

MINUTES OF REGULAR MEETING  
SUGAR CITY COUNCIL  
THURSDAY, OCTOBER 11, 2018

Presiding: Mayor David D. Ogden  
Meeting Convened at 6:30 p.m.  
Prayer: Joy Ball  
Pledge of Allegiance

Present: Mayor David D. Ogden; Clerk-Treasurer Wendy McLaughlin; Councilors Brent Barrus, Vaun Waddell, and Joy M. Ball; Planning and Zoning Chairman Dave Thompson; City Building Inspector Cliff Morris; City Attorney Dylan Anderson; The Standard Journal Reporter Lisa Smith; Dome Technology Project Managers Jason South and Daren Wheeler; DN Tank representative Kevin Peacock; Forsgren Associates Randy Johnson; Citizens Kaira Briggs, Nicholas Christensen, Matt Ja... of Rexburg, Barbara Lusk, and Catherine Nielsen. Councilman King was excused.

**MINUTES:** Mayor Ogden asked if there were any corrections to the minutes of the regular meeting held on Thursday September 27, 2018. Each councilman had a copy of the minutes prior to the meeting. It was moved by Councilman Barrus and seconded by Councilman Waddell to accept the minutes; motion carried.

**RECONCILIATION REPORTS:** Wendy presented the September reconciliation reports for the General Fund. It was moved by Councilwoman Ball and seconded by Councilman Waddell to accept the September reconciliation reports for the General Fund; motion carried. Wendy presented the September reconciliation reports for the Utility Fund. It was moved by Councilman Barrus and seconded by Councilwoman Ball to accept the September reconciliation reports for the Utility Fund; motion carried.

Wendy presented the current bills in the amount of \$430,661.54. Mayor Ogden reported that MD Construction had completed the Moody water line. Just over \$330,000 will be paid to them from the Idaho Department of Environmental Quality (DEQ) water bond. It was moved by Councilman Waddell and seconded by Councilwoman Ball to pay the current bills, together with all regular October bills; motion carried.

The council reviewed the balance sheet and year end budget totals and asked questions about those items that were over the allocated budget ; i.e.

- **Employee insurance:** \$2500 over \$5,064 – Wendy explained since dental, vision, and the supplemental insurance rates did not go up that it was more of a budget estimate problem
- **Code Enforcement Officer:** \$20,000 over \$6,073 – Mayor Ogden commented that Becky Edwards is working at making the necessary changes to reduce her hours to meet the \$15,000 budget for 2018-19.
- **Attorney Fees:** \$40,000 over \$37,519 – Councilman Barrus reminded the council of the large increase in attorney fees.

**PLANNING AND ZONING COMMISSION REPORT:** Dave Thompson reported that they did not have a quorum again for their scheduled Thursday, October 4 meeting. They will continue working on the items and report next meeting.

**P&Z Meeting Procedure:** Mr. Thompson did report that the commission will incorporate prayer and a public comment period into their regular meetings.

**Holiday Schedule:** Mr. Thompson wondered if he would be able to get a quorum for the holiday months of November and December. A public hearing could be set at the next meeting for the city zoning regulations revisions to 9-1-3 and 9-1-4.

**P&Z Chairman:** The commission will not call a Planning and Zoning vice-chair. Rather Mr. Thompson will appoint a vice-chair as needed.

**Final Plat Process:** The commission has decided to revise the final plat process following several mistakes made in the final administrative process. They will submit their suggestions in the next few weeks.

**Land Use Schedule:** The commission is looking into adopting the international and US definitions ~~for cottage homes~~ to help their work go forward.

**TURF FARM EQUIVALENT RESIDENTIAL UNIT (ERU) RATE:** The mayor met with Forsgren Associates Randy Johnson and City Engineer Dick Dyer to come up with a user rate which applied more to heavy users such as a turf farm. The current schedule is good for residential users but may be skewed against heavy users. The engineers will review the process and come up with a more equitable structure specific for unusual users within the city.

**MAYOR'S REPORTS:** The mayor reported on the following items:

**School District Request to Close Cutler Avenue Report:** The school district will make a formal request to the city to close Cutler Avenue just west of the junior high. The school will pay for all changes.

**Water Tank Bid Update:** The city received its second protest on the water tank bids. More is reported below.

**Water Line Update:** The water line addition from Moody up 7<sup>th</sup> W and connecting into 5<sup>th</sup> S is now complete. The 5<sup>th</sup> South line installed by Developers Ryan and Jeff Lerwill still needs to be pressurized and tested but is expected to be complete within the next week or so.

**CONSENT AGENDA:** City Clerk-Treasurer McLaughlin defined and explained a "Consent Agenda" and asked the council if they thought using one would be beneficial to our council meetings. The council felt it was not needed.

**EMAIL AND SECURITY COMPUTER UPDATES:** Due to a conversation with Dave Thompson, the mayor became concerned over use of personal emails for city business. The cost can be prohibitive. Dave Thompson and Spencer Cook will look into some viable options the city could use and report back to the council.

**CITY LOGO FOR COUNCIL CHAMBER:** The mayor asked the council to consider displaying the city's new logo in the council chamber. The large mostly bare wall behind the bench could use a nice presentation of the city logo and statement. The mayor will do some research and get some ideas for the council.

