

**DATE :** September 5, 2017

**TO :** Wilma Quan-Schecter, City Manager

**FROM:** Michael D. Flores, Independent Administrative Hearing Officer

**Subject:** **FINDINGS AND RECOMMENDATION TO CITY COUNCIL ON PROTEST OF MOUNTAIN CASCADE, INC., REGARDING THE FIRM FIXED PRICE DESIGN-BUILD NORTHEAST SURFACE WATER TREATMENT FACILITY STORAGE TANK PROJECT- BID FILE NO. 3531.**

### **Procedural History**

The City of Fresno (“City”) invited bids for the Firm Fixed Price Design-Build Northeast Surface Water Treatment Facility Storage Tank Project (“NESWTF Project”), Bid File no. 3531. After receiving all bids, City staff issued a determination that designated W.M. Lyles Company (“Lyles”), as the lowest responsible and responsive bidder, in compliance with the specifications set forth in the Bid Files.

The second lowest bidder, Mountain Cascade, Incorporated (“MCI”), timely protested the City’s determination. A hearing was conducted on August 16, 2017 at 10:00 A.M., in Fresno City Hall by Independent Administrative Hearing Officer Michael D. Flores.

### **Issues on Appeal**

MCI’s protest letter and supplemental briefs alleged that the contract award was to a bidder other than the lowest responsible and responsive bidder. MCI’s grounds for their contention were that, (1) The City’s designation of MCI as “Non-Responsible” in their “Staff Determination to Consider Bidder Non-Responsible to the Specifications for Request for Proposals for Firm Fixed Price Design-Build for Northeast Surface Water Treatment Facility (NESWTF) Storage Tank Project (Bid File No. 3531)” (“City Determination”), dated July 24, 2017 was unjust and not based on any valid criteria; (2) City Staff publically announced the dollar amount of the “cost proposals” or “bids”, which is highly unusual, and ultimately was prejudicial to MCI when the City requested a “Last, Best and Final” proposal from both MCI and Lyles; (3) City Staff did not provide MCI with a response to their request for the City’s scoring system used in assigning values or “weight” to the different factors included in City Staff’s evaluation of each bidder’s proposal; (4) City Staff’s requirement of a “Last, Best and Final” proposal as provided in Addendum No. 5 of the Request for Proposals (“RFP”) was not included as a possible option in the City’s original RFP; (5) City Staff allowed Lyles to submit a “Last, Best and Final” proposal, even though Lyles failed to submit such a bid within the City’s published deadline; (6) Lyles “Last, Best and Final” proposal (or as the City argued, Lyles’ “Amended Cost Proposal”) contained alternative cost saving measures which virtually mirrored those alternative cost saving

measures submitted by MCI in both their Original and “Last, Best and Final” proposals, which were submitted in the correct form and within the City’s published deadline; (7) Lyles “Last, Best and Final” proposal (or “Amended Proposal”) was submitted to the City without a signature, rendering it invalid; and (8) The evidence supports MCI’s contention that it was a “responsible and responsive” bidder, provided the best overall value to the City, and therefore should be awarded the NESWTF Project.

## **Background**

At the August 16<sup>th</sup> protest hearing, Jerry H. Mann, Esq., appeared on behalf of MCI, along with David Hicks, MCI Vice President of Estimating, and Andrew Eldridge, MCI Design-Build Manager.

Deputy City Attorney Brandon Collet appeared on behalf of the City of Fresno, along with Todd Knittel, City Purchasing Manager, and Michael Carbajal, City Planning Manager.

## **Analysis of Issues**

**(1) City’s Designation of MCI as “Non-Responsible”**: MCI’s major contention in their written briefs and testimony during the protest hearing was the City’s designation of MCI as “Non-Responsible” regarding their ability to perform the work on the NESWTF Project as required in the RFP.

After learning that the City was going to award the NESWTF Project to Lyles (“Notice of Staff Determination of Contract Award”, dated July 14, 2017, (Exhibits To Mountain Cascade, Inc.’s Appeal Re: Bid File 3531 (“MCI Exhibits”), Exhibit F) MCI Legal Counsel Jerry Mann drafted and served a letter of appeal to the City’s Purchasing Department outlining MCI’s objections to the City’s bidding process and award of the NESWTF Project to Lyles (“Appeal of Staff Determination: Fixed Price Design Build for Northeast Surface Water Treatment Facility (NESWTF) Storage Tank Project; Bid File 3531”, dated July 21, 2017 (“7/21/17 Appeal Letter”, MCI Exhibits, Exhibit G).

City Purchasing Manager Todd Knittel provided a letter to MCI Executive Vice President Roger Williamson, dated July 24, 2017, in which Purchasing Manger Knittel stated that MCI had been found “non-responsible” for the NESWTF Project, “[D]ue to the team’s inadequate experience in Design-Build Projects.” (“Staff Determination to Consider Bidder as Non-Responsible to The Specifications for Request for Proposals for Firm Fixed Price Design-Build for Northeast Surface Water Treatment Facility (NESWTF) Storage Tank Project (Bid File No. 3531)” (“Determination of MCI Non-Responsibility”), dated July 24, 2017, MCI Exhibits, Exhibit H). The Determination also stated, “The experience and capabilities of the Design-Builder/Firm is inadequate for the project scope and goals.” (Id.). And finally, “The experience and capabilities of the Key Personnel to be used on the project by Mountain Cascade is inadequate for the project scope and goals.” (Id.). In an email to City Senior Procurement Specialist Laura Rapp, dated July 25, 2017, Mr. Mann requested that the City provide particular information, if any existed, upon which the City based their designation of MCI as “non-responsible” (MCI Exhibits, Exhibit L).

On July 31, 2017, Mr. Mann drafted two separate supplemental appeal briefs, providing more detail regarding MCI's objections to the City's actions (MCI Exhibits, Exhibit T).

