all of the key personnel required by the form. Graham’s in-house membrane and filter specialist, Ken Moore, has been involved in the requisite twp projects over 4 MGD. Importantly, the Kamloops River Street Water Treatment Plant is 42 MGD, and is over ten times the size of the projects referenced in the bid. This experience is the equivalent of ten 4 MGD projects and amply satisfies the qualifications measures sought by the City. Mr. Moore also has experience with another relevant project, adding yet more to his qualifications to serve as membrane and filtration specialist. Adding

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another specialist does not make Graham's original valid bid invalid, it only proves that Graham is even more "responsible" or qualified.

In conclusion, there is no basis to the complaints raised by Messrs. Gustafson and Lust regarding Graham's bid. Graham's bid is the lowest bid, and the City will save substantial money by awarding the contract to Graham.

Very truly yours,



Dean B. Thomson

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cc: Dave Lenss, Graham Construction Services, Inc. (via e-mail)  
Mark Fisher, Graham Construction Services, Inc. (via e-mail)