## **EXECUTIVE SESSIONS:**

7:30 P.M. It was moved by Councilman Barrus and seconded by Councilman Waddell, pursuant to Idaho Code 74-206 1 (f), "Legal counsel on pending or imminently likely litigation, not merely when legal counsel is present," and Idaho Code 74-206 1 (a), "To consider hiring a public officer, employee, staff member or individual agent" and to move into executive session. The mayor called for a roll call vote:

Those voting aye: Councilors Barrus, Waddell, and Ball

Those voting nay: None

Councilman King was excused.

Thereupon the mayor declared the motion passed with no less than two-thirds vote.

8:10 P.M. The executive session ended for Idaho Code 74-206 1 (f) and the executive session for Idaho Code 74-206 1 (a) convened. No decisions were made and there was no deliberation.

8:35 P.M. The executive session ended for Idaho Code 74-206 1 (a) and the regular council meeting reconvened. No decisions were made and there was no deliberation.

**HIRING OF PUBLIC WORKS ASSISTANT:** The council decided to wait and revisit the hiring of a public works assistant until next council meeting when Councilman King can be involved. Councilman Barrus will be out of town but will leave his suggestions with the mayor. There were 31 resumes submitted, 7 interviews conducted, and three top picks presented to the council.

**WATER TANK AWARD:** The council decided to continue with the award to Dome Technology despite the 2nd protest from DN Tanks. Forsgren Associate Randy Johnson and City Attorney Dylan Anderson thoroughly reviewed the protest and recommended that the city continue with the award to Dome Technology as the lowest bidder (see Attachment #1). The items DN Tanks brought up were centered on an additional addendum to the original bid items but which did not affect scope, price or schedule (see Attachment #2). Points the council considered were:

- City engineer recommendations – Dome's addendum acknowledgement informality, failure to include experience, and failure to list a subcontractor were immaterial and did not affect scope, price, or schedule.
- City attorney recommendations – If informalities were waived for both bids, then both bids are responsive. A rebid would be expensive and Dome Technology is the low bidder.
- Public interest – Because the project had already been rebid, the council was concerned about the time and money it would take to rebid the project again. The council worried about the continued problems with bids, and felt that the project needed to get started. They did not feel it was in the best interest of the public to go through the rebid process again, and risk increased cost and further delay.

**MOTION:** It was moved by Councilman Barrus and seconded by Councilwoman Ball to continue with Dome Technology and adopt Mr. Johnson's and Mr. Anderson's memo in the best interest of the city; motion carried.

**DEPARTMENT REPORTS:**

**COUNCILMAN BARRUS:** No report  
**COUNCILMAN WADDELL:** No report  
**COUNCILWOMAN BALL:** No report.  
**COUNCILMAN KING:** Excused.

Meeting adjourned at 8:55 p.m.

Signed: \_\_\_\_\_  
David D. Ogden, Mayor

Attested: \_\_\_\_\_  
Wendy McLaughlin, Clerk-Treasurer

**MEMO**

TO: Sugar City City Council  
FROM: Dylan Anderson  
DATE: October 11, 2018  
SUBJECT: Regarding Protest over awarding of Water Tank Contract.

This is the second protest on this project. This protest is from DN Tank. As a review, if such a protest is submitted, the project is automatically stayed pending a response from the governing board. Idaho Code 67-2805 (2)(a)(x) states:

If any participating bidder objects to such award, such bidder shall respond in writing to the notice from the political subdivision within seven (7) calendar days of the date of transmittal of the notice, setting forth in such response the express reason or reasons that the award decision of the governing board is in error. Thereafter, staying performance of any procurement until after addressing the contentions raised by the objecting bidder, the governing board shall review its decision and determine whether to affirm its prior award, modify the award, or choose to re-bid, setting forth its reason or reasons therefor. After completion of the review process, the political subdivision may proceed as it deems to be in the public interest..

The Council now has the responsibility of reviewing the decision to award Dome Technology the project, and may affirm its prior award, modify the award, or choose to re-bid.

The Mayor asked that I provide an opinion as to the issues raised by this protest. There is no doubt that this is a competitive project, as both companies have now protested an award to their competitor. It should also be evident that the bidding process is highly technical and abounding with opportunities for error. For this reason, the bidding process allows the City some discretion on whether to waive an error or omission if it does not involve the cost, time or

change in work. The protest is accurate in stating that the City cannot waive a relevant statute.

The statute states that:

For a category A bid, the political subdivision may only consider the amount bid, bidder compliance with administrative requirements of the bidding process, and whether the bidder holds the requisite license, and shall award the bid to the qualified bidder submitting the lowest responsive bid.

Idaho Code § 67-2805(2)(a)

Under this code, the City may only consider the amount bid, compliance with administrative requirements, and whether the bidder holds the requisite license. The City does have some discretion on whether the bidder complied with the administrative requirements as it is the entity that dictates what those requirements are. Furthermore, the bid documents grant the City the right to waive informalities that do not involve the cost, time or change in work. Article 19.01 of Instruction to Bidders for Construction Contracts. A caveat to this discretion is that the City cannot choose to waive one bidders informalities, and hold another bidder accountable. If the City waives informalities of one, it should waive them of another. The City chose to do that in this case.