Deputy City Attorney Brandon Collet then responded with a letter to Mr. Mann dated August 2, 2017, which detailed the City's reasoning for their determination that MCI was "non-responsible" as it applied to the NESWTF Project ("Appeal of Staff Determination: Fixed Price Design Build for Northeast Surface Water Treatment Facility Storage Tank Project; Bid File No. 3531" ("CAO Response"); MCI Exhibits, Exhibit M). In summary, the Response stated that the Fresno Municipal Code ("FMC") and the City Charter authorized the City to select the Design-Build "Prime" or "Lead" Contractor using a "best value" standard, and the specific criteria contained in the RFP to be used in the City's determination of "best value" was cited (Id., p.1). The CAO Response also stated that the City had the sole discretion to determine whether a proposed bidder is "responsible" pursuant to the RFP (Id.). Deputy Collet stated that the City believed that MCI's lack of experience as a "Lead" or "Prime" Contractor on a Design-Build project, and Lyles' extensive experience as a "Lead" or "Prime" Contractor on a Design-Build project resulted in Lyles "...providing the best value to the City." (Id.). Additional statements contained in the CAO Response made it clear that the City placed great importance on Lyles' Lead Contractor experience on a Design-Build Project and MCI's lack of experience; "After reviewing MCI's proposal and additional submitted documents... [t]he City found that MCI was non-responsible because it had no experience as a prime contractor on a design build project and raised questions whether MCI could satisfactorily perform the [NESWTF] Project." (Id., p.2). Further, the City provided two documents to MCI which contained additional information regarding their evaluation criteria and the process in choosing the most qualified contractor. In a one page document entitled, "Summary of Information by Proposers Request for Proposals for Fixed-Price Design-Build Storage Tank NESWTF Bid File No. 3531" ("City Evaluation Summary", MCI Exhibits, Exhibit Q, p. 648), the City's evaluation criteria is broken down into six separate categories: Price offer (Last, Best & Final); Experience and Capabilities of Design-Builder/Firm; Experience and Capabilities of Key Personnel; Financial Condition, Organization, Management; Safety; Project Approach; and Best Value. Both bidders, MCI and Lyles were evaluated in the City Evaluation Summary using these criteria. In reviewing the document, it is clear that both MCI and Lyles are considered equally qualified in the categories of "Financial Condition" and "Project Approach", and there is a monetary difference of roughly \$500,000 between MCI and Lyles' "Last, Best and Final" proposals; with MCI being the lower of the two. It is in the categories of "Experience of Design-Builder", "Experience of Key Personnel", and "Best Value" that Lyles was rated more highly than MCI. The City's comments in these criteria emphasized the considerable experience that Lyles had as a Lead Contractor in other Design-Build projects and the experience Lyles had working on projects for the City, while MCI had no previous experience as a Lead Contractor in a Design-Build project, and less experience working on City projects. The City Evaluation Summary does provide a more detailed analysis of the criteria used by the City in choosing Lyles for the NESWTF Project.

The second document provided by the City consists of two pages and is entitled, "Report From Selection Committee for Firm Fixed-Price Design-Build for NESWTF Storage Tank, Bid File No. 3531" ("Selection Committee Report", MCI Exhibits, Exhibit Q, pp. 649-650.) The Selection Committee Report provides information on the make-up of the Committee itself, the criteria used for the selection (the same criteria listed in the City Evaluation Summary), and a

short summary of the evaluation of Lyles and MCI by the Committee. Again, the Committee placed great emphasis on Lyles' experience as a Lead Contractor on other Design-Build projects, and their experience on other major capital improvement projects for the City, which was the deciding factor in the Committee's recommendation to award the NESWTF Project to Lyles.

The overwhelming majority of the presentation by MCI at the protest hearing focused on MCI and their potential "team members" past experience on similar projects, and their qualifications, which MCI asserted would allow them to successfully complete the NESWTF Project for the City of Fresno. Both Mr. Hicks and Mr. Eldridge from MCI testified to their personal experience and qualifications, as well as MCI's experience and qualifications as a company (Mr. Hicks' resume is included in MCI Exhibits, Exhibit S, and Mr. Eldridge's resume was included in Exhibit J. MCI's past similar projects were described in documents provided in Exhibits I, O, and P). Following Mr. Hicks and Mr. Eldridge, a representative of each of the "team members" chosen to work with MCI testified to their qualifications and the qualifications of their respective company. Todd Kotey, Principal Engineer and Construction Manager of Quincy Construction Co. testified to his and Quincy Construction's qualifications to perform the design work on the Project. Mike Frisch, Vice President of Frisch Engineering, Inc. testified to his qualifications and the qualifications of his company to do the electrical designing and contract work on the Project (MCI Exhibits, Exhibit C, pg. 411). Barry Evans, Electrical Division Manager from Auburn Constructors, Inc. testified to his qualifications and his company's qualifications for the electrical subcontracting work they would perform on the Project. All of the witnesses testified that they were certain that they could successfully complete the NESWTF Project as required by the RFP, and that MCI was qualified to act as the Lead Contractor for the Project.

The City's cross examination of each of the witnesses focused on witness' experience as "Prime" or "Lead" Contractor on the projects that they had testified to working on. In response, only Mr. Evans of Auburn Constructors testified that his company had acted as a Lead Contractor on "several" projects, including some for governmental entities, including Folsom. All of the other witnesses, including Mr. Hicks and Mr. Eldridge from MCI testified that neither they nor their companies had acted as a Lead Contractor on any Design-Build project they had worked on.

In lieu of closing arguments at the protest hearing, the Hearing Officer allowed both MCI and the City to submit written closing briefs summarizing the main points of their respective arguments. Both parties submitted their briefs to the Hearing Officer within the allotted time. As to the issue of MCI's "non-responsibility", MCI argued in their closing brief that the City's RFP did not require a bidder to have previous Lead Contractor experience in a Design-Build project, but only sought a "...reputable, experienced, and knowledgeable firm/team to design and construct the facilities to meet the City's needs." MCI contended that their vast experience with similar projects and the straight forward and uncomplicated requirements of the NESWTF Project would allow them and their team to successfully complete the Project for the City despite never having been the Lead Contractor on a Design-Build project. In their closing brief, the City argued that pursuant to the FMC, the City Charter and the terms and conditions of the RFP, they had the sole discretion to determine that experience as "Prime" or "Lead" design-builder on a design-build project is necessary on this type of project, and that MCI failed to produce sufficient evidence that it could provide the best value to the City in satisfaction of the criteria in the RFP.

In analyzing this issue, the Hearing Officer reviewed the relevant statutory and case law provided by the parties, as well as the pertinent portions of the RFP and other Bid File documents. FMC §4-502 lists the selection method that the City Manager must utilize for the selection of a “Design-Build Entity” by the City Council. Section 4-502(a)(2) states that subject to the Council’s right to reject any and all proposals, the Council will award a Design-Build project to the entity that, on the basis of the “...technical criteria and methodology, including price...”, provides “...the best value in meeting the interest of the city and the objectives of the design-build project.” Section 1.2 of the RFP lists the City’s objectives for the NESWTF Project. According to the Section, the City’s main objective is for delivery of a project with the “best value”. One of the criteria for meeting that objective includes the City awarding the project to a “Qualified Firm/Team”, which is further defined in Section 1.2 as, “...a reputable, experienced, and knowledgeable firm/team to design and construct the facilities to meet the City’s need.” The language in this “subsection” of Section 1.2 leads the Hearing Officer to believe that it is a generic description, used by the City for most if not all Design-Build RFP’s when providing the potential bidder with a description of the City’s objectives for that particular project. The terms, “experienced”, and “knowledgeable” are the terms that seem the most relevant to the issue at hand. MCI would argue that their experience in numerous Design-Build projects very similar to the NESWTF Project they have been involved with, both on a larger and more complex scale, including similar projects completed for the City of Fresno, more than satisfies the requirements for MCI to be considered “experienced” and “knowledgeable”. Additionally, MCI’s contention that neither the RFP nor any other document provided by the City listed prior experience as a “Lead” or “Prime” Contractor as a specific requirement to submit a bid, or as a specific factor to be considered by the City when making their determination as to whether a bidder would be “Qualified” under Section 1.2 of the RFP has merit. The Hearing Officer could find no such requirement or mention of previous Lead Contractor experience as a factor to be considered by the City in the RFP or any other Project related document.