The essence of DN Tank's protest is that the informalities waived by the City did affect cost, time, or change in work. The technical aspects of these issues are crucial, and the analysis done by the engineer appears to be spot on. I refer the council to the engineers interpretation of whether the waived informalities involve a change in price, time, or a change in work. I will highlight a few of the legal issues here.

**1. DN Tank claims the Dome Technology's bid was nonresponsive, by failing to acknowledge Addendum No. 1**

DN Tank argues that Addendum No. 1 changes the cost, time or work of the project, and is not waivable as an informality.

DN Tank points out two occasions where Addendum No. 1 changes the cost, time or work of the project. The first is that the “interior coating shall be NSF 61 approved.” The Second is that Addendum No. 1 added a requirement for a “Hatch access from inside the tank will include for each hatch a ladder from tank floor to hatch as identified in the Plans.”

As Mr. Johnson has pointed out in his letter to the Mayor, both requirements were contained in the bid documents, and are clearly required. Addendum No. 1 did not change the work, time, or cost. The protest claims that if a bid could be withdrawn due to a mistake, then such a mistake is inherently material. *Westway Const., Inc. V. Idaho Transp. Dept.*, 139 Idaho 107 Idaho (2003). Using that analysis, Dome Technologies would not be allowed to withdraw their bid for “mistake” by claiming that they did not see the Addendum requirement for: 1) interior coating must be NSF 61 approved; and 2) a ladder from tank floor to hatch because both of those requirements are clearly contained in the bid documents. Whether Dome Technologies saw the Addendum or not, the requirement of NSF 61 approved interior coating and an interior ladder would be required because they were outlined in the bid documents. I believe that this is an informality that the City can waive because Addendum No. 1 just reiterates what is already in the bid documents.

DN Tank contends that because the ladder was not included in Dome Technology’s drawings, they have no clear intent to be bound to Addendum No. 1. This is only relevant if Addendum No. 1 included new requirements. It does not. Furthermore, as Mr. Johnson points out, the preliminary drawing obtained with each bid are not intended to be final, and there are many details not included in DN Tank’s bid drawing.

**2. DN Tank also contends that Dome Technology’s Bid is Nonresponsive as it failed to include any experience.**

Mr. Johnson give a valid explanation of this, but there is case law on this issue, and because the City chose to follow Category A of Idaho Code § 67-2805, it cannot legally consider experience. As noted above, Idaho Code § 67-2805(2)(a) only allows the City to consider the amount bid, compliance with administrative requirements, and whether the bidder holds the requisite license. The Idaho Supreme Court ruled that if a City undergoes a bidding process under Category A, it cannot reject a bid because the bidder “did not possess the necessary experience, even where it was given notice of such qualification.” Hillside Landscape Cons. v. City of Lewiston, 264 P.3d 388, 393 (Idaho 2011)

**3. DN Tank claims that Dome Technology’s bid is nonresponsive as it failed to list a design subcontractor as well as other subcontractors.** After speaking with the engineers on this issue, I endorse the explanation given by Mr. Johnson in his letter to the Mayor.

Ultimately, the Council must choose to either continue with the award to Dome Technology, change the award to DN Tank, or rebid the project.

If the Council chooses to confirm the award to Dome Technology, as the project engineer recommends, there is a risk that DN Tank would file suit. However, given the explanation of the engineers, the current case law, and that Dome Technology was the low bidder, continued litigation would not likely result in punitive actions against the City, but would have some cost to defend.

If the Council chooses to award to DN Tank, there is a risk that Dome Technology would protest. It would be harder to justify awarding the project to DN Tank because it was not the low bidder. As highlighted in Mr. Johnson’s letter, DN Tank also had informalities. Because we do not feel that Dome Technology’s informalities change the work, price, or time, it is hard to justify waiving DN Tank’s informalities, and not Dome Technology’s informalities.

If the Council chooses to rebid the project, the risk of protest is eliminated for now. However, there are costs with rebidding the project, not to mention the ensuing winter. Furthermore, the project has been rebid twice and every bid has had informalities. There is no guarantee that bidding the project again will cure this trend.

Because it is expensive to rebid, and because Dome Technology is the low bidder, I join with the project engineer in recommending the award continue with Dome Technology.



101 S. Capitol Boulevard, Suite 1900  
Boise, ID 83702  
T. 208.389.9000  
F. 208.389.9040  
www.stoel.com

TAMARA L. BOECK  
D. 208.387.4256  
tami.boeck@stoel.com

October 4, 2018

**VIA UPS OVERNIGHT COURIER**

**VIA EMAIL (WENDY@SUGARCITYIDAHO.GOV)**

Sugar City, City Hall  
10 East Center Street  
Sugar City, ID 83448

**Re: Protest of Award of Bid for Sugar City Water Tank, Bid Request II; City of Sugar City Water System Improvements Schedule II (Water Storage Tank) – Project No. 01-17-0181 - Impacts of Addendum No. 1 to September 13, 2018 Bids**

To Whom It May Concern:

Pursuant to Idaho law, including I.C. §67-2805(2)(x), our client DN Tanks, Inc. hereby submits its protest to the award of the bid on the above Project to Dome Technology, Inc., based on the City's letter to DN Tanks' dated September 28, 2018<sup>1</sup>.

The bases for DN Tanks' protest are on the following grounds:

**1. Summary Background**

On September 13, 2018, the City of Sugar City (Owner) received bids for the City of Sugar City Water System Improvements Schedule II (Water Storage Tank) project (Project). Bids were received from two (2) Bidders: Dome Technology, LLC and DN Tanks, Inc. At the bid opening, the two bids received for this Project were to be publicly opened and read aloud in accordance with the Contract Documents.

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<sup>1</sup> The City's letter was postmarked from Salt Lake City, September 29, 2018.

## **2. Bid Award Authority Mandates That A Bid Be A Responsive Bid**

Idaho has always required bids to be responsive to the solicitation. "Where plans and specifications are left to the discretion of the individual bidder, submitted with his bid, the effect is to stifle competition, and letting a contract under such circumstances would constitute a violation of the requirement to let the contract to the lowest bidder. It is only where a responsible bidder complies with the advertised terms that the contract may be awarded to him." *Parks v. City of Pocatello*, 91 Idaho 241, 245 (Idaho 1966) (emphasis added). "Since appellants proposal failed to meet the terms of the advertisement for bid, appellants...did not attain status as bidder....Consequently, the City Commission was under the legal duty to reject appellants proposal...." *Id.* (emphasis added).

In the applicable statute and standards at issue here, in order to receive an award, a prospective bidder must likewise comply with the "administrative requirements" of the bid process and submit a "responsive" bid. I.C. §67-2805(2)(a). And, a city has "... no right to waive compliance with..." mandatory bidding statutes. *See, Neilsen & Co. v. Cassia and Twin Falls County Joint Class A School District 151*, 96 Idaho 763,766 (Idaho 1975).

Additionally, the relevant statute reflects that simply because a bidder's total number is lower, it may not be the "low bidder" as required by law, but may only be the "apparent low bidder". I.C. §67-2805(2)(a)(ix). The term "apparent low bidder" has been defined as "A party that bids the lowest at first glance", *Black's Law Dictionary*, Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. (October 3, 2018), and as an "unvetted lowest bidder: a bidder for a contract who has submitted the lowest bid but who has not yet been verified as having complied with other bid requirements". *Encarta World English Dictionary, Microsoft Corporation* (North American Edition 2009).

## **3. Dome Technology's Bid Was Nonresponsive, by Failure to Acknowledge Addendum No. 1 (a substantive bid requirement)**

Upon examination of Dome Technology's bid, the first to be opened, Randall Johnson of Forsgren Associates, Inc. (Forsgren), the Engineer for the Owner, noted publicly that there was an issue in Dome Technology's bid. More specifically, Dome Technology failed to acknowledge receipt of Addendum No. 1. On Page 1 of Dome Technology's Bid Form, Article 3 Bidder's Representations, the acknowledgement of Addenda, where the bidder is to acknowledge addenda, Dome Technology wrote "N/A" (i.e. "Not Applicable"). This requirement to acknowledge receipt of all addenda by listing the addendum number and date is in accordance with Instructions to Bidders for Construction Contracts, Article 13 Preparation of Bid, Paragraph 13.09.

The Engineer stated publicly that since Dome Technology did not acknowledge Addendum No. 1, the Engineer would not be reading its pricing. The Engineer asked the two Dome Technology representatives present at the bid opening why it did not acknowledge the addendum. The representatives stated that they remembered *seeing Addendum No. 3* for the Well Station bid, but none for the subject Water Storage Tank bid. This verbal admission by the Dome Technology employees confirmed that it did not incorporate into its bid the additional scope of work items issued in Addendum No. 1. Dome Technology had, however, received notice of the Addendum via email at the same time as did DN Tanks. *See Exhibit 1* (email dated September 11, 2018 from Eva Wright of Forsgren Associates addressed to Cameron High of Dome Technology and Lynda Banks of DN Tanks issuing Addendum No. 1 to the bidders).

**a) Addendum No. 1 Is Material, Including as to Cost and Scope**

Addendum No. 1 issued on September 11, 2018, was not inconsequential, but rather added several new scope of work items, and provided a written copy of the Pre-bid meeting minutes clarifying scope related items outlined in the Contract Documents. The following is a summary of the substantive scope related changes issued in Addendum No. 1:

- Contract Documents, Specification Section 13000, Paragraph 2.1.4 was amended to add the requirement that the “interior coating shall be NSF 61 approved”. The original Contract Documents published did not require the interior coating to be NSF 61 approved. This was a design requirement change added by Addendum No. 1.
- Contract Documents, Specification Section 13000, Paragraph 1.1.C.2 was amended to add the requirement “*Hatch access from inside the tank will include for each hatch a ladder from tank floor to hatch as identified in the Plans.*” This additional scope of work item required the bidders to include in their bid the price to furnish and install two (2) interior ladders, one at each of the two roof hatches. While the contract specifications and drawings did indicate the requirement for two (2) roof hatches, *neither* the drawings nor the specifications provided any indication of the requirement for *interior* ladders at the roof hatch locations. This information was an additive change to the scope, and could only have been obtained through the review of Addendum No. 1, and is a material bid change. The result of this new and material scope of work requirement caused an increase of \$14,356 in DN Tanks’ bid price for Bid Item 24 - Furnish and Install Reservoir Overflow Piping and Appurtenances. *See Exhibit 2* (Bid Tabulation, reflecting DN Tanks’ bid price for Bid Item 24 increased by \$14,356 from \$23,353 on its May 15, 2018 bid to \$37,709 on its September 13, 2018 bid). In contrast, but consistent with the “N/A” and the material bid error of Dome Technology’s bid, its price went from \$36,000 on its May 15, 2018 bid to \$22,000 on its September 13, 2018 bid, for a decrease of \$14,000 (again consistent with “N/A”), despite a material scope increase. As shown