However, the Hearing Officer believes that it is just as reasonable to believe that the terms “experienced” and “knowledgeable” could in this case include consideration of whether a bidder has experience as a “Lead” or “Prime” Contractor in previous Design-Build projects. Certainly acting as the Lead Contractor in prior projects would be desirable, and could reasonably be considered an advantage over another potential bidder who had no such prior experience. While it is true that there was no requirement that the potential bidder for the NESWTF Project have prior experience as a Lead Contractor in a Design-Build project, there was nothing in the language of the RFP or any other document related to Bid File 3531 that precluded the City from considering such experience of a potential bidder or precluding the City from determining that the potential bidder with prior experience as Lead Contractor would have an advantage over another bidder without that experience when making the project award decision. While the Hearing Officer does believe that the language in Section 1.2 could be reasonably interpreted as meaning that the City could consider a bidder’s experience and knowledge as a “Prime” or “Lead” Contractor in evaluating the bidder, the Hearing Officer does suggest that in future Design-Build RFP’s, the City consider including language that would make it clear that, while experience as a “Prime” or “Lead” Contractor in a Design-Build project is not mandatory to submit a proposal, such experience is desirable, and would be considered as a “positive factor”, or words to that effect.

At the protest hearing, Mr. Eldridge from MCI testified that in addition to MCI's belief that they should have been awarded the NESWTF Project, MCI protested the City's designation of their company as "non-responsible" because of the potential damage the designation could do to MCI's reputation in the government and private project construction industry, and how it would negatively affect their future opportunities to participate and be awarded projects in competitive bidding situations, or to simply be hired to work on a project. Both Mr. Hicks and Mr. Eldridge testified that the City's designation of MCI as "non-responsible" would lead other potential employers, both governmental and private, to believe that MCI could not competently perform the tasks required to successfully complete a project, even though they have been a highly skilled, knowledgeable, experienced and successful company for many years. This argument also has merit. In all business ventures, one of the most important assets of a company is its reputation. A company is who is considered by their peers and by potential employers as dependable, skilled, knowledgeable, economical, innovative, has usually obtained that reputation as the result of hard work and sacrifice by the owners, supervisors and employees of the company over a period of many years. The Hearing Officer is well aware that any negative reference made about a company, especially if that negative reference is made by a former or potential employer, will probably result in the diminishment if not the loss of a company's good reputation. The diminishment or loss of a company's good reputation most always translates into loss of business and therefore loss of revenue. Like any other successful and longtime business such as MCI, one would expect the defense of their good reputation to be vigorous.

In reviewing the evidence provided to the Hearing Officer regarding this issue, the City did not initially provide any detailed explanation regarding the reasons for their designation of MCI as "non-responsible" for the NESWTF Project. In their first written communication to MCI regarding the designation, Purchasing Manager Todd Knittel issued a letter to Roger Williamson, Executive Vice President of MCI, dated July 24, 2017 (MCI Exhibits, Exhibit H), in which Mr. Knittel stated that MCI was designated as "non-responsible" because of MCI and the design team they proposed to use for the project "inadequate experience in Design-Build projects." Mr. Knittel also stated that MCI and their team did not have adequate "experience and capabilities ...for the project scope and goals." Finally, Mr. Knittel stated in the July 24<sup>th</sup> letter that MCI's "Key Personnel" lacked adequate experience and capabilities for the project scope and goals. In analyzing the plain language of this letter, it would be reasonable to think that the City believed MCI was not capable of performing any of the requirements of the project contained in the RFP. There is nothing in the July 24<sup>th</sup> letter that limits or specifies the City's determination of MCI as "non-reasonable" to their lack of prior experience as a Lead Contractor on a Design Build project. The language of this letter would lead a reasonable person to believe that MCI was a completely incompetent company, incapable of performing either design or build services. This belief, if accepted by MCI's peers in the industry, or by potential employers, would almost certainly negatively affect their reputation, which could result in the loss of work, and revenue.

However, the City provided additional responses to MCI's request for further information on the City's designation. Deputy City Attorney Brandon M. Collet provided a letter to MCI's legal counsel Jerry Mann, dated August 2, 2017, (MCI Exhibits, Exhibit M), in which Deputy Collet explained that the City's designation of MCI as "non-responsible" was chiefly based on their lack of prior experience as a Lead Contractor on a Design-Build project, and Lyles' extensive

experience as Lead Contractor on prior Design-Build projects. Deputy Collet pointed out to Mr. Mann that MCI's proposal and additional submitted documents established that MCI had no experience as Lead Contractor on a Design-Build project. In the "Conclusion" portion of the letter, Deputy Collet wrote, "...the City determined that MCI was non-responsible because MCI has no experience as the prime contractor on a design build project." In this letter, the City has made it clear that MCI was designated as "non-responsible" solely because of its lack of experience as a Lead Contractor in a Design-Build project, and for no other reason. This could not damage MCI's reputation in their industry, because it is the truth. MCI admitted as much in their documents provided to the City and in their testimony at the protest hearing. Additionally, the City provided MCI with a "City Evaluation Summary" (MCI Exhibits, Exhibit Q, page 648), which provided the criteria upon which both MCI and Lyles were evaluated, and a summary of the evaluation of each bidder in each evaluation category. As mentioned above, the City Selection Committee found both MCI and Lyles similarly qualified in most categories, except those that stressed experience of the company and of their "key personnel" as Lead Contractor in prior Design-Build projects they were involved in. These additional documents provided by the City make it clear that MCI's designation as "non-responsible" for purposes of the NESWTF Project is primarily based on their lack of experience as Lead Contractor on prior Design-Build projects, and not their general competence as a company in the project construction industry. The City also provided a report from the Selection Committee who made the selection of Lyles as the responsible, responsive bidder (MCI Exhibits, Exhibit Q, pp. 649-650). On the second page of the report (Id., page 650), the Selection Committee determined that MCI's, "...limited experience in Design-Build projects was found to be inadequate for the scope and goals of this project (the first design-build project of this magnitude for the City of Fresno)."