Sugar City, City Hall

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on the attached Bid Tabulation, the net delta of not including the interior ladders for Bid Item 24 between Dome Technology, LLC's bid and DN Tanks, Inc.'s bid is \$28,356, which omission reflects a 3.6% material error in the Dome Technology bid for this item alone.

Of course, as the Idaho Supreme Court has stated, "It was manifestly the purpose of the Legislature, in enacting the [statutes], to procure competitive bidding for contracts for making public improvements of the kind here under consideration, and thereby to safeguard public funds and prevent favoritism, fraud and extravagance in their expenditure.... *Seysler*, 29 Idaho at 416-17, 160 P. at 263, *recently quoted in J & J Contractors/O.T. Davis Const., A.J.V. v. State*, 118 Idaho 535, 536, 797 P.2d 1383, 1384 (1990)." *See Scott v. Buhl Joint School Dist. No. 412*, 123 Idaho 779 (Idaho 1993).

**b) The Failure to Include Addendum No. 1 Scope Is Significant Under Idaho Law, and Cannot Be Waived As Dome Technology Admitted It Was Not Included, and the Bid Documents Do Not Reflect Its Intent to Be Bound**

A part of the purpose of the statutory process, therefore, is to first determine if the bidders are "responsive" to the bid, or whether there is a material error in the bid which would cause it to be rejected as nonresponsive or capable of being withdrawn as a mistake. *See Parks v. City of Pocatello*, 91 Idaho 241 (Idaho 1966), and I.C. §54-1904B and §54-1904C. If a bid could be withdrawn due to a "mistake" recognized under I.C. §54-1904B and C, then such a mistake is inherently "material" and also cannot be waived. *See e.g., Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107 (Idaho 2003). And, if the bidder fails to promise the construction services that the bidding documents seek, then there is a fatal flaw in the bid, and it must be rejected. *See National Coach Corp. v. State Board of Control* (1982) 137 Cal. App.3d 750.

In determining what was "clerical" or "material," the Idaho Supreme Court has agreed that even a 6% percentage of error in comparison to the total bid (let alone an admittedly missing scope element of the bid), was plainly material. *See e.g., Boise Jr. College Dist. v. Mattefs Const. Co.*, 92 Idaho 757 (Idaho 1969). *See also, e.g., "IDAPA 074. MISTAKES, 03. Mistakes Discovered After Opening But Before Award"*, as illustrative of the appropriate handling, consistent with Idaho law (*italics added*):

This subsection sets forth procedures to be applied in three (3) situations described below in which mistakes are discovered after opening but before award. (3-15-02) a. *Minor Informalities. Minor informalities are matters of form rather than substance evident from the bid or proposal document, or insignificant mistakes that can be waived or corrected without prejudice to other submitting vendors, that is, the effect of the mistake on price, quantity, quality, delivery or contractual conditions is not significant.* The buyer may

waive such informalities. Examples include the failure of a submitting vendor to: (3-15-02) i. Return the required number of signed submissions. (3-15-02) ii. Acknowledge the receipt of an amendment, but only if: (3-29-17) (1) It is clear from the submission that the submitting vendor received the amendment and intended to be bound by its terms; or (3-29-17) (2) The amendment involved had a negligible effect on price, quantity, quality or delivery. (3-29-17) ...

Thus, unless it is clear from the bid that the bidder intended to be bound, or an addendum/amendment has only a negligible effect on price, quantity, quality or delivery, failure to acknowledge that amendment is material and not waivable.

**i) No Intent, nor Clear Intent, To Be Bound to Addendum No. 1 in Dome Technology's Bid**

It is apparent from the Dome Technology bid documents that it did not know of the Addendum No. 1 to include it in the bid (as it admitted at the bid opening), and therefore that it could not intend to be bound by its terms (and of course it cannot be "clear" intent to be bound where Dome Technology already acknowledged it failed to include the scope and therefore pricing associated with the changes incorporated into the Contract Documents by Addendum No.1).

Additional evidence of Dome Technology's material error, and nonresponsive bid:

- See **Exhibit 3** – Dome Technology's Drawing 310.01 – Tank Section and Details which *fails* to indicate interior ladders added by Addendum No. 1 which only reaffirms the interior ladders were not included in their bid price. These documents were required to be submitted as part of the bid submission.
- See **Exhibit 4** – DN Tanks' Drawing S1 – Floor and Dome Appurtenance Layouts and Drawing S5 - Floor and Dome Appurtenance Details depict the interior ladders added by Addendum No. 1 and identify the quantity of two (2) required by the addendum. Please refer to Detail 4 on Sheet S5 Interior Ladders which depicts the 304 SS Interior Ladders. Detail 4 also depicts OSHA required fall prevention devices be installed on ladders with an unbroken length of 20' or greater. As a safety design standard, DN Tanks has been detailing and installing fall prevention devices on all ladders to protect workers when accessing its tanks. These documents were required to be submitted as part of the bid submission.
- See **Exhibit 5** – Contract Specification 13000 Prestressed Water Storage Tank, Paragraph 2.15 Appurtenances and Contract Drawings C200, C300, and C301 do not include the requirement for interior ladders. This additional scope of work requirement to add interior ladders was only added to the Contract by Addendum No. 1.