In conclusion, had the City's initial response to MCI's request for an explanation of the factors considered in their designation of MCI as "non-responsible" in regard to the NESWTF Project been their only response, MCI's contention that the City's designation should be reversed or removed would be justified. Purchasing Manager Knittel's July 24<sup>th</sup> letter to MCI was vague, and did not provide specific criteria upon which the City based their designation of MCI as "non-reasonable". It would have been reasonable for MCI to interpret this response to mean that the City did not believe MCI was competent to perform the basic design or construction services required for the Project. This is especially true since the crucial factor used by the City in designating MCI as "non-responsible", lack of experience as a "Prime" or "Lead" contractor in a Design-Build project, was not listed in the RFP, or any other related document. Had Mr. Knittel's response been the sole response from the City on this issue, MCI would have a reasonable belief that their reputation as a competent, knowledgeable, innovative and skillful company would be damaged by the City's designation, and MCI could reasonably have believed that the consequences of the damage to their reputation would be loss of job opportunities, and loss of revenue. However, the City's subsequent responses to MCI's request, specifically Deputy City Attorney Collet's letter to MCI legal counsel Jerry Mann, and the two additional documents provided to MCI, the City Evaluation Summary, and Selection Committee Report, make it very clear that the major factor, and perhaps the sole factor considered in the City's designation of MCI as "non-responsible" was their lack of experience as a "Prime" or "Lead" contractor in a Design-Build Project. MCI's lack of experience in this area is undisputed. Therefore, under the authority given to the City by the City Charter, the Fresno Municipal Code, and the provisions of the RFP for Bid File no. 3531, the City's designation of MCI as "non-

responsible” because of their lack of experience as a “Lead” or “Prime” contractor on a Design-Build project was not unjustified, and need not be reversed or rescinded.

**(2) Public Announcement of the Bid Cost Proposal:** MCI also objects to the City’s “public” announcement of each bidder’s cost proposal or proposal price. MCI contends that announcing each bidder’s cost proposal publically was highly unusual and suspect, and by doing so, the City had disclosed MCI’s proposed figure to Lyles, and in light of the City’s subsequent request for a “Last, Best and Final” proposal, provided an unfair advantage to Lyles when assembling their “Last, Best and Final” proposal.

On May 10, 2017, prior to the City’s request for a “Last, Best and Final” proposal, MCI provided a “Proposal Questions for Firm Fixed-Price Design-Build Project for Northeast Surface Water Treatment Facility Storage Tank Project” (“Request for Information”) to City Senior Procurement Specialist Laura Rapp (MCI Exhibits, Exhibit D). One of the questions asked was whether the bidders should provide the cost proposals in a separate envelope, so that, “‘scoring’ on non-price components will not be biased.” (Id.) According to Mr. Mann’s initial letter of appeal, dated July 21, 2017 (MCI Exhibits, Exhibit G), on or about May 12, 2017, in response to MCI’s question, City Staff stated that the bids would be read publically because the City wished the bidding process to be “transparent” (Id., page 440). At the hearing, both Mr. Hicks and Mr. Eldridge testified that publically announcing the bid cost proposal was practically unheard of in MCI’s experience. Mr. Eldridge also testified that he felt revealing the bid cost proposals became an issue when the City issued Addendum No. 5, which requested “Last, Best and Final” bids from MCI and Lyles. Mr. Eldridge contended that Lyles had an unfair advantage in calculating their “Last, Best and Final” bid because they knew what MCI’s cost proposal was.

MCI provided no statutory or case law which prohibits a governmental entity from publically announcing bidders’ cost proposals, nor could the Hearing Officer find any such prohibition in the RFP, Municipal Code, Charter, or any other statute. MCI’s contention seems to be that this is one of the factors that, along with others to be analyzed below, evidence significant flaws in the City’s bidding process regarding this Project, leading to deviation of accepted and published competitive bidding standards, resulting in the abuse of the process by the City and thereby requiring award of the Project to Lyles (MCI Exhibits, Exhibit G, pp. 440-442).

Unfortunately, the City failed to provide documentary or testimonial evidence regarding whether public announcement of bidders’ cost proposals was common for similar City projects, whether it was a general policy of the City to do so for all competitively bid projects, or whether there were special factors present in this particular Project that required a public announcement of the bid cost proposal; such as utilization of outside funding sources (e.g. Federal or State grants), or a particular type of project (Design-Build, as opposed to Design-Bid-Build).

In the absence of statutory or case law prohibiting the public announcement of bidders’ cost proposals on a project for a public entity, the Hearing Officer finds no evidence that the City’s bidding process for this Project was flawed, or that the City abused the bidding process by doing so.



**(3) City's Failure to Provide MCI With Their "Scoring" System to Evaluate the Bids:** MCI also objects to the City's failure to provide them with an explanation of the "scoring" system used by the City in evaluating each bidders proposal, and contends that the City's lack of response indicates that there was in fact no "scoring" system in place, making it impossible for MCI to determine how much "weight" each criteria would be given in evaluating the proposals. In their "Request for Information", dated May 10, 2017 (MCI Exhibits, Exhibit D), MCI requested that the City provide them with an explanation of the scoring system to be used by the City. According to their briefs, Senior Procurement Specialist Laura Rapp failed to respond to that request (MCI Exhibits, Exhibit G, p. 440). MCI contends that the City had no "scoring" system or any process to assign "weight" or "relative importance" to each criterion it would use to evaluate the proposals or bids. Further, MCI contends that California Public Contract Code § 22164 requires that all Design-Build projects subject to competitive bidding include the relative importance or "weight" assigned to each of the factors to be evaluated that are identified in the RFP. ("Supplemental Appeal of Mountain Cascade, Inc. Regarding City of Fresno Staff's Determination of Non-Responsibility (City of Fresno Resolution 2003-129)", dated July 31, 2017 ("MCI Supplemental Brief 1"), MCI Exhibits, pp. 17-18).

MCI does not dispute that there were criteria provided to the bidders in the RFP, although they did claim that the criteria were not clearly defined (Id, p.6). MCI's claim was that standard practice and California Public Contract Code §22164 require each criteria used to evaluate proposals or bids in a Design-Build project be assigned a "weight" or "relative importance", usually in the form of a percentage of the overall scoring or the assignment of a number of the total "points" available. However, the City's appeal brief ("Respondent's Brief", dated August 11, 2017 ("City Exhibit 1")) points out that pursuant to City Charter §1208, the City is not subject to any section of the California Public Contract Code unless specifically agreed to by ordinance approved by the City Council. Charter §1208(e) states, "The city shall not be subject to the California Public Contract Code, in whole or in part, unless Council agrees by ordinance." Fresno Municipal Code §4-114 also contains the same language. MCI provided no evidence that the City Council had approved an ordinance adopting Public Contract Code §22164, nor did MCI provide statutory or case law that established an exception to the City's authority to be subject to only those Public Contract Code sections it adopted by Ordinance. While neither party provided any statutory or case law authority on this issue, it would seem a reasonable assumption that in the absence of any such authority, a prospective bidder should consider all such factors or criteria listed in an RFP to be equally "weighted". Although MCI's past experience in bidding for projects of this type may have included a "weighted" scoring system relating to the criteria used to evaluate the bids received, MCI has failed to establish that the City was required in this instance to provide or abide by one.