**ii) Material *Per Se* Effect, Not Negligible, As To Price and Scope  
By Addendum No. 1**

As discussed above, even the single discrepancy of the omission of the interior ladders reflects a non-negligible discrepancy in the Dome Technology bid, which is therefore material. *See e.g., Parks, Id. and Boise Jr. College Dist. v. Mattefs Const. Co., 92 Idaho 757 (Idaho 1969).*

Also important to the bid was the inclusion of the Pre-bid meeting minutes that were issued as part of Addendum No. 1 and were incorporated as part of the Contract Documents. Although the information included in the meeting minutes was verbally discussed at the Pre-bid Meeting where both Dome Technology and DN Tanks were present, Addendum 1, paragraph B.2 states that “clarifications or interpretation not made in writing through an addendum shall not be used by the Contractor in preparation of any bid proposal.” The meeting minutes provided in Addendum No. 1 detailed several scope of work clarifications including: the project sign, testing requirements required by the Contractor, and schedule coordination with the well house contractor regarding the inability for the schedule II contractor to complete backfill if the tank is complete prior to the schedule I well house.

It is also important to note that while at the Pre-Bid Conference Dome Technology asked a number of the questions responded to in section I of Addendum 1, including question 4.a “Does City provided testing cover everything required by code for the construction”, question 5, “How does the tank contractor complete back fill around tank,” and question 9 regarding the volume provided in Bid Item 21. This is counter to the statement Mayor David Ogden noted in an email to the Sugar City Councilors dated Wednesday September 26, 2018 “Since the addenda to the bid was to answer DN Tanks questions, and Dome Technologies had no questions, it is believed that the addenda would have had no effect on the price of the project, therefore, we must assume that their prices are acceptable to them, based on the bid documents, and again award to the low bidder.” *See Exhibit 12* (Mayor Ogden email September 26, 2018 to Councilors). These scope of work clarifications incorporated by Addendum No. 1, and made part of the Contract Documents, resulted in schedule and cost implications for the Bidders which DN Tanks incorporated in its September 13<sup>th</sup> bid. As Dome Technology admittedly did not evaluate the Addendum No. 1, it could not have addressed any of these issues and the cost and schedule implications, creating an ability of Dome Technology to seek a withdrawal of its bid by “mistake”, and giving it an unfair advantage in the bid process which is diametrically at odds with Idaho law.

A review of DN Tanks’ September 13<sup>th</sup> bid price in the amount of \$795,079 reflects that it includes the additional scope of work items included in Addendum No. 1, as required by the bid documents, and therefore it reflects a nominal overall price reduction of \$21,590 from DN Tanks’ May 15<sup>th</sup> bid. This represents a 2.66% reduction in price. Significantly however, Dome

Technology's September 13, 2018 bid pricing reflected a reduction of \$129,984 from its original bid submission on May 15, 2018. This represents a 14.7% reduction in price. This significant reduction in price is evidence of, and can only be rationally reflective of Dome Technology's failure to acknowledge or incorporate the costs and schedule requirements included in Addendum No. 1. See **Exhibit 2** (Bid Tabulation).

Although we presume that Dome Technology will claim it will abide by its bid, public bidding law does not support giving the bidder a role in that decision. *Valley Crest Landscape, Inc. v City Council* (1996) 41 Cal.App.4th 1432 (If the low bidder is given any role in deciding whether the irregularity will be waived, then that bidder has an unfair competitive advantage: the advantage of a "last look" at all bids, accompanied by permission to back out.). See also *MCM Constr. v City & County of San Francisco* (1998) 66 Cal.App.4th 359; *Ghilotti Constr. Co. v City of Richmond* (1996) 45 Cal.App.4th 897; *Monterey Mechanical Co. v Sacramento Reg'l County Sanitation Dist.* (1996) 44 Cal.App.4th 1391.

#### **4. Dome Technology's Bid Is Nonresponsive As It Failed to Include Any Experience, and This Failure Is Not Waivable By Reference To Unrelated Projects**

An additional basis for the City to reject Dome Technology's bid is the complete lack of compliance with the bid documents related to the identification of experience. After the City Engineer's review of Dome Technology's bid, it was stated by Randall Johnson of Forsgren in his September 24, 2018 email communication to the Mayor of Sugar City, ID that Dome Technology's experience meeting Specification Section 13000, Paragraph 1.2.A.4 was not fully documented in their bid submittal. See **Exhibit 6** (email from Randall Johnson dated September 24, 2018). Mr. Johnson opined that this Dome Technology omission is of no consequence and that he had documentation from another bid that Dome Technology meets the experience requirements for this Project.

The determination that this Dome Technology omission is of no consequence is unsupported, as a review of Dome Technology's bids on two other Idaho projects shows that Dome Technology does not meet the experience requirements. DN Tanks has reviewed Dome Technology's bid submittal package for two recently bid water storage tanks with Forsgren in ID – Shelley, ID and the original Sugar City, ID bids. For the Shelley, ID bid on November 6, 2017, Dome Technology submitted its Tank Designer as a third party subcontractor, Engineering System Solutions (ES2), and submitted the Designer Project References experience list as shown in the attached **Exhibit 7**. In reviewing this Designer Project Reference list, it includes five (5) tanks and shows several different Engineers of Record, including Jason South, Terrol Bateman and Douglas Weber. For the original Sugar City, ID bid on May 15, 2018 Dome Technology submitted with its bid package tank design calculations and drawings stamped and sealed by

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Terrol Bateman of ES2 as shown in the attached **Exhibit 8**. In other words, both of these bids showed Dome Technology subcontracting design responsibility to ES2.

For the current Sugar City, ID bid on September 13, 2018, Dome Technology submitted with its bid package tank design calculations and drawings with Dome Technology company letterhead stamped and sealed by Jason South, and an experience list for Dome Technology Construction References with Jason South shown as the Engineer of Record for all tanks listed as shown in the attached **Exhibit 9**. However, Jason South is listed as a licensed engineer with Engineering Systems Solutions (ES2) on the Board of Licensure of Professional Engineers and Professional Land Surveyors as shown in **Exhibit 10**, not a licensed engineer employed by Dome Technology.

As Jason South is licensed as a professional engineer for a separate legal company (i.e. ES2), he is not, particularly for purposes of licensing laws, an employee as a licensed professional engineer for Dome Technology. This would be true for licensing purposes even if he is also somehow “employed” by Dome Technology. With no in-house designer, Dome Technology would therefore need to subcontract the Tank Design, presumably to ES2. Also, where the previous bids by Dome Technology included a separate entity as the designer (again, ES2) and different individuals as the Tank Designer, it is not reasonable nor possible to use the prior experience submitted with previous bids to satisfy this current bid requirement. Accordingly, this is a non-waivable material omission which should cause Dome Technology’s bid to be deemed nonresponsive.

**5. Dome Technology’s Bid Is Nonresponsive As It Failed to List A Design Subcontractor Over 1%, and This Failure Is Not Waivable**

In addition to the lack of responsiveness as to experience that was improperly relied upon and opined to be waived by the Engineer, Dome Technology’s bid is nonresponsive as it failed to list the Designer on the List of Subcontractors required to be submitted with the bid if the work they perform will be in excess of 1% of the contract value. As indicated in Addendum No. 1, “All subcontractors that will perform in excess of 1% of the work must be listed in the bidding documents.” Based upon DN Tanks’ experience, the value of this tank design would be between 3 and 5 percent (3-5%) of the Project cost if self-performed (which DN Tanks has included in its September 13<sup>th</sup> bid) and greater than 5 percent (5%) if hiring an outside subcontractor (i.e. such as ES2). During the Pre-bid meeting, the Project Engineer publicly stated that this section was a mandatory requirement to be completed by each bidder with correct information. See Exhibit 1 (Addendum No. 1, Pre-Bid Meeting, Declaration, Item 8). In review of Dome Technology’s bid form, it is clear that it did not list any subcontractor for Tank Designer on the List of Subcontractor Form or provide the required experience for the tank designer. Furthermore, as described above, Dome Technology cannot benefit from ES2’s experience where Dome

Technology has not listed ES2 as a design subcontractor. Thus, Dome Technology's failure to list a design subcontractor renders its bid nonresponsive.

Ultimately of course, a nonresponsive and rejected bid by Dome Technologies left only DN Tanks' bid as responsive and qualified, and it should have been awarded the Contract as the qualified and responsive bidder. *See e.g., Scott v. Buhl Joint School Dist. No. 412, 123 Idaho 779 (Idaho 1993).*

**6. Dome Technology's Bid Is Nonresponsive As It Failed to List All Required Subcontractors Over 1%, and This Failure Is Not Waivable**

A review of the Schedule II Water Storage Tank bid form includes two "List of Subcontractors" to be submitted with the bid. The first of these lists instructs the Bidder to list the licensed Electrical, HVAC, and Plumbing contractors with license numbers, contacts, addresses, phone numbers, emails, dates bids were submitted, and whether or not the subcontractors were DBE certified.<sup>2</sup> The second "List of Subcontractors" required the bidder to list the name and business address of each subcontractor who will perform work under this contract in excess of one percent of the Contractor's total bid price, and shall also list the portion of the work which will be done by such subcontractor. Dome Technology, in its September 13th bid, identified Electrical, HVAC, Plumbing, and Excavation Subcontractors on the first "List of Subcontractors."