**(4) Addendum No. 5 ("Last, Best and Final Bid") Not Included in the RFP:** MCI also protests the City's decision to provide for a "Last, Best and Final" proposal by issuing Addendum No. 5 to the RFP. MCI's protest stems from their belief that the "Last, Best and Final" proposal was not provided as an option in the RFP, and therefore unknown to prospective bidders at the time of the original bid. MCI also contended that the "Last, Best and Final" proposal was requested only after the proposal costs, and MCI's cost saving alternatives (relocation of the tank, and redistribution of the soil, among others) contained in their original proposal had been made public. MCI contended that these two issues were only a small part of

many other factors that evidenced the City's flawed bidding process, resulting in an unfair advantage to Lyles, and MCI being unjustly denied the award of the NESWTF Project (MCI Exhibits, Exhibit G, pp. 438-441; MCI Exhibits, Exhibit T, MCI Supplemental Brief 1, pp. 7-8).

The City stated that after the original proposals were opened on May 16 2017, City Staff "[I]dentified additional cost saving measures and requested proposers to submit a Last Best and Final proposal." (City Exhibit 1, p. 6). This request took the form of Addendum No. 5, "Request to Proposers to Submit a 'Last, Best and Final' Proposal" (MCI Exhibits, Exhibit E). According to the Addendum's Introduction page, the request for a "Last, Best and Final" proposal was directed by the City Manager to be issued (Id., p. 432). Both MCI and Lyles were invited to submit a "Last, Best and Final" proposal or bid, "[B]ased on the deduction and addition of specific items detailed in this Last, Best and Final, that meet the requirements and technical specifications of the RFP." (Id.). Neither the City's Appeal Brief nor their presentation at the protest hearing addressed MCI's protest regarding this issue. The City cited no language in the City Charter, Fresno Municipal Code or RFP for the NESWTF Project that authorized or provided for the issuance of a request for a "Last, Best and Final" proposal. Nor did the City elicit any testimony from City Staff at the protest hearing regarding whether a "Last, Best and Final" proposal request had been issued in any previous Design-Build or other City project, and if so, how frequently such a request had been issued. Nonetheless, a review of the RFP includes a section which addresses addenda affecting proposal specifications, and a requirement that the bidders be aware of any such addenda (MCI Exhibits, Exhibit A, Sect. 7.2, p. 39). A request for a "Last, Best and Final" proposal would seem to qualify under that section. Additionally, an attempt by the City to allow both bidders to formulate cost saving alternatives through a "Last, Best and Final" proposal process when both bidders' proposals were above the Engineer's estimate would be consistent with its stated objective of completing the Project within the City's allocated budget (Id., Sect. 1.2, p. 11). Although there is no specific authorization for the City to issue such an addendum, the City's project objectives and the language regarding addenda contained in the Project RFP does seem to allow for a "Last, Best and Final" proposal request.

**(5) City Staff allowed Lyles to submit a "Last, Best and Final Bid" After the Deadline:** MCI contends that the final proposal from Lyles upon which the City based their award of the NESWTF Project was a proposal that could only have been submitted as a result of the request for a "Last, Best and Final" proposal as provided in Addendum No. 5. The document provided by the City to MCI containing Lyles' "winning" bid was identical to the document provided by the City for the bidders' "Last, Best and Final" proposal (MCI Exhibits, Exhibit Q, p. 640). Yet MCI's witness Reed Van Duyn testified at the hearing that he submitted MCI's "Last, Best and Final" proposal on 8:45 A.M. on June 1, 2017 to the Purchasing Managers' Office at City Hall before the deadline, and was told by City Senior Procurement Specialist Laura Rapp on that day that she had not received, nor did she expect a "Last, Best and Final" proposal from Lyles. Mr. Van Duyn also testified that on the instructions of his supervisor, he remained at the Purchasing Manager's Office until well after the 9:00 A.M. deadline to confirm that no proposal from Lyles were submitted, and did not observe any proposal submitted. Additionally, on direct examination by Mr. Mann, Planning Director Carbajal testified that Lyles did not submit a "Last, Best and Final" proposal. MCI also contended that the Request for "Last, Best and Final" proposals contained language clearly stating that should a bidder fail to submit a "Last, Best and Final" proposal, "[I]t [would] be understood by the City to mean that the proposer wishes to be

considered on the basis of the pricing included in their original proposal.” (MCI Exhibits, Exhibit E, p. 432). Lyles original cost proposal submitted on May 16, 2017 was for \$13,242,700.00 (Id.) The cost proposal from Lyles accepted by the City and referred to in the City’s “Notice of Staff Determination of Contract Award- Posted July 14, 2017” (MCI Exhibits, Exhibit F) was \$11,758,200.00; a difference of \$1,484,500.00, and which was in direct conflict with the language of the Request for “Last, Best and Final” proposals issued as Addendum No. 5 of the RFP regarding the final cost proposal dollar amount.

However, the City argued that the Request for “Last, Best and Final” proposals also included language that allowed the City to negotiate with either MCI or Lyles to obtain the “best value” to the City relating to the Project. In the introduction section of Addendum No. 5, the City included the following language: “The term ‘Last, Best and Final’ is **not** intended to inhibit, in any way, the City’s rights and options to select the proposal that the City believes provides the best overall value to the City. Accordingly, the City reserves its rights to negotiate all terms and conditions of the agreement that may eventually result from the Request for Proposals process.” (MCI Exhibits, Exhibit E, p. 432) (Emphasis in the original). During the protest hearing, the City contended that the amended cost proposal from Lyles accepted by City Staff was the result of the negotiations between the City and Lyles as authorized by the language contained in Addendum No. 5. During his direct examination by Mr. Mann, Planning Director Carbajal testified that the City did negotiate with Lyles during the period of the City’s request for the “Last, Best and Final” proposal. It is noted that the sole document provided by the City to both MCI and the Hearing Officer evidencing the final cost proposal from Lyles that was accepted by the City is contained on a “Last, Best and Final” form provided by the City in Addendum No. 5., along with supplemental documents detailing the “Alternatives” proposed in their amended cost proposal (MCI Exhibits, Exhibit Q, p.640-641). Two other points related to the document are also noted by the Hearing Officer, and will be discussed in greater detail below. First, several of the cost saving alternatives provided on the Lyles’ amended cost proposal are virtually identical to the alternatives included in both the original proposal and “Last, Best and Final” proposal provided by MCI; specifically, the relocation of the storage tank, changing valve types, and removing the trees in the South portion of the wastewater treatment plant site. Additionally, the amended cost proposal from Lyles accepted by the City and provided by the City to both MCI and the Hearing Officer is unsigned.

As to MCI’s contention that Lyles’ amended proposal is in essence a “Last, Best and Final” proposal from Lyles accepted by the City after the published deadline, thus voiding the proposal and requiring the City to consider only Lyles’ original cost proposal, the Hearing Officer finds the contention unsupported by the evidence. The language of Addendum No. 5, requesting a “Last, Best and Final” proposal clearly states that, notwithstanding the request, the City was free to negotiate with either MCI or Lyles in order to meet the City’s objective to select the proposal that provided the best overall value, and the amended proposal from Lyles could reasonably be interpreted to be evidence of that negotiation, and not a “Last, Best and Final” proposal.

**(6) Lyles Amended Cost Proposal Contained Cost Saving Alternatives That Mirrored MCPs:** As briefly noted above, one of MCI’s contentions was that the amended cost proposal from Lyles ultimately accepted by the City contained alternative cost saving measures that were extremely similar if not identical to MCI’s cost saving alternatives contained in both their

original proposal submitted to the City on May 16, 2017, and their “Last, Best and Final” cost proposal, submitted on June 1, 2017. The chief similarities in the cost proposal alternatives were the relocation of the new storage tank, the changing of the valve types (proposed by MCI in the original cost proposal only), and the removal of the trees at the South end of the treatment plant site (proposed by MCI in the original cost proposal only). At the time of the submission of their “Last, Best and Final” proposal, MCI did state that they felt that it was unfair that Lyles was able to implement the storage tank relocation alternative and the other alternatives originally submitted by MCI as it was now being provided by the City as alternatives to address in the “Last, Best and Final” request for proposals. By the City providing these alternatives, Lyles had an unfair advantage to help reduce their amended cost proposal. MCI contended that the proof of the unfair advantage was contained in the documents provided by the City evidencing Lyles amended proposal. However, the Hearing Officer does not believe that the evidence is quite as convincing as does MCI. As to the relocation of the storage tank, that alternative was mentioned (as permission to change layout of storage tank and pond) by the City in the project specifications contained in the RFP (MCI Exhibits, Exhibit B, p. 271, Note 8). As to the other alternatives originally submitted by MCI and contained in the City’s request for “Last, Best and Final” proposals, the issue as to whether those alternatives were “unique” or a result of the “specialized knowledge” exclusive to those persons employed by MCI, the answer is not as easy. The Hearing Officer does not claim to be an expert on project construction bidding or design and construction, and would not blithely state that MCI’s idea to dig a second ponding basin in lieu of making the existing pond deeper, installing the new storage tank at a level that would not require hand rails, or changing of valve types would be obvious cost saving alternatives to any experienced company bidding on this project. However, Section 7.3 of the RFP states that the information bidders provide in their proposal to the City becomes public property upon submittal, unless that information is identified and marked, “PROPRIETARY” or “CONFIDENTIAL”. The section also prohibits the bidder from designating the entire proposal as proprietary. All information not marked as proprietary or confidential is considered public record under Section 7.3 (MCI Exhibits, Exhibit A, p. 38). None of the information submitted by MCI in their original cost proposal or their “Last, Best and Final” proposal were marked in that manner.

Under the terms of the RFP, the alternatives submitted by MCI in their original cost proposal or the “Last, Best and Final” proposal, were public record, subject to availability upon request. Therefore, the City’s disclosure of those alternatives to Lyles was not unfair or unlawful.

**(7) Lyles’ Amended Proposal was Submitted and Accepted Without a Signature:** As noted above, the only document provided to MCI and the Hearing Officer to evidence Lyles’ amended proposal to the City which was accepted and was to be recommended to the City Council to be awarded, was included in MCI’s Exhibits as Exhibit Q, pages 640-645. The document consisted of a bid proposal form, entitled, “RFP for Firm Fixed-Price Design-Build For NESWTF Storage Tank Project: Last, Best and Final Bid Proposal Form: Request for Proposal No. 5351”; a one page document which included short descriptions of “Deduct Alternate #1: Alternate Tank Location That Provides Cost Savings”, and “Alternate #2: Any other cost-saving alternatives”, which summarized the changing of valve types on several locations on the Project, and the removal of the trees on the South portion of the treatment plant site; a page depicting an overhead photo of the treatment plant site, with an overlay of the proposed storage tank

relocation site; a CAD drawing entitled, "Actuator Access Manhole Sample Design"; a one page CAD drawing entitled, "Chemical Injection Manhole Sample Design"; and a one page document depicting an overhead photo of the treatment plant site, with an overlay of the proposed storage tank relocation site and a shaded area showing the proposed section of trees to be removed. These documents were virtually identical to those documents provided by the City in Addendum No. 5, which was the request for "Last, Best and Final" proposals. The bid form filled out by Lyles in the amended proposal was in fact identical to the "Last, Best and Final" bid form provided by the City, including the title, "Last, Best and Final Bid Proposal Form". When MCI was provided with this document, it certainly would have been reasonable for them to assume that the City allowed Lyles to submit a "Last, Best and Final" proposal after the deadline. Especially since MCI's representative Reed Van Duyn testified at the hearing that when he submitted MCI's "Last, Best and Final" proposal he was told by Laura Rapp that Lyles had not submitted a "Last, Best and Final" proposal, and he personally confirmed that fact by staying at the appointed submittal drop off site well after the deadline time and saw no one submit any proposal. This was also confirmed at the protest hearing by the testimony of Planning Director Carbajal.