On Dome Technology's May 15th bid, it listed three (3) Excavation Subcontractors and indicated 10% beneath the column "percent of total contract" for each of these Excavation subcontractors. However, on Dome Technology's September 13th bid, they listed two Excavation subcontractors (i.e. TMC Contractors, Inc. and Rhodehouse Construction, Inc.) on the first "List of Subcontractors," but failed to identify any Subcontractors on the second "List of Subcontractors" which would be performing work in excess of one percent of the contractor's total bid price. *See Exhibit 11* (List of Subcontractors Forms from Dome Technology's September 13th and May 15th Bid Submittal Package). It is evident from Dome Technology's May 15th bid submission that the Excavation scope of work would be subcontracted and that such subcontract for this project would be worth in excess of one percent. Based on this, Dome Technology failed to list all subcontractors who will perform work under this contract in excess of one percent of the Contractor's total bid price. This was a mandatory requirement of the Contract Documents and was reiterated in Addendum No. 1. *See Exhibit 11* (List of Subcontractors from Dome Technology's September 13, 2018 Bid and May 15, 2018 bid).

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<sup>2</sup> Note, the original May 15, 2018 Bid Form "List of Subcontractors" was revised for the September 13, 2018 bid. The May 15th version included a column for the bidders to list the "percent of total contract". In the September 13th bid form, the List of Subcontractors was separated into two separate lists.

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## 7. DN Tanks' Bid Was Responsive

Although it is unnecessary to address at this point, to put the issue to rest, we do note that the City and the Engineer have stated that DN Tanks' bid contained "inconsistencies" as well. Specifically, in the evaluation of DN Tanks' September 13, 2018 bid submittal package performed by the Engineer, he pointed out that DN Tanks' bid submittal included a filled out DEQ Form 6-A, Attachment A - Sworn Statement of Compliance with Disadvantaged Business (DBE) Utilization Requirements. *See Exhibit 6* (Email dated September 24, 2018 at 4:38 PM from Randall Johnson of Forsgren Associates to David Ogden, Mayor of City of Sugar City). The email indicates "Potential irregularities on the bid submitted by DN Tanks: 1. DEQ Form 6-A, Attachment A was submitted unsigned. Should be of no Consequence since the document just needs to be submitted prior to DEQ authorization to award."

However, this conclusion by the Engineer that this is a "potential irregularity" is not altogether consistent with the Engineer/Owner's prior decision to not reject but to fully consider the May 15th bid received by Dome Technology. This is because Dome Technology completely failed to submit a DEQ Form 6-A, Attachment A with its bid (no document, no signature). If the submission and execution of DEQ Form 6-A, Attachment A is a requirement of the bid and an irregularity that could cause the rejection of DN Tanks' bid absent a waiver, then Dome Technology's failure to submit that Form at all in its May 15th bid should have deemed its bid as being "nonresponsive" and then DN Tanks' prior bid would have remained fully responsive.

This is important because had the City deemed Dome Technology's May 15th bid as nonresponsive, DN Tanks' low bid would have been the only (and low) bid. As Dome Technology was not the low bidder on the first bid, as a nonresponsive and rejected bid, it would have been a "non-interested party" under Idaho law, and therefore it could not have protested the May 15th bid, and the City should have moved forward with the award to DN Tanks. *See e.g., Parks, Id.* and *Scott, Id.* Accordingly, if the City chooses to view the Form differently in different bids, particularly on the same project, it will reflect an arbitrary and capricious decision, contrary to the purpose of the Legislature and the Idaho Supreme Court in the bid process.

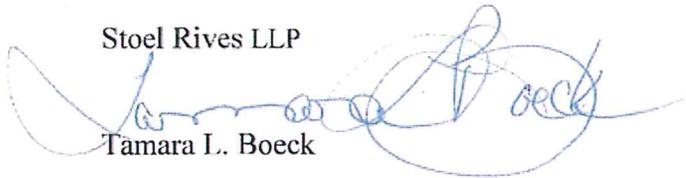
It is DN Tanks' position that the evidence reflects that Dome Technology's bid is nonresponsive based on a material error and non-waivable discrepancies, and therefore under Idaho law it must be rejected. As the DN Tanks bid was consistently actually responsive, including under the City's prior conduct as to the Form, and DN Tanks is a qualified bidder, the City should award the contract to DN Tanks, Inc.

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Thank you.

Very truly yours,

Stoel Rives LLP

A handwritten signature in blue ink, appearing to read "Tamara I. Boeck". The signature is stylized and somewhat cursive, with a large loop at the end.

Tamara I. Boeck

TLB:src

Exhibits 1-12

cc: Dylan Anderson, Esq. (w/exhibits via email only)

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List of Exhibits:

1. Email dated September 11, 2018 from Eva Wright of Forsgren Associates addressed to Cameron High of Dome Technology and Lynda Banks of DN Tanks issuing Addendum No. 1 to the bidders
2. Bid Tabulation, reflecting DN Tanks' bid price for Bid Item 24 increased by \$14,356 from \$23,353 on its May 15, 2018 bid to \$37,709 on its September 13, 2018 bid
3. Dome Technology's Drawing 310.01
4. DN Tanks' Drawing S1
5. Contract Specification 13000 Prestressed Water Storage Tank
6. Email dated September 24, 2018 at 4:38 PM from Randall Johnson of Forsgren Associates to David Ogden, Mayor of City of Sugar City
7. Dome Technology - Shelley, ID November 6, 2017 Bid
8. Dome Technology - May 15, 2018 Bid
9. Dome Technology - September 13, 2018 Bid
10. Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors roster search re Engineering System Solutions
11. List of Subcontractors from Dome Technology's September 13, 2018 Bid and May 15, 2018 bid
12. Mayor Ogden email September 26, 2018 to Councilors