The one document missing from Lyles amended cost proposal was a signature page. Division V, Section 5.0 of the RFP requires that all proposals must include all forms provided by the City, completely filled out, and the proposal **must be signed by the proposer** [emphasis added] (MCI Exhibits, Exhibit A, p. 25). In the "Introduction" page of the Request for "Last, Best and Final" Proposals issued as Addendum No. 5, the City stated, "All terms, conditions and descriptions contained within the Request for Proposals No. 3531 remain in force unless otherwise noted (MCI Exhibits, Exhibit E, p. 432). Since the terms of the RFP required that the original proposal from the bidders be signed, the language in Addendum No. 5 would also require that the "Last, Best and Final" proposal, or any other proposal accepted by the City would require a signature from an authorized representative of the proposer. Both MCI's original proposal (MCI Exhibits, Exhibit C, p. 356), and their "Last, Best and Final" proposal (MCI Exhibits, Exhibit E, p. 436) were submitted with a signature page signed by Estimating Vice President and Secretary David Hicks as the City required. Lyles' Senior Vice President, Kenneth Strosnider signed their original proposal as well (MCI Exhibits, Exhibit Q, p. 562). The amended cost proposal, memorialized only by the documents provided by MCI in MCI's Exhibit Q, did not include a signature page. The Hearing Officer is unaware of any other document that may have been executed by the City and Lyles memorializing their final proposal that was ultimately accepted by City Staff. The City provided no such document, nor did it provide any signature page for the amended proposal, assuming one exists. Nor did the City provide any testimony at the protest hearing from Purchasing Director Knittel, Planning Director Carbajal, Senior Procurement Specialist Rapp, or any other member of City Staff regarding the existence or non-existence of such a signature page for Lyles' amended proposal as provided in MCI's Exhibit Q, or the existence of another signed agreement between the City and Lyles reflecting the final proposal accepted by the City. The City also failed to provide any statutory or case law that provided for an exception to their requirement that proposals be signed by an authorized representative; assuming of course that such an exception exists.

The absence of a signed cost proposal between the City and Lyles that reflects the final, amended proposal negotiated between and agreed to by the parties and accepted by the City is very

troubling to the Hearing Officer. The terms and conditions contained in both the RFP and the Request for “Last, Best and Final” proposals required, among other things, that those proposals be submitted with a signature from an authorized representative of the proposer. Failure to adhere to those terms and conditions were grounds for the City to reject the proposal. The signature requirement was met by MCI for both their original proposal and their “Last, Best and Final” proposal. Lyles followed the same requirement with their original proposal, but there was no evidence submitted by the City or by Lyles that the signature requirement was met with the amended proposal. Without evidence of a signed proposal, or in the alternative, statutory or case law providing an exception to the signature requirement, the very validity of the amended proposal and the awarding of the NESWTF Project itself is in question, and could be considered evidence supporting MCI’s contention that the City’s actions in accepting the final amended proposal from Lyles was contrary to their own bidding process and procedures.

**(8) MCI Should be Awarded the NESWTF Project Contract-** As discussed in greater detail above, MCI contends that the City should remove their “non-responsible” designation, and as a responsible bidder with the lowest proposal, MCI should be awarded the NESWTF Project. However, for reasons provided in section (1) above, the Hearing Officer believes that the City’s designation of MCI as “non-responsible” was made solely as a result of MCI’s lack of experience as a Prime Contractor for a Design-Build project. This reasoning was consistent with the evaluation criteria as provided in the RFP, and is undisputed by MCI. And the City provided MCI with a detailed explanation of their reasons for the designation. Since the City’s designation of MCI as “non-responsible” in this instance is reasonable, the contention that they should be awarded the NESWTF Project contract is without merit.

**Conclusion:** While MCI’s protest to the awarding of the NESWTF Project to Lyles was presented in their briefs and argued at the protest hearing in a number of separate contentions, which the Hearing Officer has attempted to address individually above, those crux of those contentions can be condensed, and addressed by answering two questions:

1. Was the City’s designation of MCI as “non-responsible” unjust, and inconsistent with the evaluation criteria contained in the RFP?
2. Was the City’s Bidding Process (at least as it applies to the NESWTF Project), flawed in some way?

The first question would include MCI’s contentions that the RFP did not require that a potential bidder have experience as a “Lead” or “Prime” contractor on a Design-Build project, and their contention that the evaluation criteria did not include consideration of a bidder’s experience as a “Lead” or “Prime” contractor on a Design-Build project.

The second question would encompass MCI’s objections regarding the public announcement of the “price” of the proposals, the lack of a “scoring system” to be used by the City in conjunction with the evaluation criteria, the lack of the City’s issuance of the Proposal for a “Last, Best and Final” Cost Proposal (Addendum No. 5) being included as an option in the RFP, allowing Lyles to submit an amended cost proposal (which looked very much like a “Last, Best and Final” proposal) after the deadline for a “Last, Best and Final” proposal had expired, and MCI’s

objection to the City providing Lyles with the same or similar alternative cost saving measures as MCI had submitted with their original cost proposal, in order for Lyles to submit an amended cost proposal.

After detailed review of the facts of the case and review of the pertinent law, and as thoroughly analyzed in Section (1) above, it is the Hearing Officer's determination that the City's designation of MCI as "non-responsible" for the NESWTF Project was justifiable, as the City clearly informed MCI that their lack of experience as a "Prime" or "Lead" Contractor on a Design-Build project was the chief if not sole reason for their designation, and not due to their lack of general competency as a design or construction company to perform such services. This designation was consistent with the criteria provided in the RFP; especially the criteria of "Experience and Capabilities of a Design/Build Firm" and "Experience and Capabilities of Key Personnel". Because the City was clear regarding their reasons for the designation, the Hearing Officer believes that MCI will not suffer any loss of reputation in their industry from their peers or potential employers, and will not lose any future business or revenue due to the City's designation.

As to the question regarding the City's Bidding Process, it is the Hearing Officer's determination that MCI's contentions relating to the City's Bidding Process being unlawful, unfair or unjustified are without merit. As analyzed and discussed in detail above, all of the City's competitive bidding requirements objected to by MCI in their protest were consistent with the law and City policies. The Hearing Officer could find no law or City policy prohibiting the City from making public the details of the proposals at the opening at bid opening. The City was not subject to section 22164 of the California Public Contract Code which requires governmental entities to assign "relative importance" or "weight" to each separate evaluation criterion used in a Design-Build project, therefore the City's omission of such a "weighted" system was not unlawful.

The issuance of a "Last, Best and Final" proposal, though not specifically authorized or mentioned as a possible option in the terms and conditions of the RFP is consistent with the City's stated objectives of the Project relating to completing the Project within the allocated budget. The Hearing Officer also determined that the proposal submitted by Lyles after the deadline for submission of "Last, Best and Final" proposals had expired, and which was ultimately accepted by the City was not a "Last, Best and Final" proposal, but an amended proposal authorized to be negotiated between the City and Lyles pursuant to the language included in Addendum No. 5.

The Hearing Officer then determined that MCI's contention that Lyles amended proposal ultimately accepted by the City contained cost saving alternatives virtually identical to those proposed by MCI in the original cost proposal, and that were provided by the City to Lyles unfairly and unlawfully was without merit. Section 7.3 of the RFP which required that any proprietary or confidential information contained in a cost proposal submitted by a bidder be designated as such by a stamp or typeface reading, "PROPRIETARY" or "CONFIDENTIAL" over that information. Any information in the proposal not identified this way can be considered public record. MCI did not mark any of the information contained in their proposal in that manner, and therefore their cost saving alternatives were public record under the terms of the

RFP. Finally, the Hearing Officer found that the only document provided to he and MCI evidencing Lyles amended cost proposal ultimately accepted by the City was not signed, and he policy and procedure of the City required a signature for all submitted proposals to be considered and accepted by the City. However, the omission of the signature was not due to a flaw in the City's bidding process and policies as contended by MCI, but an error in adhering to the requirements of City bidding policy and procedure by City Staff.

It is the lack of a signature on Lyles' final amended proposal that the Hearing Officer finds the most distressing aspect of this case. The Municipal Code, City Charter, and the terms and conditions of the RFP all require that certain standards be met and certain procedures followed. Most importantly, these standards and procedures are a result of the requirements of the Municipal Code, City Charter and RFP, and must be applied consistently and fairly to all, and in all situations. In competitive bidding of projects, the proposals, or "bids" are required to contain certain information, and in some cases, that information is required to be provided on certain forms provided by the City or other governmental entity. And in virtually all circumstances, regardless of what type of project, Design-Build, Design-Bid-Build, or whatever the case may be, that proposal must include a signature from an authorized representative of the proposer. For the NESWTF Project, both the original and "Last, Best and Final" proposal required a signature attached to the proposals. It would not be too unreasonable to believe that a signature is required not only for every project bid or proposal submitted for any City project, but for every document in which the City and any other person or entity agree to buy, sell, barter or provide goods or services of any kind. Without a signature on an agreement, in most cases it is difficult if not impossible to legally require that party to keep the promises memorialized in that particular agreement. The signature page for the NESWTF Project binds the proposer to the terms and conditions of the RFP, and allows the City to rely on the information submitted by the proposer. And if the proposal does not follow the terms and conditions of the RFP, or does not perform as promised, the City has the option to pursue one or more legal or equitable remedies. Unless the law provides for an exception, without a signature, the City may not have access to those legal or equitable remedies. Additionally, an unsigned agreement would be subject to legal attack by either party, or even a third party. Without a signature, the terms and conditions actually agreed to could be difficult if not impossible to determine legally should there be a dispute. There would always be the threat of one party or the other claiming that either an agreed upon term or condition was missing in the agreement, or a term or condition contained in the agreement was not agreed upon and added later without the other party's consent. These possible negative consequences and numerous others not mentioned here are the reason the City's bidding procedures require proposals to be signed. In this case, the proposal accepted by the City from Lyles was not signed, or if it was, no evidence supporting a signature being obtained was provided to the Hearing Officer. Should the City have a document signed by Lyles that reflects the terms and conditions of the amended cost proposal or can submit statutory or case law that provides for an exception to the RFP's requirement for a signed proposal to be valid, the Hearing Officer suggests that it be provided to the City Manager for distribution to the Council for their consideration.

While not as crucial an oversight, the Hearing Officer did find the fact that Lyles amended proposal was submitted to the City using the same form as that provided by the City for the "Last, Best and Final" proposal somewhat troubling as well. The form submitted by Lyles still



had the title, “Last, Best and Final” Bid Form at the top. While this issue could be considered relatively minor, it does lend itself to possible legal attack that could have been easily avoided by using a different bid form, or merely removing the “Last, Best and Final’ Bid Form” from the form’s title.

While the Hearing Officer does not believe that City Staff’s actions in this regard were carried out deliberately to prevent MCI from being awarded the NESWTF Project or to ensure that Lyles was awarded the Project, it is the public’s perception of these actions, and the possible negative consequences that may result from that perception that the Hearing Officer believes requires a somewhat drastic remedy. MCI’s citation of Schram Construction, Inc. v. Regents of the University of California (2010), 187 Cal.App.4<sup>th</sup> 1040, at 1059, may be relevant to this particular issue. The Schram court simply held that the mere appearance of impropriety such as favoritism undermines the integrity of the public bidding process, even though there is no affirmative, tangible proof that any such favoritism actually occurred. While the language of the RFP allows for the City to waive “deficiencies, informalities and irregularities in a Proposal and accept and review a non-conforming Proposal” (MCI Exhibits, Exhibit A, Section 7.4, p. 38), the combination of allowing Lyles to submit their amended proposal on a form that was entitled “Last, Best and Final Bid Form” (a minor error), and accepting the amended proposal without a signed signature page (a major and arguably fatal error) would in the opinion of the Hearing Officer, lead to a public perception of favoritism on the part of the City toward Lyles, which would undermine the integrity of the City’s competitive bidding process. It is the Hearing Officer’s belief that in order for the City to avoid this perception of favoritism, or impropriety in their public bidding process, the City Council should reject all bids, and direct the appropriate City Department Manager or Director to reinstate the bidding process for the NESWTF Project, and avoid the issues that occurred during this bidding process, thus bolstering the public’s trust in the City and the City’s bidding process, and avoid the possibility of costly and unnecessary litigation.

Of course, the Hearing Officer is well aware that the process or rebidding the Project will require additional time and money to achieve, and that both are limited resources, not to be squandered or used frivolously under any circumstances. The Hearing Officer is also aware that under the rules and procedures of Resolution 2003-129, the findings contained herein are only suggestions, and it is the City Council that makes the final administrative decision regarding this protest. It is the Hearing Officer’s hope that he has provided the Council with a thorough, balanced and accurate analysis of the facts and the applicable laws and regulations, so that they may be able to make an informed and wise decision.

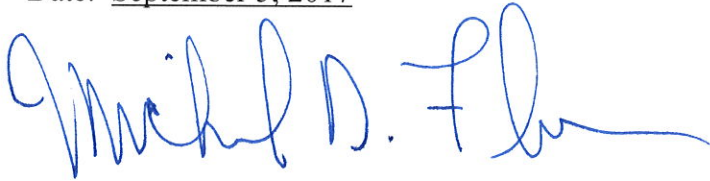
**Recommendation:**

For the reasons provided above, the Hearing Officer recommends that the City Council:

1. **DENY** Mountain Cascade, Incorporated’s request that the City remove or reverse the City’s designation that they are a “non-responsible” bidder relating to the NESWTF Project.
2. Find that the City’s Bidding Process for the NESWTF Project was in compliance with the City’s Competitive Bidding Policies, but the actions taken by City Staff as described above though inadvertent, resulted in the violation of those policies.

3. In light of the violations of the City's Competitive Bidding Policies, and to avoid any perception of unlawful or unfair conduct regarding the City's bidding process, the City Council reject all bids, and direct the appropriate City Department Manager or Director to reinstate the bidding process for the NESWTF Project.

Date: September 5, 2017



Michael D. Flores  
Independent Administrative Hearing Officer

cc: Todd Knittel, Purchasing Manager  
Michael Carbajal, Planning Manger  
Laura Rapp, Senior Procurement Specialist  
Jerry Mann, Esq. Legal Counsel, MCI  
Deputy City Attorney Brandon Collet